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H2A Employer Requirements, Assurances and Obligations

Introduction

The Immigration and Nationality Act (INA) authorizes the lawful admission of temporary, nonimmigrant workers (H-2A workers) to perform agricultural labor or services of a temporary or seasonal nature. The Department of Labor's regulations governing the H-2A Program also apply to the employment of U.S. workers by an employer of H-2A workers in any work included in the ETA-approved job order or in any agricultural work performed by the H-2A workers during the period of the job order. Such U.S. workers are engaged in corresponding employment.

Overview of Employer Contractual Obligations

Recruitment of U.S. Workers: In order for the Department of Labor to certify that there are not sufficient U.S. workers qualified and available to perform the labor involved in the petition and that the employment of the foreign worker will not have an adverse effect on the wages and working conditions of similarly employed U.S. workers, employers must demonstrate the need for a specific number of H2A workers. In addition to contacting certain former U.S. employees and coordinating recruitment activities through the appropriate State Workforce Agency, employers are required to engage in positive recruitment of U.S. workers. H-2A employers must provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 50 percent of the period of the work contract has elapsed. Employers must offer U.S. workers terms and working conditions which are not less favorable than those offered to H-2A workers.

Termination of Workers: Employers are prohibited from hiring H-2A workers if the employer laid off U.S. workers within 60 days of the date of need, unless the laid-off U.S. workers were offered and rejected the agricultural job opportunities for which the H-2A workers were sought. A layoff of U.S. workers in corresponding employment is permissible only if all H-2A workers are laid off first. Employers may only reject eligible U.S. workers for lawful, job-related reasons.

In order to negate a continuing liability for wages and benefits for a worker who is terminated or voluntarily abandons the position, employers are required to notify the Department of Labor (DOL), and in the case of an H-2A worker the Department of Homeland Security, no later than two working days after the termination or abandonment.

Petitioners of H-2A workers must notify USCIS within 2 workdays if any of the following occur:

- **No show:** The H-2A worker fails to report to work within 5 workdays of the latter of:
 - The employment start date on the H-2A petition, or
 - The start date established by the employer.
- **Abscondment:** The H-2A worker leaves without notice and fails to report for work for 5 consecutive workdays without the consent of the employer.
- **Termination:** The H-2A worker is terminated before completing of the H-2A labor or services for which he or she was hired; or
- **Early Completion:** The H-2A worker finishes the labor or services for which he or she was hired more than 30 days earlier than the date specified in the H-2A petition.

Petitioners must include the following information on the employment-related notification:

1. The reason for the notification (for example, explain that the worker was either a “no show,” “absconder,” “termination,” or “early completion”).
2. The reason for untimely notification and evidence for good cause, if applicable.
3. The USCIS receipt number of the approved H-2A petition.
4. The petitioner's information, including:
 - Name
 - Address
 - Phone number
 - Employer identification number (EIN)

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5. The employer's information (if different from that of the petitioner):
 - Name
 - Address
 - Phone number
6. The H-2A worker's information:
 - Full Name
 - Date of birth
 - Place of birth
 - Last known physical address and phone number

Additionally, to help USCIS identify the H-2A worker, submit the following for each H-2A worker, if available:

- Social Security number (if available)
- VISA number

Failure to Notify USCIS: A petitioner who fails to comply with these employment notification requirements, or fails to demonstrate good cause for untimely notification, may be required to pay \$10 in liquidated damages for each instance of noncompliance.

Note: USCIS defers to DOL's definition of "workday." According to the Fair Labor Standards Act (FLSA), this generally means the period of time on any particular day when an employee begins and ends his or her "principal activities."

How do I notify USCIS? As your Agent, The Bracero Group will assist you in the process of writing and filing requisite paperwork to the appropriate parties.

Rates of Pay: The employer must pay all covered workers at least the highest of the following applicable wage rates in effect at the time work is performed: the adverse effect wage rate ([AEWR](#)), the applicable prevailing wage, the agreed-upon collective bargaining rate, or the Federal or State statutory minimum wage. Wages may be calculated on the basis of hourly or "piece" rates of pay. The piece rate must be no less than the piece rate prevailing for the activity in the area of intended employment and on a pay period basis must average no less than the highest required hourly wage rate.

Written Disclosure: No later than the time at which an H-2A worker applies for a visa and no later than on the first day of work for workers in corresponding employment, the employer must provide each worker a copy of the work contract – in a language understood by the worker – which describes the terms and conditions of employment. In the absence of a separate written work contract, the employer must provide each worker with a copy of the job order that was submitted to and approved by DOL. The work contract must include:

- the beginning and ending dates of the contract period as well as the location(s) of work.
- any and all significant conditions of employment, including payment for transportation expenses incurred, housing and meals to be provided (and related charges), specific days workers are not required to work (i.e., Sabbath, Federal holidays).
- the hours per day and the days per week each worker will be expected to work.
- the crop(s) to be worked and/or each job to be performed.
- the applicable rate(s) for each crop/job.
- that any required tools, supplies, and equipment will be provided at no charge.
- that workers' compensation insurance will be provided at no charge; and
- any deductions not otherwise required by law. All deductions must be reasonable. Any deduction not specified is not permissible.

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Guarantees to All Workers: H-2A employers must guarantee to offer each covered worker employment for a total number of hours equal to at least 75% of the workdays in the contract period – called the “three-fourths guarantee.” For example, if a contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would need to be guaranteed employment for at least 360 hours (e.g., 10 weeks x 48 hours/week = 480 hours x 75% = 360).

If during the total work contract period the employer does not offer sufficient workdays to the H-2A or corresponding workers to reach the total amount required to meet the three-fourths guarantee, the employer must pay such workers the amount they would have earned had they actually worked for the guaranteed number of workdays. Wages for the guaranteed 75% period will be calculated at no less than the rate stated in the work contract.

Housing: Employers must provide housing at no cost to H-2A workers and to workers in corresponding employment who are not reasonably able to return to their residence within the same day. If the employer elects to secure rental (public) accommodations for such workers, the employer is required to pay all housing-related charges directly to the housing’s management.

In addition, employers are required to either provide each covered worker with three meals per day, at no more than a DOL-specified cost, or to furnish free and convenient cooking and kitchen facilities where workers can prepare their own meals.

Employer-provided or secured housing must meet all applicable safety standards.

Transportation: Employers must provide daily transportation between the workers’ living quarters and the employer’s worksite at no cost to covered workers living in employer-provided housing. Employer-provided transportation must meet all applicable safety standards, be properly insured, and be operated by licensed drivers.

Inbound & Outbound Expenses: If not previously advanced or otherwise provided, the employer must reimburse workers for reasonable costs incurred for inbound transportation and subsistence costs once the worker completes 50% of the work contract period. Note: the FLSA applies independently of H-2A and prohibits covered employees from incurring costs that are primarily for the benefit of the employer if such costs take the employee’s wages below the FLSA minimum wage. Upon completion of the work contract, the employer must either provide or pay for the covered worker’s return transportation and daily subsistence.

Records Required: Employers must keep accurate records of the number of hours of work offered each day by the employer and the hours actually worked each day by the worker.

On or before each payday (which must be at least twice monthly), each worker must be given an hours and earnings statement showing hours offered, hours actually worked, hourly rate and/or piece rate of pay, and if piece rates are used, the units produced daily. The hours and earnings statement must also indicate total earnings for the pay period and all deductions from wages.

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Notices and Posters

The Department's Employment and Training Administration and Wage and Hour Division published a final rule implementing changes to the H-2A program effective March 15, 2010. One of the requirements in the rule is for employers who employ H-2A workers to display [a new H-2A poster](#) where employees can readily see it. The poster is also available [in Spanish](#).

Employee Rights

An employer who files an application for temporary foreign labor certification pursuant to the H-2A regulations must meet many specific conditions, including those concerning recruitment, wages, housing, meals, transportation, workers' compensation insurance, tools and supplies, certification and recruitment fees, labor disputes, and other conditions.

Workers who believe that their rights under the H-2A regulations were violated may file their complaints through the Job Service Complaint System, as described in [20 CFR part 658, Subpart E](#).

H-2A workers as well as non-H-2A workers who are engaged in corresponding employment (i.e., performing any agricultural work performed by the H-2A workers or any other work included on the employer's job order) during the validity period of the H-2A contract may file complaints about non-compliance with H-2A labor standards with a [local Wage and Hour Division office](#). In addition, ETA or any State Workforce Agency will forward any complaint received about contractual H-2A labor standards between the employer and the employee to a [local Wage and Hour Division office](#) for appropriate action.

Penalties/Sanctions

The Wage and Hour Division has a primary role in investigating and enforcing the terms and conditions of employment. The Wage and Hour Division is responsible for enforcing the contractual obligations employers have toward employees and may assess civil money penalties and recover unpaid wages. Administrative proceedings and/or injunctive actions through Federal courts may be instituted to compel compliance with an employer's contractual obligations to employees.

ETA has the authority to audit applications for which certifications have been granted and may refer its audit findings to DHS or another appropriate enforcement agency. ETA may revoke a temporary agricultural labor certification if the employer substantially violated a material term or condition of the certification, if fraud or misrepresentation was found in the application, or if the employer failed to cooperate with a DOL investigation or audit.

Both WHD and ETA may debar an employer or any successor in interest to that employer from receiving future labor certifications for up to three years if the employer substantially violated a material term or condition of its temporary labor certification.

Relation to State, Local, and Other Federal Laws

Foreign workers employed under the H-2A program are not covered under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA); however, various other laws, such as workers' compensation, tax (unemployment insurance, local, state, and Federal), the Fair Labor Standards Act, and the Family and Medical Leave Act may apply to the employment of these workers.

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Additional Assurances and Obligations: Employers must comply with all applicable laws and regulations, including the prohibition against holding or confiscating workers' passports or other immigration documents. In addition, employers must not seek or receive payment of any kind from workers for anything related to obtaining the H-2A labor certification, including the employer's attorney or agent fees, the application fees, or the recruitment costs. Employers must also assure that there is no strike or lockout in the course of a labor dispute at the worksite for the H-2A certification which the employer is seeking. In addition, employers cannot discriminate against – or discharge without just cause – any person who has filed a complaint, consulted with an attorney or an employee of a legal assistance program, testified, or in any manner, exercised or asserted on behalf of himself/herself or others any right or protection afforded by sec. 218 of the INA or the H-2A regulations

§ 655.135 Assurances and obligations of H-2A employers.

An employer seeking to employ H-2A workers must agree as part of the Application for Temporary Employment Certification and job offer that it will abide by the requirements of this subpart and make each of the following additional assurances:

(a) **Non-discriminatory hiring practices.** The job opportunity is, and through the period set forth in paragraph (d) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. Rejections of any U.S. workers who applied or apply for the job must be only for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hires and rejections as required by § 655.167.

(b) **No strike or lockout.** The worksite for which the employer is requesting H-2A certification does not currently have workers on strike or being locked out in the course of a labor dispute.

(c) **Recruitment requirements.** The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an Application for Temporary Employment Certification is made) for the job opportunity until the end of the period as specified in paragraph (d) of this section and must independently conduct the positive recruitment activities, as specified in § 655.154, until the date on which the H-2A workers depart for the place of work. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of business.

(d) **Fifty percent rule.** From the time the foreign workers depart for the employer's place of employment, the employer must provide employment to any qualified, eligible U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed. Start of the work contract timeline is calculated from the first date of need stated on the Application for Temporary Employment Certification, under which the foreign worker who is in the job was hired. This provision will not apply to any employer who certifies to the CO in the Application for Temporary Employment Certification that the employer:

- (1) Did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in sec. 203(u) of Title 29.
- (2) Is not a member of an association which has petitioned for certification under this subpart for its members; and
- (3) Has not otherwise associated with other employers who are petitioning for temporary foreign workers under this subpart.

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(e) Compliance with applicable laws. During the period of employment that is the subject of the *Application for Temporary Employment Certification*, the [employer](#) must comply with all applicable Federal, [State](#) and local laws and regulations, including health and safety laws. In compliance with such laws, including the William

Wilberforce Trafficking Victims Protection Reauthorization [Act](#) of 2008, [Pub. L. 110-457](#), [18 U.S.C. 1592\(a\)](#), the [employer](#) may not hold or confiscate workers' passports, visas, or other immigration documents. H-2A [employers](#) may also be subject to the FLSA. The FLSA operates independently of the H-2A program and has specific requirements that address payment of [wages](#), including deductions from [wages](#), the payment of Federal minimum wage and payment of overtime.

(f) Job opportunity is full-time. The [job opportunity](#) is a full-time [temporary](#) position, calculated to be at least 35 hours per work week.

(g) No recent or future layoffs. The [employer](#) has not laid off and will not lay off any [similarly employed](#) U.S. worker in the [occupation](#) that is the subject of the *Application for Temporary Employment Certification* in the [area of intended employment](#) except for lawful, job-related reasons within 60 days of the [date of need](#), or if the [employer](#) has laid off such workers, it has offered the [job opportunity](#) that is the subject of the *Application for Temporary Employment Certification* to those laid-off U.S. worker(s) and the U.S. worker(s) refused the [job opportunity](#), was rejected for the [job opportunity](#) for lawful, job-related reasons, or was hired. A layoff for lawful, job-related reasons such as lack of work or the end of the growing season is permissible if all H-2A workers are laid off before any U.S. worker in [corresponding employment](#).

(h) No unfair treatment. The [employer](#) has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

- (1) Filed a [complaint](#) under or related to [8 U.S.C. 1188](#), or this subpart or any other [Department](#) regulation promulgated thereunder;
- (2) Instituted or caused to be instituted any proceeding under or related to [8 U.S.C. 1188](#) or this subpart or any other [Department](#) regulation promulgated thereunder;
- (3) Testified or is about to testify in any proceeding under or related to [8 U.S.C. 1188](#) or this subpart or any other [Department](#) regulation promulgated thereunder;
- (4) Consulted with an [employee](#) of a legal assistance program or an [attorney](#) on matters related to [8 U.S.C. 1188](#) or this subpart or any other [Department](#) regulation promulgated thereunder; or
- (5) Exercised or asserted on behalf of himself/herself or [others](#) any right or protection afforded by [8 U.S.C. 1188](#) or this subpart or any other [Department](#) regulation promulgated thereunder.

(i) Notify workers of duty to leave United States.

- (1) The [employer](#) must inform H-2A workers of the requirement that they leave the U.S. at the end of the period certified by the [Department](#) or separation from the [employer](#), whichever is earlier, as required under [paragraph \(i\)\(2\)](#) of this section, unless the H-2A worker is being sponsored by another subsequent H-2A [employer](#).
- (2) As defined further in [DHS](#) regulations, a [temporary](#) labor [certification](#) limits the [validity period](#) of an H-2A petition, and therefore, the authorized period of stay for an H-2A worker. See [8 CFR 214.2\(h\)\(5\)\(vii\)](#) A foreign worker may not remain beyond his or her authorized period of stay, as determined by [DHS](#), nor beyond separation from employment prior to completion of the H-2A [contract](#), absent an extension or change of such worker's status under [DHS](#) regulations. See [8 CFR 214.2\(h\)\(5\)\(viii\)\(B\)](#).

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(j) *Comply with the prohibition against employees paying fees.* The [employer](#) and its [agents](#) have not sought or received payment of any kind from any [employee](#) subject to [8 U.S.C. 1188](#) for any [activity](#) related to obtaining H-2A labor [certification](#), including payment of the [employer's](#) attorneys' [fees](#), application [fees](#), or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from [wages](#), salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. This provision does not prohibit [employers](#) or their [agents](#) from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport [fees](#).

(k) *Contracts with third parties comply with prohibitions.* The [employer](#) has contractually forbidden any foreign labor [contractor](#) or recruiter (or any [agent](#) of such foreign labor [contractor](#) or recruiter) whom the [employer](#) engages, either directly or indirectly, in international recruitment of H-2A workers to seek or receive payments or other compensation from prospective employees. This [documentation](#) is to be made available upon request by the CO or another Federal party.

(l) *Notice of worker rights.* The [employer](#) must post and maintain in a conspicuous location at the [place of employment](#), a poster provided by the [Secretary](#) in English, and, to the extent necessary, any language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and protections for workers employed pursuant to [8 U.S.C. 1188](#).

Where to Obtain Additional Information

These requirements, assurances and obligations are not exhaustive and are subject to change. This is general information and is not to be considered in the same light as official statements of position contained in the regulations.

Compliance Assistance Available

Copies of the application forms, regulations, and relevant directives may be obtained from the Employment and Training Administration's national office. Copies of Wage and Hour Division publications may be obtained from the [Wage and Hour Division Web site](#) or by contacting the [local Wage and Hour Division office](#).

The Department of Labor provides employers, workers, and others with clear and easy-to-access information and assistance on how to comply with the Immigration and Nationality Act. Among the many resources available are:

- [Section H-2A of the Immigration Act](#): This fact sheet provides general information concerning the application of the H-2A requirements to the agricultural industry.
- The Department's Employment and Training Administration offers many helpful materials on its [H-2A Temporary Agricultural Program](#) web page.

By my signature, I acknowledge that I have read, understand, and agree to the Employer Requirements, Assurances and Obligations.

Printed Name

Signature

Company

Date