WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #78: General Requirements for Employers Participating in 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

The H-2B provisions of the Immigration and Nationality Act (INA) provide for the admission of nonimmigrants to the U.S. to perform temporary non-agricultural labor or services. 8 U.S.C. 1101(a)(15)(H)(ii)(b). This fact sheet provides general information concerning employer requirements under the H-2B program for H-2B applications submitted on or after April 29, 2015. Other topic-specific Fact Sheets are available from the Wage and Hour Division website, http://www.dol.gov/agencies/whd/fact-sheets-index. The Interim Final Rule published by the Department of Labor governing these and other requirements may also be found on the Wage and Hour Division website, at Interim Final Rule.

As part of the labor certification process, employers filing an Application for Temporary Employment Certification (the Application) with DOL on or after April 29, 2015, must agree to comply with the requirements below. Employers must comply with these requirements with respect to both their H-2B workers and workers in corresponding employment. Corresponding employment is generally defined as non-H-2B workers performing substantially the same work as that included in the job order or substantially the same work as that performed by the H-2B workers, with exclusions for certain long-term incumbent workers and for certain workers under a collective bargaining agreement or individual employment contract.

1. The employer has requested and been granted H-2B Registration by DOL (upon announcement in the Federal Register of the transition period).
2. The employer must pay at least the offered wage indicated on the Application, which equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage, for all hours worked during the entire period of the job order, and must pay those wages free and clear. For more on this topic, see "Fact Sheet #78C: Wage Requirements under the H-2B Program".
3. If workers are paid based on piece-rates, commissions, bonuses, or other incentives, the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.
4. The employer must make all deductions from workers' paychecks required by law. Other additional deductions must be reasonable and must be disclosed in the job order. Deductions that are not disclosed are prohibited. Whether deductions are reasonable is determined under the principles in 29 CFR Part 531. The wage requirement in condition 2, above, will not be met where unauthorized deductions, deposits, rebates, or refunds reduce the wage payment below the offered wage or where the worker "kicks back" any pa of the wages to the employer or another person for the employer's benefit. For more on this topic, see "Fact Sheet #78D: Deductions and Prohibited Fees under the H-2B Program".
5. The job opportunity is a bona fide, full-time, temporary position of at least 35 hours per workweek. The qualifications and requirements for the job must be listed in the job order and must be consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and geographic area.
6. The employer must include in the job order any minimum productivity standard which the workers must meet in order to retain the job. Any such standard must be normal and usual for non-H-2B employers for the same occupation and geographic area.

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7. The employer must guarantee to offer the workers employment for a total number of work hours equal to at least 75% of the workdays in each 12-week period (or each 6-week period if the job order is less than 120 days). This is the "three-fourths guarantee." The guarantee period begins with the first workday after the worker arrives at the place of employment or the advertised first date of need, whichever is later, and ends on the last day of the job order. If during any 12- or 6-week period, the employer does not offer H-2B or corresponding workers sufficient hours to meet the three-fourths guarantee, the employer must pay such workers the amount they would have earned had they actually worked for the guaranteed number of workdays. For more on this topic, see "Fact Sheet #78E: Job Hours and the Three-Fourths Guarantee under the H-2B Program".
8. If, before the end of the job order, the services of a worker are no longer required for unforeseeable reasons beyond the control of the employer (for example, fire, weather, other Act of God, or similar, man-made catastrophic events), the employer may terminate the job order with approval of the Certifying Officer. If a termination is approved, the employer must:
    a. fulfill the three-fourths guarantee (see condition #7, above) to the time of termination; and
    b. make efforts to transfer the workers to comparable employment consistent with the INA by, for example, contacting the State Workforce Agencies or searching the national job registry. If the worker is not transferred, the employer must provide the worker return transportation to the place from which the worker departed to work, disregarding intervening employment.
9. The employer must keep accurate records of workers' earnings, hours of work offered, and hours actually worked. On or before each payday (which must occur at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent), each worker must be given a pay stub showing hours offered, hours actually worked, hourly rate and/or piece-rate of pay, and, if piece-rates are used, the number of units produced daily. The pay stub must also indicate total earnings for the pay period and all deductions from wages.
10. Requirements related to visa expenses and transportation/subsistence costs:
    a. The employer must either advance all visa, border crossing, and visa-related expenses to H-2B workers, pay for them directly, or reimburse all such expenses in the first workweek.
    b. The employer must disclose how it will provide inbound transportation and subsistence costs (lodging incurred on the employer's behalf and meals) in the job order. The employer will either advance all transportation and subsistence expenses to workers traveling to the employer's worksite, pay for them directly, or reimburse the expenses no later than the time workers complete 50 percent of the period covered by the job order. The employer may be obligated under the FLSA to reimburse workers for their inbound transportation during the first workweek to the extent that the travel costs they incurred would bring workers below the Federal minimum wage. This provision applies to H-2B workers and to workers in corresponding employment who travel from far enough away to the worksite that it is not reasonable for them to return home every day.
    c. The employer must pay for the return transportation and daily subsistence (if the workers have no immediate subsequent H-2B employment) for any workers who work until the end of the job order or are dismissed from employment for any reason before the end of that period.
    d. All employer-provided transportation must comply with all applicable Federal, State, or local laws and regulations.
    e. For more on these requirements, see "Fact Sheet #78F: Inbound and Outbound Transportation Expenses, and Visa and Other Related Fees under the H-2B Program".
11. The employer must provide to workers, without charge or deposit, all tools, supplies, and equipment required to perform the duties assigned.
12. All H-2B and corresponding workers must be provided with a copy of the job order. H-2B workers located abroad must receive the job order no later than when they apply for a visa. H-2B workers already in the country must receive the job order no later than when the job offer is made. Corresponding workers must receive the job order no later than the day work starts.
13. The employer must post a DOL-provided poster in English detailing H-2B and corresponding workers' rights and protections in a conspicuous location at each worksite. The employer must post additional posters if a significant portion of workers are not fluent in English and if DOL provides the poster translated into their language.
14. The employer must not (and must not cause another person to) discharge or discriminate against any person who participates in any protected activity such as filing a complaint; testifying; consulting with a workers' center, community organization, labor union, legal assistance program or attorney; or exercising or asserting any right or protection under the INA, DHS regulations, or DOL regulations. For more on this topic, see "Fact Sheet #78H: Retaliation Prohibited under the H-2B Program".
15. The employer and its attorney, agents and/or employees must not seek or receive payment of any kind from the H-2B worker for any activity related to obtaining employment certification, including but not limited to payment of the employer's attorney or agent fees, application or DHS petition fees, or recruitment costs. Payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.
16. The employer must contractually forbid in writing any agent or recruiter (or any employee of such agent or recruiter) whom the employer engages, directly or indirectly, in international recruitment of H-2B workers to seek or to receive payments or other

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compensation from prospective workers. The employer and its attorney and/or agent must provide the Department:

a. a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers, and

b. the identity and location of all persons or entities hired by or working for the agent or recruiter, and any of their agents or employees, to recruit prospective foreign workers for the H-2B job opportunities offered by the employer.

17. The employer must not offer terms, wages, and working conditions to U.S. workers that are less favorable than what the employer offers or provides to H-2B workers. Also, the employer must not impose restrictions or obligations on U.S. workers that are not imposed on H-2B workers.
18. In order to find qualified and available U.S. workers to perform the labor in the job order, the employer must conduct all required recruitment activities according to the regulations. The employer must also continue to accept State Workforce Agency referrals and hire all qualified and eligible U.S. workers who apply for the job until 21 days before the job order starts. For more on this topic, including a complete list of required recruiting activities, see "Fact Sheet #78B: Recruiting Requirements under the H-2B Program".
19. The job opportunity must be open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. U.S. workers who apply for the job may be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections.
20. There must be no strike or lockout at any of the employer's worksites within the area of intended employment for which the employer is requesting an H-2B certification.
21. The employer must not lay off any similarly-employed U.S. worker in the occupation and area of intended employment from 120 days before the start of the job order through the end of the job order, unless all H-2B workers are laid off first.
22. The employer must not place any H-2B workers outside the area of intended employment or in an occupation not listed on the approved Application, unless the employer obtains a new approved Application from DOL.
23. The employer must notify DOL if any H-2B or corresponding worker separates from the job for any reason before the end of the job order. The notification must be made in writing and no later than 2 days after the separation is discovered by the employer. Similarly, the employer must also notify DHS of such separation of an H-2B worker.
24. During the period of employment certified on the Application, the employer must comply with applicable Federal, State and local employment-related laws and regulations including, but not limited to, employment-related health and safety laws. In addition, the employer and its agents and attorneys are prohibited from knowingly holding, destroying, or confiscating workers' passports, visas, or other immigration documents pursuant to 18 U.S.C. 1592(a).
25. The employer must cooperate with any agent of the Secretary of Labor who is exercising or attempting to exercise DOL's authority pursuant to 8 U.S.C. 1184(c).
26. The employer must retain all documents pertaining to the Application and Registration, the recruitment-related documents, the payroll records, and related documents for 3 years. For more on this topic, see "Fact Sheet #78I: Records Retention Requirements under the H-2B Program".

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.

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