WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #78I: Records Retention 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 the recordkeeping requirements for employers 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.

All employers filing an H-2B Registration (upon notice in the Federal Register of the transition period) and an Application for Temporary Employment Certification (Application) must retain the following documents and records and provide them in the event of an audit or investigation. These requirements are in addition to any records employers maintain to comply with other laws (e.g., the Fair Labor Standards Act, the Internal Revenue Code).

What records must be kept and made available to the Wage and Hour Division within 72 hours upon request?

1. The H-2B Registration, job order, the approved Application, the original Appendix B, the H-2B Petition (DHS Form I-129), and supporting documents and records.
2. Documents and records not previously submitted during the registration process that substantiate temporary need.
3. Proof of recruitment efforts, as applicable, including:
    a. Job order placement as specified in 20 CFR § 655.16;
    b. Advertising as specified in 20 CFR §§ 655.41 and 655.42;
    c. Contact with former U.S. workers as specified in 20 CFR § 655.43;
    d. Contact with bargaining representative(s) or a copy of the posting of the job opportunity, whichever is applicable, as specified in 20 CFR § 655.45(a) and (b); and
    e. Additional employer-conducted recruitment efforts directed by the Certifying Officer, as specified in 20 CFR § 655.46.
4. Records to substantiate the information submitted in the recruitment report prepared in accordance with 20 CFR § 655.48.
5. The final recruitment report and any supporting resumes and contact information as specified in 20 CFR § 655.48.
6. Records of each worker's earnings, hours offered and worked, location(s) of work performed, and other information specified in 503.16(i) (see itemized list of required pay stub information below).
7. If appropriate, records of when and how much the employer reimbursed workers for transportation and subsistence costs, as specified in 29 CFR 503.16(j).
8. Evidence of contact with U.S. workers who applied for the job opportunity, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in 29 CFR§ 503.16(r).
9. Evidence of required contact with any former U.S. worker in the occupation and place of employment, including documents demonstrating that the U.S. worker had been offered the job opportunity and either refused it or was rejected for lawful, job-related

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reasons, as specified in 29 C.F.R § 503.16(w).

10. The written contracts with agents or recruiters, as specified in 20 CFR §§ 655.8 and 655.9, including the written contract prohibiting an agent or recruiter from receiving prohibited payments, as specified in 29 CFR§ 503.16(p), and the list of identities and locations of persons working for the agent or recruiter, and these entities' agents or employees, as specified in 20 CFR § 655.9.
11. Written notice provided to and informing the Office of Foreign Labor Certification (of the Department of Labor's Employment and Training Administration) that an H-2B worker or worker in corresponding employment has separated from employment before the end date of employment certified in the Application, as specified in 29 CFR § 503.16(y).
12. Any collective bargaining agreement, individual employment contract, or payroll records used to substantiate any claim that certain incumbent U.S. workers are not included in corresponding employment.

How long must an employer retain records?

The employer must retain records and documents for 3 years from the date the Application is certified, or from the date of adjudication if the Application is denied, or from the day the Department receives the letter of withdrawal if the employer withdraws the Application.

Must an employer provide its employees with a pay stub?

The employer must furnish each worker on or before each payday a written statement (pay stub) containing the following information:

1. The worker's total earnings for each workweek in the pay period;
2. The worker's hourly rate and/or piece rate;
3. If piece rates are used, the daily units produced by the worker;
4. Itemized deductions made from the worker's wages;
5. For each workweek in the pay period, the hours of employment offered to the worker showing offers in accordance with the three-fourths guarantee. (See Fact Sheet #78E Job Hours and the Three-Fourths Guarantee under the H-2B Program);
6. Hours actually worked by the worker in each workweek of the pay period;
7. Beginning and ending dates of the pay period; and
8. Employer's name, address, and Federal Employer Identification Number (FEIN).

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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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.