WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #78A: Corresponding employment under the H-2B Program

The Department of Labor Appropriations Act, 2016, Division H, Title I of Public Law 114-113 ("2016 DOL Appropriations Act"), provides that the Department of Labor ("Department") may not use any funds to enforce the definition of corresponding employment found in 20 CFR 655.5 or the three-fourths guarantee rule definition found in 20 CFR 655.20, or any reference thereto. See Sec. 113. This appropriations rider has been included in the continuing resolutions that have passed throughout FY2017 and FY2018, and the Department remains prohibited from enforcing these provisions or any reference thereto. However, the 2016 DOL Appropriations Act and continuing resolutions did not vacate these regulatory provisions, and they remain in effect, thus imposing a legal duty on H-2B employers, even though the Department will not use any funds to enforce them until such time as the rider may be lifted

This fact sheet provides general information concerning corresponding employment under the H-2B program for H-2B applications submitted on or after April 29, 2015. An employer employing H-2B workers and/or workers in corresponding employment (as defined below) under a certified Application for Temporary Employment Certification (Application) must agree as part of the Application to comply with the following conditions.

What workers are considered "corresponding workers"?

Corresponding workers are defined as non-H-2B workers employed by an employer that has a certified Application who perform either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, with two exceptions described below. To qualify for corresponding employment, the work must be performed during the period of the job order, including any extension approved by the Department.

What exceptions are there to corresponding employment?

The following two categories of workers are not included in the definition of corresponding employment.

1. Incumbent employees:
    a. who have been continuously employed by the H-2B employer performing the work described above during the 52 weeks prior to the date of need in the job order;
    b. who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks, as demonstrated by the employer's payroll records (except that the employer may take credit for hours that were reduced by the employee voluntarily choosing not to work due to person reasons like illness or vacation); and
    c. whose terms and working conditions of employment have not been substantially reduced by the employer during the period o the job order.
2. Incumbent employees covered by a collective bargaining agreement or an individual employment contract that guarantees both an offer of at least 35 hours of work each workweek and continued employment with the H-2B employer at least through the period of the job order (except that they may be dismissed for cause).

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What protections are provided to workers in corresponding employment?

Employers with a certified Application are required to provide workers in corresponding employment at least the same protections and benefits as those offered or provided to H-2B workers (except for payment of expenses related to obtaining the visa, which is not applicable).

For instance, workers in corresponding employment are entitled to be paid at least the same wage rate paid to the H-2B workers for all hours worked during the job order period (see 20 CFR 503.16(a) through (c)). Corresponding workers who responded to the required H-2B recruitment and who live far enough away from the worksite that they are unable to realistically return home every day would be eligible for the same inbound and outbound transportation and daily subsistence that the employers must provide to the H-2B workers (see 20 CFR 503.16(j)). Other employer obligations to corresponding workers are captured in Appendix B of the Application and in Departmental regulations at 20 CFR 503.16.

Why do the H-2B regulations extend protections to corresponding workers?

The Immigration and Nationality Act (INA) allows the Department of Homeland Security (DHS) to approve petitions for H-2B workers only after consulting with appropriate agencies, such as the Department of Labor. DHS regulations require that, in order for an employer to bring in H-2B workers, the employment of the foreign workers must not adversely affect the wages and working conditions of similarly-employed U.S. workers.

Having been delegated enforcement authority from DHS, the Department of Labor not only protects foreign H-2B workers, but also recognizes that providing for corresponding employment is necessary to protect the welfare of similarly-employed workers described above.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.dol.gov/agencies/whd and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

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