WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #78E: Job Hours and the Three-Fourths Guarantee 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 hours 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.

What hours of work must an employer make available to an H-2B worker?

The job opportunity must be a full-time temporary position, at least 35 hours of work per workweek throughout the length of the time period specified on the Application and job order.

How is a workweek determined?

An employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

What if the H-2B employer does not have enough work to offer 35 hours a week to an H-2B worker or worker in corresponding employment?

All H-2B employers must fulfill a three-quarters guarantee. The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays in each 12-week period (or 6-week period for job orders lasting less than 120 days). This obligation begins with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ends on the end date indicated in the job order (or its extensions, if any). A workday means the number of hou in a workday as stated in the job order.

How are the 12- or 6-week periods calculated?

The 12-week periods (for certified periods of employment lasting at least 120 days) or 6-week periods (for certified periods of employment lasting less than 120 days) are based on the workweek used by the employer for pay purposes. The first period also includes any partial workweek, if the first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first 12-week period may include up to 12 weeks and 6 days). The final period includes any time remaining after the last full period ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

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For example, if a job order is for a 10-week period, and a normal workweek is specified as 5 days a week, 8 hours per day, the employer must guarantee the worker employment for at least 180 hours (6 weeks × 40 hours/week = 240 hours × 75 percent = 180) in the first 6-week period, and at least 120 hours (4 weeks × 40 hours/week = 160 hours × 75 percent = 120) in the final partial period.

In the event the worker begins working later than the certified date of need, the guarantee period begins with the first workday after the worker's arrival at the place of employment, and continues until the last day the job order and all extensions (if any) are in effect. However, an employer cannot delay the three-fourths guarantee by telling workers not to come to work on or after the advertised first date of need because the employer does not have a need for them at that time.

What if a worker is paid by piece rate?

If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

May a worker be offered more than the specified hours of work on a single workday?

Yes. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met.

What if an employer offers less employment than the required three-fourths guarantee?

If during any 12- or 6-week period during the period of the job order, the employer offers the U.S. or H-2B worker less employment than that required under the three-fourths guarantee, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer has not met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time as specified in the job order.

What if it becomes impossible to fulfill the job order for reasons beyond the control of the employer?

If, before the end date specified in the job order, the services of the worker are no longer required for reasons beyond the control of the employer due to unforeseeable, catastrophic events (fire, weather, or other Act of God or man-made event) making fulfillment of the job order impossible, the employer may terminate the job order with the approval of the Certifying Officer. If the job order is terminated, the employer must fulfill the three-fourths guarantee for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H-2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the Immigration and Nationality Act. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2B employer, whichever the worker prefers.

Are there any other exceptions to the three-fourths rule calculation?

Yes. If the worker fails to work any hours that the employer offers (up to a maximum of the number of hours specified in the job order for a workday), then the employer may still count them toward the three-fourths guarantee. For instance, if the job order states that the worker is expected to work five eight-hour days each week and the employer offers that much work but the worker fails to work two days, then the employer can count those two days as hours offered in calculating whether each period of guaranteed employment has been met. However, if the same employer offered ten hours on single day instead of eight and the worker did not work the extra two hours, those two hours cannot be counted toward the three-fourths guarantee.

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Also, an H-2B employer's obligation to fulfill the three-fourths guarantee changes if the worker is terminated for cause or voluntarily abandons the job before the end of the employment period and the employer notifies the Office of Foreign Labor Certification (and the Department of Homeland Security in the case of an H-2B worker) within two days. In either of these cases, the worker is not entitled to the three-fourths guarantee after the last full 12- or 6-week period before his or her voluntary abandonment or termination for cause.

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).

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