WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #26A: Recruitment Requirements under the H-2A Visa Program

November 2022

On April 29, 2024, The U.S. Department of Labor published a final rule, "Improving Protections for Workers in Temporary Agricultural Employment in the United States" Further information on the final rule is found here.

This fact sheet provides general information on H-2A employers' recruiting requirements for prospective workers under the H-2A visa program. The Immigration and Nationality Act (INA) authorizes the lawful admission of temporary, nonimmigrant workers (H-2A workers) into the U.S. to perform agricultural labor or services of a temporary or seasonal nature when the employer demonstrates that there are not sufficient workers who are able, willing, qualified, and available, and that the employment of the H-2A workers will not adversely affect the wages and working conditions of workers similarly employed in the U.S. An H-2A employer employing H-2A 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 recruitment requirements.

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

Employers must recruit qualified U.S. workers for the positions listed in the Application, including by conducting the following recruitment activities:

- Contact formerly employed U.S. workers and invite them to return to their job;
- Submit information for the publication of the job through the Office of Foreign Labor Certification's (OFLC) electronic job registry (SeasonalJobs.dol.gov);
- Cooperate with the State Workforce Agency (SWA) by accepting referrals of applicants;
- Hire any applicants who are qualified and available up until the 50% point of the contract, including those who are referred by the SWA and those who apply directly to the employer;
- Reject U.S. applicants only for lawful, job-related reasons;
- Create and maintain a recruitment report detailing all recruitment activities; and
- Conduct any additional recruitment activities as directed by the OFLC's Certifying Officer (CO).

The job order, which is the document containing the material terms and conditions of employment offered by the employer, is circulated by the SWA and posted on SeasonalJobs.dol.gov as part of the recruitment activities described above. The terms and conditions advertised to U.S. workers in the job order must accurately identify the actual terms and conditions of the job. For example, an employer that regularly offers an average of 55 hours of work per week over the course of the season may not list only 40 hours in the job order. Similarly, an employer that offers a production bonus, an end-of-contract bonus, or other additional compensation must include that information in the job order as well. An employer that intends to offer an H-2A worker additional pay for performing special duties – such as driving or supervising a crew – must include the additional pay and the special duties in the job order. It is necessary to include accurate and complete information about the work in the job order for prospective U.S. workers to consider whether to apply for the job.

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Additionally, an employer may not offer benefits to H-2A workers that are not offered to U.S. workers, and it may not impose job requirements on U.S. workers that are not also imposed on H-2A workers. These include experience requirements, lifting requirements, drug testing requirements, and criminal background checks. An employer that wishes to impose any such requirements must ensure that they are included in the job order, and that they are applied at least as stringently to H-2A workers as they are applied to U.S. worker applicants.

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

Employers that 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-2A workers with more favorable treatment with regard to such interviews or with easier access to interviews. For example, if an employer requires an interview before hiring a prospective U.S. worker, the employer must also require an interview for each H-2A worker. Similarly, if an employer offers optional interviews to any H-2A worker, then the employer must also offer optional interviews to all prospective U.S. workers.

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

The employer must invite U.S. workers employed during the previous year in the occupation and at the place of employment listed in the application to return to their jobs. This does not include workers whose jobs were terminated for cause or who abandoned the worksite. Contact may be made by mail or other effective means. This contact must occur during the period of time that the job order is being circulated by the SWA, which is generally up to the 50 percent point of the contract period. The employer must record the outcome of contact with each former U.S. worker on its recruitment report.

What if an H-2A employer has laid off U.S. workers?

Generally, a prospective H-2A employer may not lay off any U.S. workers. If the employer has laid off any U.S. worker employed in the job position listed and at the work location included in its application except for lawful, job-related reasons within 60 days of the date of need, it must offer the job to that worker, and demonstrate that the worker refused the job, was rejected for lawful, job-related reasons, or was rehired. Layoffs for lawful, job-related reasons such as lack of work or the end of the growing season are permissible only if all H-2A workers are laid off before any worker in corresponding employment.

An employer may not obtain an H-2A Temporary Labor Certification if any of its workers are on strike or locked out in the course of a labor dispute.

When is a prospective H-2A employer required to conduct additional recruitment?

When the CO determines that an employer's job opportunity is served by an area of traditional or expected labor supply, the employer may also be required to recruit U.S. workers in up to three additional states, as directed by the CO.

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

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

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

The employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted by the date specified by the CO in the Notice of Acceptance.

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The recruitment report must contain the following information:

1. The name of each recruitment activity or source and dates of advertisement;
2. The name and contact information of each U.S. worker who applied for or was referred to the job opportunity, and the outcome of each worker's application;
3. Confirmation that each former U.S. worker was contacted, on what date and by what means; and
4. If applicable, explanation of the lawful job-related reason(s) for not hiring each U.S. worker who applied for the position but was not hired.

The employer must continue to update the recruitment report throughout the recruitment period, up to the 50 percent point of the contract. The updated report must be made available in the event of a post-certification audit or upon request by DOL. The recruitment report must document the information listed above for **all** prospective U.S. workers who apply for the job, including those who were not referred by any outside source, but rather apply directly with the employer ("at the gate" applicants), including for those workers who applied after the start of the contract period but before the 50 percent point of the contract.

What are the potential remedies and penalties if an employer unlawfully rejects a U.S. worker for employment?

An H-2A employer who fails to hire a U.S. worker who has applied for the job up to the 50 percent point of the contract, or who fails to contact former U.S. workers or accept SWA referrals may face substantial civil money penalties and may be debarred from future participation in the H-2A visa program. Additionally, affected U.S. workers may be entitled to make-whole relief from the employer, including hiring or reinstatement, and the payment of wages that would have been earned had the worker been properly hired. Similarly, U.S. workers who were not offered the same benefits that were offered to H-2A workers may be entitled to back wages, and the offending employer may be subject to civil money penalties and debarment.

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).

The requirements listed above can be found in 20 CFR Part 655 subpart B, and 29 CFR Part 501.

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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