



## **ISSUE UPDATE**

December 2013

### **DOES HEALTHCARE REFORM APPLY TO H-2A GUEST WORKERS?**

#### **SEPARATING FACT FROM FICTION**

H-2A guest workers ("Guest Workers") have become an integral part of many agricultural operations. As growers and other employers of Guest Workers prepare for complying with Healthcare Reform's employer "play or pay" mandate in 2015 (the "Employer Mandate"), there appears to be no shortage of conflicting information about the extent to which Healthcare Reform applies to Guest Workers. Below are answers to some of the most frequently asked questions.

#### 1. Do Guest Workers "Count" for Purposes of Healthcare Reform?

Yes. The rights and obligations set forth in Healthcare Reform generally apply to all U.S. citizens and individuals who are lawfully present in the U.S. Guest Workers are lawfully present in the U.S. Accordingly, Guest Workers "count" for purposes of the various rights and obligations under Healthcare Reform. There are no explicit exceptions in Healthcare Reform for Guest Workers.

#### 2. Are Guest Workers Subject to Healthcare Reform's Individual Mandate?

Yes. Beginning in 2014, all U.S. citizens and individuals lawfully present in the U.S. must maintain minimum essential health coverage or else pay a penalty tax. In 2014, the annual penalty tax is generally \$95 or, if greater, 1% of the individual's household income above the tax return filing threshold. For 2015 and 2016, the annual penalty amounts / income percentages increase to \$325 / 2% and \$695 / 2.5%, respectively. For 2017 and beyond, the annual penalty amount will increase based upon increases in the cost of living. One-twelfth of the annual penalty tax will be imposed for each month during which an individual does not maintain

minimum essential health coverage. Accordingly, for each month during which a Guest Worker is lawfully present in the U.S., the Guest Worker will be subject to the individual mandate penalty tax if he or she does not maintain minimum essential health coverage during such month. The penalty tax will be imposed and paid when the Guest Worker files his or her federal personal income tax return.

3. Will Guest Workers Be Permitted to Purchase Health Insurance Coverage Through the Government Insurance Exchanges?

Yes. Exchange coverage is available to all U.S. citizens and individuals lawfully present in the U.S. In addition, if a Guest Worker is expected to have U.S. household income of not more than 400% of the applicable federal poverty level, the Guest Worker should be eligible for tax subsidies to help cover the cost of exchange coverage.

4. Do Guest Workers "Count" as Employees for Purposes of the Employer Mandate?

Yes. There are no blanket exceptions for Guest Workers. The Employer Mandate applies to all full-time employees. Accordingly, the issue with respect to Guest Workers is whether they will qualify as "full-time employees," given the limited and temporary nature of their work (as discussed further in number 6 below).

5. May Guest Workers Be Disregarded for Purposes of the Employer Mandate Because They Are "Seasonal Employees"?

Generally, no. The existing Internal Revenue Service proposed regulations with respect to the Employer Mandate define seasonal work as follows: "Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year." Accordingly, most Guest Workers performing seasonal agricultural work will be considered "seasonal employees" for purposes of the Employer Mandate. However, this does not mean that Guest Workers may be disregarded for purposes of the mandate. It is important to remember that the "seasonal employee" concept is relevant for two distinct purposes with respect to the Employer Mandate.

First, there is the "seasonal worker" exception to the "50 or more full-time employees test," which looks at an employer's average number of full-time employees and full-time equivalents ("FTEs") during a calendar year to determine whether the employer will be subject to the Employer Mandate in the following calendar year. If an employer's workforce exceeds 50 full-time employees and FTEs for 120 days or fewer during a calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days were "seasonal workers," then the Employer Mandate will not apply in the following calendar year,

regardless of whether the employer averaged 50 or more full-time employees and FTEs across the entire measurement year. In most cases, Guest Workers performing seasonal agricultural work will be considered "seasonal workers." Accordingly, Guest Workers could assist an employer with avoiding the Employer Mandate by satisfying the "seasonal worker" exception to the "50 or more" test. However, Guest Workers are not simply disregarded for purposes of the "50 or more" test.

The second Employer Mandate purpose for which the "seasonal employee" concept is relevant relates to the determination of which employees qualify as "full-time employees" for purposes of the mandate. Once an employer is subject to the Employer Mandate, the obligation to "play" (*i.e.*, offer adequate and affordable group health coverage) or "pay" (*i.e.*, pay a penalty tax for failing to offer such coverage) applies only to "full-time employees." In some cases, the seasonal nature of the work performed by Guest Workers may prevent them from qualifying as "full-time employees" for purposes of the Employer Mandate (as discussed further in number 6 below). However, Guest Workers are not simply disregarded for purposes of determining which employees qualify as "full-time employees."

#### 6. May Guest Workers Qualify as "Full-Time Employees" for Purposes of the Employer Mandate?

Yes. However, most Guest Workers performing seasonal agricultural work will be considered "seasonal employees" for purposes of the Employer Mandate. Accordingly, based upon the existing Internal Revenue Service proposed regulations with respect to the Employer Mandate, an agricultural employer may choose to measure the average hours of service of a "seasonal employee" Guest Worker during the 12-month period beginning on the Guest Worker's first day of employment (the "Initial Measurement Period") to determine whether the Guest Worker averages at least 30 hours of service per week, which is the requirement for qualifying as a "full-time employee" for purposes of the mandate. If an agricultural employer does so, then no "seasonal employee" Guest Worker will qualify as a "full-time employee" for purposes of the Employer Mandate during his or her first 12 months of employment (*i.e.*, the 12-month Initial Measurement period), regardless of how many hours of service are worked during this period.

Whether a "seasonal employee" Guest Worker may qualify as a "full-time employee" for purposes of the Employer Mandate after his or her 12-month Initial Measurement Period will depend on whether the Guest Worker averaged at least 30 hours of service per week during his or her Initial Measurement Period or any future "standard" Measurement Period. The "standard" Measurement Period is the fixed annual Measurement Period that an employer applies to all ongoing employees (as opposed to new employees) to see if they qualify as "full-time employees." For example, an employer may choose to measure the hours of all ongoing employees during the 12-month period running from each December 1 to November 30 to see if an employee will qualify as a "full-time employee" and therefore be eligible for coverage during the next following calendar year. Initial Measurement Periods, on

the other hand, are unique to each employee and are measured from the employee's initial time of hire.

It is important to note that for purposes of measuring the hours of service of a Guest Worker, there is a "break in service" rule that generally requires an employer to treat an individual as a continuing employee if the individual ceases working for the employer, but then returns to service within 6 months. Accordingly, if a Guest Worker works for an employer for 9 months, leaves for 3 months and then returns to work for the employer again, rather than being treated as a new employee (subject to a new 12-month Initial Measurement Period) upon returning to work, the Guest Worker will, in effect, step back into the shoes he or she was wearing when he or she left 3 months prior and be treated as a continuing employee for purposes of determining "full-time" status. However, the 3-month gap in employment will "count" as 3 months during which no hours of service were worked for purposes of determining the Guest Worker's average hours of service during the 12-month Initial Measurement Period. In other words, the 3-month gap in employment will dilute the average hours of service worked during the 12-month Initial Measurement Period. This could prevent the average from reaching 30 or more hours per week and thus prevent the Guest Worker from qualifying as a "full-time employee" for up to the next 12 months (the "Initial Stability Period"), which is the period of time during which the employer generally may treat the Guest Worker as either a "full-time employee" or otherwise, based upon the average hours of service worked during the 12-month Initial Measurement Period.

After the Initial Measurement Period, an employer generally must apply its "standard" Measurement Period to the Guest Worker for as long as there is no gap in employment exceeding 6 months. As discussed above, the "standard" Measurement Period is the fixed annual Measurement Period that an employer applies to all ongoing employees (as opposed to new employees) to see if they qualify as "full-time employees." For example, an employer may choose to measure the hours of all ongoing employees during the 12-month period running from each December 1 to November 30 to see if an employee will qualify as a "full-time employee" and therefore be eligible for coverage during the next following calendar year. In this case, the calendar year coverage period is considered the "standard" Stability Period.

The following two examples illustrate how the "Measurement Period" and "Stability Period" concepts may apply to certain "seasonal employee" Guest Workers:

Example 1:

Guest Worker A is hired to perform seasonal work by Agricultural Employer X on November 3, 2014 and works an average of 36 hours of service per week until he ceases employment on July 3, 2015, for a total of 1,260 hours of service (35 weeks x 36 hours of service per week). Guest Worker A then returns to work for Agricultural Employer X on November 2, 2015.

Because Guest Worker A's gap in employment with Agricultural Employer X was less than 6 months, Guest Worker A is treated as a continuing employee when he returns to work for Agricultural Employer X on November 2, 2015. Accordingly, whether Guest Worker A qualifies as a full-time employee for his 12-month Initial Stability Period beginning on November 3, 2015 will depend on whether he averaged at least 30 hours of service per week during his 12-month Initial Measurement Period, which ran from November 3, 2014 through November 2, 2015, including the nearly 4-month gap in employment during which no hours of service were worked.

During his 12-month Initial Measurement Period, Guest Worker A averaged approximately 24.23 hours per week (1,260 hours of service / 52 weeks). Accordingly, Guest Worker A may be treated as a part-time employee (*i.e.*, Agricultural Employer X will have no Employer Mandate obligation with respect to Guest Worker A) for his 12-month Initial Stability Period beginning on November 2, 2015, unless Guest Worker A ends up averaging at least 30 hours of service per week during Agricultural Employer X's "standard" Measurement Period.

Agricultural Employer X's "standard" Measurement Period runs from each December 1 to November 30. Each ongoing employee who averages at least 30 hours of service per week during a standard Measurement Period is treated as a "full-time employee" for Agricultural Employer X's next "standard" Stability Period, which runs from each January 1 to December 31 (*i.e.*, the calendar year). Accordingly, if Guest Worker A ends up averaging at least 30 hours of service per week during the "standard" Measurement Period running from December 1, 2014 to November 30, 2015 (noting that this is unlikely), then he will need to be treated as a "full-time employee" for the "standard" Stability Period running from January 1, 2016 to December 31, 2016, even though this period overlaps with Guest Worker A's Initial Stability Period. Otherwise, Guest Worker A may be treated as a part-time employee through December 31, 2016, after which his full-time vs. part-time status for each subsequent calendar year will be determined based upon hours of service worked during each "standard" Measurement Period ending the previous November 30, as long as there is no gap in employment exceeding 6 months. If there is a gap in employment exceeding 6 months, then Guest Worker A will be treated as a new employee for any subsequent rehire.

## Example 2:

Guest Worker B is hired to perform seasonal work by Agricultural Employer X on November 3, 2014 and works an average of 50 hours of service per week until he ceases employment on July 3, 2015, for a total of 1,750 hours of service (35 weeks x 50 hours of service per week). Guest Worker B then returns to work for Agricultural Employer X on November 2, 2015.

Because Guest Worker B's gap in employment with Agricultural Employer X was less than 6 months, Guest Worker B is treated as a continuing employee when he returns to work for Agricultural Employer X on November 2, 2015. Accordingly, whether Guest Worker B qualifies as a full-time employee for his 12-month Initial Stability Period beginning on November 3, 2015 will depend on whether he averaged at least 30 hours of service per week during his 12-month Initial Measurement Period, which ran from November 3, 2014 through November 2, 2015, including the nearly 4-month gap in employment during which no hours of service were worked.

During his 12-month Initial Measurement Period, Guest Worker B averaged approximately 33.65 hours per week (1,750 hours of service / 52 weeks). Accordingly, Guest Worker B must be treated as a "full-time employee" (*i.e.*, Agricultural Employer X will have an Employer Mandate obligation with respect to Guest Worker B) for his 12-month Initial Stability Period beginning on November 2, 2015.

Agricultural Employer X's "standard" Measurement Period runs from each December 1 to November 30. Each ongoing employee who averages at least 30 hours of service per week during a standard Measurement Period is treated as a "full-time employee" for Agricultural Employer X's next "standard" Stability Period, which runs from each January 1 to December 31 (*i.e.*, the calendar year). Accordingly, if Guest Worker B ends up averaging at least 30 hours of service per week during the "standard" Measurement Period running from December 1, 2014 to November 30, 2015 (which is likely if Guest Worker B continues working an average of 50 hours of service per week when he returns to employment on November 2, 2015), then he will need to be treated as a "full-time employee" for the "standard" Stability Period running from January 1, 2016 to December 31, 2016 (noting that this period overlaps with the Initial Stability Period). Thereafter, Guest Worker B's full-time vs. part-time status for each subsequent calendar year will be determined based upon hours of service worked during each "standard" Measurement Period ending the previous November 30, as long as there is no gap in employment exceeding 6 months. If there is a gap in employment exceeding 6 months, then Guest Worker B will be treated as a new employee for any subsequent rehire.

As the examples above illustrate, whether a "seasonal employee" Guest Worker may qualify as a "full-time employee" for purposes of the Employer Mandate will depend on how many months he or she works each year, whether there is a gap in

employment exceeding 6 months and how many hours per week he or she works during each period of employment.

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The bottom line for growers and other employers of Guest Workers is that there are no explicit exceptions in Healthcare Reform for Guest Workers. Like any other types of employees, growers and other employers will have Employer Mandate obligations with respect to Guest Workers if the Guest Workers work sufficient schedules to average at least 30 hours of service per week and eventually qualify as "full-time employees." In addition, Guest Workers will have the same rights and obligations with respect to the Individual Mandate and access to subsidized exchange coverage as any other types of employees. Accordingly, it is important for growers and other employers to move past various misinformation regarding the application of Healthcare Reform to Guest Workers and instead focus their efforts on evaluating and planning for the extent to which they may have Employer Mandate obligations for Guest Workers

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This article was written by Sheldon J. Blumling, a partner in the Employee Benefits Practice Group of the national labor and employment law firm Fisher & Phillips LLP. The information provided in this article is for general education purposes only. This information is not intended to provide legal or tax advice and cannot substitute for the advice of your own legal and tax professionals.

NCAE Thanks the Florida Fruit and Vegetable Association (FFVA) for commissioning this article and giving NCAE permission to share it as an NCAE Issue Update. (12/2013.)