WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #78C: Wage Requirements 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 required wages for workers employed 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 under a certified Application for Temporary Employment Certification (Application) must agree as part of the Application to comply with the following requirements.

Must an H-2B worker be paid a guaranteed wage?

The H-2B employer must pay its H-2B workers and workers in corresponding employment at least the wage rate specified in the job order. That wage rate must be at least the highest of the prevailing wage rate obtained from the Employment and Training Administration (ETA) or the applicable Federal, State, or local minimum wage. To determine an employer's workers in corresponding employment, please see Fact Sheet #78A: Corresponding employment under the H-2B Program.

The wage rate must be met "free and clear" without unauthorized deductions or kickbacks to the employer (see Fact Sheet #78D: Deductions and Prohibited Fees under the H-2B Program).

How does an employer obtain prevailing wage information?

H-2B employers must request a prevailing wage from the National Prevailing Wage Center (NPWC) by submitting a completed ETA Form 9141, Application for Prevailing Wage Determination. Instructions can be found at http://www.foreignlaborcert.doleta.gov/. The NPWC will return the form, indicating the prevailing wage, the source, and the validity period. The H-2B employer must retain the form in accordance with documentation retention requirements (see Fact Sheet #78I: Records Retention Obligations under the H-2B Program).

Can an H-2B employer pay its employees using methods other than an hourly rate?

Yes, an employer may use commissions, bonuses, or other incentives. However, in any workweek where the employee does not earn the equivalent of the offered wage, the employer must supplement the employee's pay so it equals what he or she would have earned had the pay been computed based on the offered hourly wage.

An employer paying on a piece-rate basis must pay a piece rate that is no less than the normal rate paid by non-H-2B employers for workers performing the same activity in the area of intended employment. The average hourly piece rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece rate basis and at the end of the workweek the piece rate earnings are less than the

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amount the worker would have earned had the worker been paid at the offered hourly rate, then the employer must supplement the worker's weekly earnings at that time so they at least equal the amount the employee would have earned at the offered hourly wage rate for each hour worked.

May an employer require productivity standards?

Yes, but if the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and must be normal and usual for non-H-2B employers for the same occupation in the area of intended employment. The use of productivity standards cannot result in workers being paid less than the offered wage.

How frequently must H-2B workers and workers in corresponding employment be paid?

H-2B employers must pay at least every two weeks or according to the prevailing practice for that occupation in the area of employment, whichever is more frequent. The employer must state in the job order the frequency with which the worker will be paid. Employers must pay all wages when due.

Are H-2B workers and workers in corresponding employment covered by any other Federal wage requirements?

Yes. Other Federal wage statutes, such as the overtime provisions of the Fair Labor Standards Act, apply to these workers in the same manner as they apply to other U.S. workers.

Are any deductions permitted to be made from a worker's pay?

The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay. Deductions not disclosed are prohibited. Certain other deductions are also prohibited. For more detailed information on this topic, see Fact Sheet #78D: Deductions and Prohibited Fees under the H-2B Program.

What wage rate must an employer advertise in required recruitment activities?

In all recruitment activities (such as the newspaper advertisements, job order, any offers to former U.S. workers, etc.), the employer must offer at least the highest of the prevailing wage rate or the applicable Federal, State, or local minimum wage. The employer must offer at least the wage that it intends to pay its H-2B workers. For instance, if the employer plans on paying by the piece, providing per diems or any other wage supplements, paying a premium for experience, etc., then the employer must accurately disclose those plans so that U.S. workers can make an informed decision about their interest in the job opportunity.

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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