WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #78B: Recruiting 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 employers' recruiting requirements for prospective workers under the H-2B program for H-2B applications submitted on or after April 29, 2015. An employer seeking H-2B certification by submitting an Application for Temporary Employment Certification (Application) must agree as part of the Application to comply with the following requirements.

What are the requirements for prospective H-2B employers to recruit U.S. workers?

Employers must meet the recruiting requirements found at 20 CFR §§ 655.40 - 655.48.

(1) Employers must conduct certain recruitment to ensure that there are not qualified U.S. workers available for the position listed in the Application. Unless otherwise instructed by the Certifying Officer (CO), the employer must conduct the recruitment described in 20 CFR §§ 655.41- 655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in 20 CFR § 655.48. The employer must accept and hire any applicants who are qualified and available, and may reject U.S. applicants only for lawful, job-related reasons.

(2) U.S. worker referrals. The Office of Foreign Labor Certification (OFLC) will maintain the job posting on its registry and the State Workforce Agency (SWA) will maintain the job posting and employers must continue to accept referrals of all U.S. applicants interested in the position until 21 days before the date of need.

(3) Interviewing U.S. workers. Employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential H-2B workers with more favorable treatment with regard to such interviews.

(4) Recruitment report. The employer must prepare a recruitment report that details the results of required recruitment activities. In accordance with 20 CFR § 655.48, this report must include, among other information, the names and contact information of all U.S. applicants, whether they were offered a position or rejected, and the lawful, job-related reasons for any rejections. After submitting the recruitment report to the OFLC, Employment and Training Administration, the employer must continue to update the report to include U.S. applicants until 21 days before the date of need.

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What are the general requirements for prospective H-2B employers to advertise the job opportunity?

All recruitment must meet the requirements described below and must contain terms and conditions of employment that are not less favorable than those offered or that will be provided to the H-2B workers. The terms and conditions must reflect, at a minimum, those contained in the job order.

In addition, all advertising must contain the following information:

(a) The employer's name and contact information.

(b) The geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job;

(c) A description of the job opportunity with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates;

(d) A statement that the position is temporary and full-time, including the total number of job openings the employer intends to fill;

(e) If applicable, a statement that overtime will be available to the worker and the wage offer(s) for working any overtime hours;

(f) If applicable, a statement indicating that on-the-job training will be provided to the worker;

(g) The wage the employer is offering, or in the event that there are multiple wage offers (such as where an itinerary is authorized through special procedures with multiple wage rates or where the employer will pay multiple wage rates based on experience), the range of applicable wage offers;

(h) If applicable, any board, lodging, or other facilities the employer will offer to workers or intends to assist workers in securing;

(i) A list of all deductions not required by law that the employer will make from the worker's paycheck, including, if applicable, reasonable deductions for board, lodging, and other facilities offered to the worker;

(j) A statement that transportation and subsistence from the place where the worker has come to work for the employer to the place of employment and return transportation and subsistence will be provided as required by 20 CFR § 655.20(j)(1) (see Fact Sheet #78F);

(k) If applicable, a statement that work tools, supplies, and equipment will be provided to the worker without charge;

(l) If applicable, a statement that daily transportation to and from the worksite will be provided by the employer;

(m) A statement summarizing the three-fourths guarantee as required by 20 CFR § 655.20(f) (see Fact Sheet #78E); and

(n) A statement directing applicants to apply at the nearest office of the SWA in the State in which the advertisement appeared, that SWA's contact information, and, if applicable, the job order number.

What are the specific requirements for prospective H-2B employers to advertise the job opportunity in newspapers?

(1) The employer must place an advertisement (in a language other than English, where appropriate) on two separate days, which may be consecutive, one of which must be a Sunday, in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and the workers likely to apply for the job opportunity. If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the CO may direct the employer, in place of a Sunday edition, to advertise in the regularly published daily edition with the widest circulation in the area of intended employment. The newspaper advertisements must satisfy the requirements described above as required by 20 CFR § 655.41.

(2) The employer must maintain copies of newspaper pages (with date of publication and full copy of the advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication furnished by the newspaper containing the text of the printed advertisements and the dates of publication, consistent with the document retention requirements in 29 CFR 503.17 (see

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Fact Sheet #78I: What Records Must Be Maintained by All H-2B Employers?).

What are an employer's obligations to contact its former U.S. employees?

The employer must solicit the return of any U.S. workers employed during the previous year in the occupation and place of employment for which the employer is requesting H-2B workers. This includes employees laid off within 120 calendar days before the date of need, but not those employees who were dismissed for cause or who abandoned the worksite. Contact may be made by mail or other effective means; it must disclose the terms of the job order, and solicit the worker's return. The employer must maintain documentation sufficient to prove such contact.

What are an employer's obligations to contact a union and the workers' bargaining representative?

If the occupation or industry is customarily unionized, the SWA will circulate the job order to the appropriate union(s) to elicit referrals.

If there is a bargaining representative for any of the employer's employees in the occupation and area of intended employment, the employer must provide the bargaining representative(s) a copy of the Application and the job order, and must maintain documentation demonstrating that the copies were sent. An employer in such a case must include information in its recruitment report that confirms that the bargaining representative(s) was contacted and notified of the position openings and whether the representative(s) referred qualified U.S. workers, including the number of referrals, or was non-responsive to the employer's requests.

Are there additional requirements regarding posting and written notice?

(1) If there is no bargaining representative, the employer must post the availability of the job opportunity in at least two conspicuous locations at each place of anticipated employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H-2B workers. The notice must be posted for at least 15 consecutive business days. The employer must maintain a copy of the posted notice and identify where and when it was posted.

(2) If the CO, in the Notice of Acceptance, directs the employer to do so, the employer must provide written notice of the job opportunity to a community-based organization, and maintain documentation demonstrating that it was sent as directed. In such case the employer must include information in its recruitment report that confirms that the community-based organization was contacted and notified of the position openings and whether the organization referred qualified U.S. workers, including the number of referrals, or was non-responsive to the employer's requests.

May a prospective H-2B employer be required to conduct additional recruitment?

The employer may be instructed by the CO to conduct additional reasonable recruitment if the CO determines that there likely are qualified U.S. workers available for the work (including for job opportunities located in an area of substantial unemployment). In such case the CO will describe the precise number and nature of the additional recruitment efforts, which may include posting on the employer's Web site or another Web site, contact with community-based organizations, contact with State One-Stop Career Centers, and other print advertising, such as using a professional, trade or ethnic publication where such a publication is appropriate for the occupation and the workers likely t apply for the job opportunity. The CO will specify the documentation or other supporting evidence that must be maintained by the employ as proof that the additional recruitment requirements were met.

Which U.S. workers may a State Workforce Agency refer for employment?

SWAs may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and have indicated by accepting referral to the job opportunity that they are qualified and will be available for employment.

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What are an employer's requirements to maintain a recruitment report?

(1) The employer must prepare, sign, and date a written recruitment report as required by § 655.48. The recruitment report must be submitted by the date specified by the CO in the Notice of Acceptance and contain the following information:

(a) The name of each recruitment activity or source (e.g., SWA job order, the name of the newspaper, etc.);

(b) The name and contact information of each U.S. worker who applied for or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker's application. The employer must clearly indicate whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined;

(c) Confirmation that former U.S. employees were contacted, if applicable, and by what means;

(d) Confirmation that the bargaining representative was contacted, if applicable, and by what means, or that the employer posted the availability of the job opportunity to all employees;

(e) If applicable, confirmation that the community-based organization designated by the CO was contacted;

(f) If applicable, confirmation that additional recruitment was conducted as directed by the CO; and

(g) If applicable, for each U.S. worker who applied for the position but was not hired, the lawful, job-related reason(s) for not hiring the U.S. worker.

(2) The employer must continue to update the recruitment report throughout the recruitment period, until 21 days before the first date of need. The updated report must be made available in the event of a post-certification audit or upon request by DOL.

Must an employer disclose agreements with foreign recruiters?

The employer, and its attorney or agent, as applicable, must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under this Application.

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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