H-2B Temporary Nonimmigrant Worker Visa Program

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

dol.gov/whd
1-866-4US-WAGE

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Wage and Hour Division

WHD enforces laws governing wages, hours, working conditions, leave, and child labor, including:

- Fair Labor Standards Act (FLSA)
- Family and Medical Leave Act (FMLA)
- Service Contract Act (SCA)
- Davis-Bacon and Related Acts (DBRA)
- Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
- OSHA Field Sanitation Standards
- Immigration and Nationality Act (INA) (H-1B, H-2B, H-2A)

Agenda

This presentation will:

- Summarize H-2B program compliance principles
- Identify common violations
- Provide compliance assistance
- Review the investigatory process

This presentation will not:

- Discuss responsibilities of other government agencies

H-2B Visa Program

The Immigration and Nationality Act (INA) provides for the admission of nonimmigrants in the H-2B visa classification to perform temporary non-agricultural labor or services in the United States. 8 U.S.C. §1101(a)(15)(H)(ii)(b)

The Department of Homeland Security (DHS) delegated H-2B enforcement responsibility to WHD on **January 18, 2009**, for all Applications for Temporary Employment Certifications filed on or after that date

Regulations: 20 CFR part 655, 29 CFR part 503

WHD's H-2B Enforcement Responsibility

Whether the employer conducted the required recruitment for U.S. workers

+

Whether U.S. workers were offered employment

+

Whether U.S. workers were improperly laid off or displaced

+

Review of job order and certification obligations, including wages and working conditions, for H-2B workers and protected U.S. workers

Employer Obligations to U.S. Workers

U.S. Worker Recruitment Requirements

The employer must:

- Submit a job order to the State Workforce Agency (SWA), which must remain open until 21 days before the employer's first date of need
- Have its job order placed on seasonaljobs.dol.gov
- Contact its former U.S. employees
- Provide written notification to the bargaining representative, if there is one
- If there is no bargaining representative, post the availability of the job opportunity in at least two locations
- Conduct additional recruitment if required by ETA
- Maintain a recruitment report

U.S. Worker Hiring Requirements

- The employer must hire qualified U.S. applicants and may not refuse to hire the U.S. applicants for discriminatory reasons
- Employers must not impose any restrictions or obligations on U.S. workers that will not also be imposed on H-2B workers
- Each job qualification and requirement must be listed in the job order

Prohibition of Preferential Treatment

An employer must offer U.S. workers terms and working conditions at least as favorable as those offered or provided to H-2B workers.

Prohibition of U.S. Worker Layoff or Displacement

- The employer may not layoff its U.S. employees in the period beginning 120 days before the date of need through the end of the certification
- If such a layoff has occurred in the period beginning 120 days before the first date of need, the employer must contact those former workers and solicit their return to the job
- If a lawful, job-related layoff is necessary after H-2B workers have arrived, the employer must layoff all H-2B workers before laying off U.S. workers

Additional Assurances and Obligations

Payment of Required Wages

- Offered wage must equal or exceed the highest of the:
  - prevailing wage obtained from ETA, or
  - federal, state, or local minimum wage
- Employer must pay the offered wage during the entire period of employment
- Wages must be paid free-and-clear
- Employer must pay at least every two weeks, or the prevailing frequency in the geographical area

Travel Time and Hours Worked

Ordinary home-to-work travel is not work time.

Travel between job sites during the normal workday is work time.

If an employee is required to report to a meeting place to receive instructions, perform other work there, or to pick up equipment or tools, the travel from the designated meeting place to the workplaces is part of the day's work and must be counted as hours worked

- If the employee is required to return to the employer's office or job site, the travel time back to the office is counted as hours worked

Deductions, Tools and Equipment

- Employers must make all deductions required by law
- Deductions not required by law must be disclosed in the job order and must be reasonable
- Deductions for expenses that are for the primary benefit of the employer are not reasonable and therefore may not bring an employee's wages below the H-2B required wage rate
- The employer must provide workers all tools, supplies, and equipment required to perform the assigned duties at no cost to the worker

Disclosure

- The employer must provide a copy of the job order to both the H-2B workers and protected U.S. workers
  - H-2B workers who are abroad must receive the job order no later than when they apply for the visa
  - H-2B workers already in the U.S. must receive the job order no later than when the job offer is made
- Job order must be provided in a language understood by the worker

Transportation and Visa Costs

Inbound transportation:

- The employer must provide *or* pay for transportation and daily subsistence to the place of employment *or* reimburse workers when 50% of the job order has elapsed

Outbound transportation:

- The employer must provide *or* pay for return transportation and subsistence if the worker completes the job order period or is dismissed early with or without cause

Visa fees:

- Employer is always liable for visa fees & related expenses in or before the first workweek

Place of Intended Employment & Job Classification

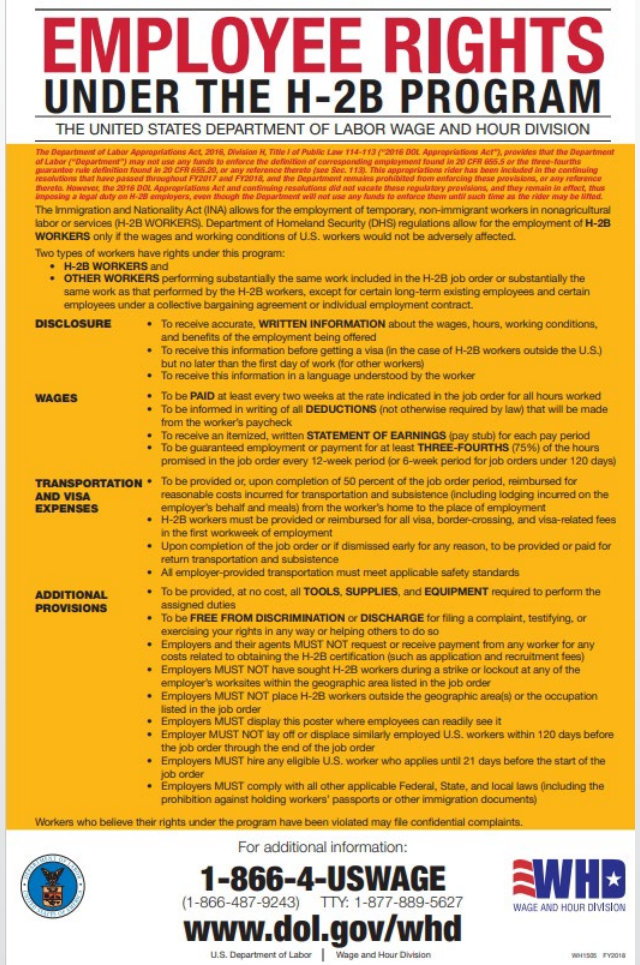
- The employer must not place an H-2B worker outside the area of intended employment listed on the job order
- The employer is also prohibited from placing H-2B workers outside the certified occupation listed on the job order

Prohibited Fees

- The employer, its agent, and its attorneys must not seek or receive payments from workers related to the certification, including agent or attorney fees and recruitment costs
- The employer must contractually forbid any agent or recruiter whom the employer engages directly or indirectly in international recruiting from seeking or receiving payments from prospective workers

Other H-2B Program Obligations

- The job must be a bona-fide, full-time temporary position, with full-time defined as 35 or more hours per week
- There must be no strike or lockout at any of the employer's worksites in the same geographic area
- Display workers' rights poster
- Provide an earnings statement to each worker on or before each payday
- Retain required documents for 3 years



EMPLOYEE RIGHTS
UNDER THE H-2B PROGRAM
THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

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.

The Immigration and Nationality Act (INA) allows for the employment of temporary, non-immigrant workers in nonagricultural labor or services (H-2B WORKERS). Department of Homeland Security (DHS) regulations allow for the employment of **H-2B WORKERS** only if the wages and working conditions of U.S. workers would not be adversely affected.

Two types of workers have rights under this program:

- **H-2B WORKERS** and
- **OTHER WORKERS** performing substantially the same work included in the H-2B job order or substantially the same work as that performed by the H-2B workers, except for certain long-term existing employees and certain employees under a collective bargaining agreement or individual employment contract.

DISCLOSURE
- To receive accurate, **WRITTEN INFORMATION** about the wages, hours, working conditions, and benefits of the employment being offered
- To receive this information before getting a visa (in the case of H-2B workers outside the U.S.) but no later than the first day of work (for other workers)
- To receive this information in a language understood by the worker

WAGES
- To be **PAID** at least every two weeks at the rate indicated in the job order for all hours worked
- To be informed in writing of all **DEDUCTIONS** (not otherwise required by law) that will be made from the worker's paycheck
- To receive an itemized, written **STATEMENT OF EARNINGS** (pay stub) for each pay period
- To be guaranteed employment or payment for at least **THREE-FOURTHS** (75%) of the hours promised in the job order every 12-week period (or 6-week period for job orders under 120 days)

TRANSPORTATION AND VISA EXPENSES
- To be provided or, upon completion of 50 percent of the job order period, reimbursed for reasonable costs incurred for transportation and subsistence (including lodging incurred on the employer's behalf and meals) from the worker's home to the place of employment
- H-2B workers must be provided or reimbursed for all visa, border-crossing, and visa-related fees in the first workweek of employment
- Upon completion of the job order or if dismissed early for any reason, to be provided or paid for return transportation and subsistence
- All employer-provided transportation must meet applicable safety standards

ADDITIONAL PROVISIONS
- To be provided, at no cost, all **TOOLS**, **SUPPLIES**, and **EQUIPMENT** required to perform the assigned duties
- To be **FREE FROM DISCRIMINATION** or **DISCHARGE** for filing a complaint, testifying, or exercising your rights in any way or helping others to do so
- Employers and their agents MUST NOT request or receive payment from any worker for any costs related to obtaining the H-2B certification (such as application and recruitment fees)
- Employers MUST NOT have sought H-2B workers during a strike or lockout at any of the employer's worksites within the geographic area listed in the job order
- Employers MUST NOT place H-2B workers outside the geographic area(s) or the occupation listed in the job order
- Employers MUST display this poster where employees can readily see it
- Employer MUST NOT lay off or displace similarly employed U.S. workers within 120 days before the job order through the end of the job order
- Employers MUST hire any eligible U.S. worker who applies until 21 days before the start of the job order
- Employers MUST comply with all other applicable Federal, State, and local laws (including the prohibition against holding workers' passports or other immigration documents)

Workers who believe their rights under the program have been violated may file confidential complaints.

For additional information:
1-866-4-USWAGE
(1-866-487-9243) TTY: 1-877-889-5627
www.dol.gov/whd
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Other H-2B Program Obligations continued

- Cooperate with WHD investigators
- Notify ETA and DHS in writing within two days if a worker separates prior to the end date of employment certified in the Application
- Do not intimidate, threaten, discharge, or discriminate against any person who has exercised their rights under the H-2B program
- Comply with other applicable laws (e.g. FLSA overtime)

Temporary Visa Cap Increases

In an investigation, WHD will review:

- Whether supplemental recruitment of U.S. applicants was required and occurred
- Whether the employer complied with all obligations to hire qualified U.S. workers pursuant to its supplemental recruitment, as applicable
- The employer's statement and supporting evidence that it was suffering or would suffer impending irreparable harm without access to supplemental visas

Investigations

- Meeting(s) with the employer
- Tour of the establishment
- Records review
- Confidential interviews with employees
- Determination Letters (if applicable)

Sanctions and Remedies

- Recover unpaid wages
- Seek make whole relief, instatement, or reinstatement for laid off or improperly rejected U.S. workers
- Assess civil money penalties
- Debar the employer, attorney, and/or agent for up to 5 years
- Recommend to ETA that it revoke the current certification

Have questions later?

Please call us at 1-866-4US-WAGE

Or go to our website: dol.gov/whd

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