WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #78F: Inbound and Outbound Transportation Expenses, and Visa and Other Related Fees 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 an employer's obligations regarding travel, visa, and related expenses 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.

Does an H-2B employer have to provide workers with inbound and outbound travel?

Yes, under certain conditions, the H-2B employer is liable for inbound and outbound transportation and daily subsistence – including meals and lodging – to the place of employment, regardless of whether the H-2B workers will come to the job from their home community outside the United States or are already in the United States and are changing H-2B employers. This requirement also extends to corresponding U.S. applicants hired for the job who come from far enough away from the worksite that it is not reasonable to return home each day.

When is an employer required to provide inbound and outbound transportation?

The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer (the place of recruitment) if the worker completes 50 percent of the period of employment covered by the job order. The employer must provide outbound transportation and subsistence to workers who work until the end of the job order or who are dismissed for any reason before the end of the job order.

If the worker has no immediate plans to work for another H-2B employer, then the employer must provide transportation and subsistence to the place from which the worker originally departed to work for the employer, ignoring any intervening employment. The current employer is not liable for outbound transportation and subsistence to workers immediately changing employment and moving to another authorized H-2B employer when the subsequent employer has agreed in its job order to provide transportation and subsistence to its worksite.

The employer is not required to provide outbound transportation or subsistence if the worker abandons the job before the end of the period of employment certified on the Application.

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How may the employer provide for transportation, what must be paid for, and must it be disclosed?

The amount of inbound and outbound transportation payments must be at least equal to the costs charged by the most economical and reasonable common carrier for the distances involved. In addition, H-2B employers must also pay the workers a daily subsistence amount to provide for meals while traveling. Subsistence would also include lodging required during an H-2B worker's travel from their hometown to the consular city to wait to obtain a visa and from there to the place of employment. All appropriate transportation and subsistence must not only be provided to H-2B workers but also to corresponding U.S. applicants who are unable to reasonably return to their residence each day.

The employer may fulfill its inbound travel obligation in one of several ways: by actually providing the transportation, arranging and paying for it directly, or advancing the reasonable cost of the transportation to the worker before the worker departs. The employer may also reimburse the worker after the worker completes 50 percent of the period of employment covered by the job order (assuming the employer has not already paid for the transportation).

If it is prevailing practice of non-H-2B employers in the area to provide or pay for the costs in advance, the employer must do so. If the employer advances the required transportation and subsistence costs to its H-2B workers, it must also advance transportation and subsistence costs to those workers in corresponding employment who are unable to reasonably return to their residence each day.

The employer may be obligated under the FLSA to reimburse workers for their inbound travel during their first workweek to the extent that their travel costs would bring them below the Federal minimum wage. See below.

The employer may fulfill its outbound travel obligation by actually providing the travel, by arranging and paying for it directly, or by reimbursing the worker during the last workweek of employment.

Finally, the employer must disclose in the job order and required newspaper advertisements that inbound and outbound travel and daily subsistence will be provided. Additionally, the employer's job order must detail how inbound travel and subsistence will be provided.

What are an employer's obligations regarding inbound travel under the FLSA?

The FLSA applies independently of H-2B and requires employers covered by the FLSA to pay costs that are primarily for the benefit of the employer if such costs would take a non-exempt employee's wages below the FLSA minimum wage. As discussed in the preamble to the 2015 H-2B Interim Final Rule (published April 29, 2015), the Department views the inbound transportation costs to be primarily for the benefit of the H-2B employer. Under the FLSA, there is no difference between deducting a cost directly from a worker's wages and shifting a cost to the worker. Therefore, failure to reimburse such worker-incurred costs would be a de facto deduction from the first week's wages that would constitute a minimum wage violation under the FLSA for employers subject to the Act if bearing such costs would effectively bring the worker's wages below the minimum wage.

This principle does not apply to the reimbursement of meal costs as the FLSA regulations state that meals are always regarded as primarily for the benefit and convenience of the employee. Thus, the employer's FLSA obligation does not extend to the first workweek reimburseme of meal costs.

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For example, if the worker incurred $200.00 for the most reasonable and economical cost of common carrier transportation from the home community to the place of employment, an FLSA-covered, non-exempt employer is obligated to reimburse the full $200.00 amount in the first workweek in order to ensure that the employee receives at least the FLSA minimum wage and must pay at least the FLSA minimum wage for each hour worked. Once this amount has been reimbursed, the employer may elect to recoup this money in subsequent workweeks by making deductions from the worker's paycheck to the extent that such deductions do not violate the FLSA minimum wage requirement. The employer can deduct the difference between the H-2B offered wage and the FLSA minimum wage multiplied by the number of hours worked per week, provided the deduction was properly disclosed to the worker in the job order. The deductions may only be made until the employer has recouped the entire transportation cost. In no case may this deduction be made after the 50 percent point of the work contract. Upon the worker completing 50 percent of the job order period, an employer who makes such a deduction to recoup inbound travel expenses must reimburse such costs to the worker to comply with the H-2B requirements.

It is important to remember that undisclosed deductions are impermissible and will be treated as a violation of the H-2B requirements. Therefore, if an employer intends to make a deduction for transportation expenses, this must be fully disclosed in the job order.

Must an employer pay for the H-2B employee's visa and other related fees?

The employer must either pay or reimburse the H-2B worker in the first workweek for any visa, visa processing, and other related fees incurred by the worker. But an employer need not pay passport or other charges primarily for the benefit of the worker.

What if an employer engages a third party to recruit H-2B workers?

The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, directly or indirectly, in recruitment of H-2B workers from seeking or receiving payments or other compensation from prospective workers. This documentation must be made available upon request by the Certifying Officer or other Federal representative. In addition, the employer and its attorney, agents, or employees cannot seek or receive payment of any kind from the worker for recruitment costs.

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.

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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