The H-2A Program

The H-2A program takes its name from Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA), enacted in 1986, which provides for the lawful admission of temporary nonimmigrant aliens to perform agricultural labor or services of a temporary or seasonal nature. The term "nonimmigrant alien" refers to an alien having residence in a foreign country which he/she has no intention of abandoning. Such temporary nonimmigrant alien agricultural workers are referred to as H-2A workers. The H-2A program has grown dramatically since 1986. Investigators can now expect to encounter H-2A workers engaged in virtually all types of agricultural activities across the country. As employers face the very real possibility of workplace sanctions for employing undocumented workers, this increase in the H-2A program is expected to continue.

PURPOSE AND SCOPE OF THE H-2A REGULATIONS

DOL (Employment and Training Administration, Office of Foreign Labor Certification or ETA-OFLC) must determine that there are not:

- Sufficient ***"able, willing and qualified U.S. workers to perform temporary and seasonal agricultural employment... "***

and that the

- Employment of H-2A workers ***"will not adversely affect the wages and working conditions of workers in the U.S. similarly employed."***

The H-2A regulations protect both domestic workers in the U.S. and H-2A workers. They are also intended to prevent an "adverse impact" on workers similarly employed in the U.S., and WHD is responsible for the enforcement of worker protections and regulations that prevent this "adverse impact."

The H-2A regulations seek to:
Establish minimum standards which are disclosed in the *job offer, job order,* and *work contract.*

- The *job offer, job order,* and *work contract* must all contain terms and conditions of employment such as wages, hours, duration, area of employment, type of work, free housing, and transportation guarantees.

- An employer can offer more than what the H-2A regulations require, but not less.

- An employer must ensure equal treatment for U.S. workers.

- An employer must offer to U.S. workers what is being offered, provided, or will be provided to the H-2A workers. The terms and conditions of work offered to U.S. workers must be equal to (no less than) offers made to H-2A workers in terms of benefits, wages, and working conditions.

- The *work contract* cannot include modifications or conditions that will deliberately exclude U.S. workers from being qualified for the job.

• Requirements cannot be unilaterally applied to U.S. workers and notH-2A workers (such as productivity standards, background checks, credit checks, personal interviews, etc.).

• Job qualifications must be bona-fide. The *work contract* cannot be drafted in such a manner as to exclude U.S. workers or require other qualifications unrelated to the actual job being offered.

DEFINITIONS

Form 790, Agricultural aud Food Processing Clearance Order
This form, also known as the job order, together with the 9142 (see below), can become the minimal requirements of the work contract (if there is not a separate, written work contract). The 790 is given to the State Workforce Agency (SWA) to recrnit workers. It contains hours, conditions of work, etc.

Form 9142, Application for Temporary Employment Certification
Application for temporary employment completed by employers and sent to ETA. Appendix A is applicable to H-2A. (See also Job Offer, Job Order, Work Contract.)

Adverse Effect Wage Rate (AEWR)
Under the regulations, the adverse effect wage rate is the annual weighted average hourly wage for field and livestock workers (combined) in States/regions. It is published annually by the U.S. Deparhnent of Agriculture (USDA) based on its quarterly wage survey. The OFLC Administrator then publishes the AEWR for each State as a notice in the Federal Register (typically during Febrnary).

The preamble to the regulations provides some background on the purpose of the AEWR.

> *This requirement reflects a longstanding concern that there is a potential for the entry of foreign workers to depress the wages and working conditions of domestic agricultural workers. The AEWR is the minimum wage rate that agricultural employers seeking nonimmigrant foreign workers must offer to and pay their U.S. and foreign workers if the prevailing wage rate, the collectively bargained wage rate, and any Federal or State minimum wage rates are below the AEWR. The AEWR is designed to prevent the potential wage-depressive impact of foreign workers on the domestic agricultural workforce. The AEWR* is *a wage floor, and its existence does not prevent the worker from seeking, or the employer from paying, a higher wage.*

Agent
An agent can be a legal entity or person, such as an association of agricultural employers, or an attorney for an association, that is legally authorized to act on behalf of an employer for temporary agricultural labor cel iification purposes and is NOT an employer and is not under suspension, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or the Department of Homeland Security (DHS).

Agricultural Association (AGAS)
An agricultural association is any nonprofit or cooperative association of fanners, growers, or

ranchers (including but not limited to canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers) incorporated or qualified under applicable state law, that recrnits, solicits, hires, employs, furnishes, houses or transpolis any worker. An AGAS may act as the agent of an employer *or* as the sole or joint employer of any worker subject to H-2A.

ALJ
Administrative Law Judge.

Area of Intended Employment
The area of intended employment is defined as the area within normal commuting distance of the place of the job opportunity. The area of intended employment does not include a rigid measure of distance due to a variety of conditions *(e.g., terrain, man-made barriers/obstacles, quality of transportation network).* If the jobsite is within a Metropolitan Statistical Area (MSA), any location in the MSA is deemed to be within the area of intended employment *(including multistate MSAs).* MSAs are not controlling. Places outside an MSA may be within normal commuting distance of a location within the MSA.

Certifying Officer (CO)
The person in the ETA OFLC who makes determinations of applications filed under the H-2A program.

Corresponding Employment
Corresponding employment refers to work performed by workers who are not on an H-2A visa that is within the scope of an approved H-2Ajob order or in any agricultural work performed by H-2A workers that is performed during the validity period of the job order, including any extensions thereof. This is to effectuate the purpose of the statute that the wages and working conditions of workers similarly employed in the U.S. not be adversely impacted by importing foreign agricultural workers.

The statute speaks to workers similarly employed in the U.S. To effectuate the statute, the definition in the regulations does not restrict workers engaged in corresponding employment to "U.S. workers." Undocumented workers can come within the scope of corresponding employment if an H-2A employer chooses to employ such workers and engages them in work that the employer's H-2A workers are performing.

The definition also includes the employment of workers who are not H-2A workers by an employer who has an approved *job order* or in any agricultural work performed by H-2A workers during the validity period of the job order, including any approved extensions.

Date of Need
This is the date indicated on the 9142 Application as the first date the employer requires the services of H-2A workers.

Displacement
Removal of a U.S. worker, for other than lawful reasons, in order to place an H-2A worker in his/her position. Or, removal of an H-2A worker, for other than lawful reasons, after 50 percent of the contract has elapsed.

Employee

An employee is a person engaged to perform work for an employer, as defined under the general common law meaning. Factors relevant to the determination of "employee" status include:

I. The hiring party's right to control;
2. The skill required to perform the work;
3. The source of the tools;
4. The location of the work;
5. The hiring party's discretion over time and length of work; and
6. Whether the work is part of the hiring party's regular business.

While these "common law" factors are quite similar to the "economic realities" factors defining the employment relationship under the FLSA and MSPA, the common law test has a greater focus on the "control" factor than the "economic realities" test in which control is merely one of several factors.

Employer

An employer is any person (including any individual partnership, association, incorporation, cooperative, firm, etc.) that has an employment relationship with an H-2A worker and/or a worker in corresponding employment, and that has a physical location (place of business) in the U.S. and a means by which it may be contacted for employment. In order to file a 9142 application, an employer must also possess a valid Federal Employer Identification Number (FEIN).

Where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker. Joint employment under H-2A is determined under the "common law" test rather than the "economic realities" test used under the FLSA and MSPA.

Fixed-Site Employer

A fixed-site employer is an employer who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed; and who recruits, solicits, hires, employs, houses, or transports any worker subject to H-2A. This definition distinguishes this type of employer from H-2ALCs and associations.

H-2A Labor Contractor (H-2ALC)

An H-2A labor contractor is an employer who is not a fixed-site employer, agricultural association, or an employee of a fixed-site employer or agricultural association; and who in addition to employing, may recruits, solicits, hires, furnishes, houses, or transports any worker subject to the H-2A regulations.

An H-2A labor contractor (H-2ALC) may apply for H-2A employees through the same method as an H-2A fixed-site employer, but with additional requirements. They are limited to a single *area of intended employment* per application, just as a *fixed-site agricultural employer* is limited.

H-2ALCs must identify the name and location of the jobsite as well as the crops to be harvested. H-2ALCs who are required to be registered as a Farm Labor Contractor (FLC) under MSPA must provide a copy of the MSPA certificate of registration (note: there are MSPA exemptions specific to certain farm labor contractors who will not have a certificate to provide); must provide a surety bond; and a copy of each contract with each fixed-site employer connected with the job order.

Additionally, H-2ALCs must demonstrate that the housing where the workers will live, whether provided by the fixed-site grower or by the H-2ALC, has been properly inspected and approved for occupancy, and must also assure that transportation provided by either the fixed-site agricultural business or the H-2ALC meets the H-2A requirements.

Job Offer
The job offer is the offer made by an employer or potential employer of H-2A workers to both *U.S.* and H-2A workers describing all the material terms and conditions of employment, including those related to wages, working conditions, and other benefits. (Also see *Job Order* and *Work Contract.)*

Job Order
The job order is the document that discloses the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its inter- and intra-state clearance systems based on the employer's *Agricultural and Food Clearance Order* (ETA Form-790) as submitted to the SWA. (Also see *Job Offer* and *Work Contract.)*

Joint Employment
Two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee. Note that joint employment under H-2A uses the common law control test. Factors to consider include: the putative employer's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the putative employer's discretion over when and how long to work; and whether the work is part of the regular business of the putative employer.

OFLC
Office of Foreign Labor Certification. This is the organizational component of the ETA that provides national leadership and policy guidance and develops regulations and procedures concerning the admission of foreign workers to the U.S.

State Workforce Agency
State Workforce Agencies (SWA) provide information, technical assistance, and resources to businesses and workers.

Positive Recruitment
Independently conduct DOL-specified recruitment activities and cooperate with the SWA by accepting referrals of eligible U.S. workers.

Successor in Interest
A successor in interest may be held liable for the duties and obligations of the violating employer in certain circumstances.

United States Worker
A worker who is

a.) a citizen of the U.S.; or,
b.) a lawfully admitted alien resident; or,
c.) an individual who is not an unauthorized alien with respect to the employment in which the worker is engaging.

Wages
All forms of cash remuneration to a worker by an employer in payment for personal services.

Work Contract
The work contract contains all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits required by the H-2A regulations. At a minimum, the work contract contains all of the information required in the *job order.* The *work contract* must be provided to all H-2A employees and employees engaged in *corresponding employment.* In the absence of a separate, written work contract, a copy of the approved job order will serve as the work contract. (Also see *Job Offer* and *Job Order.)*

Work Day
The work day in H-2A is defined by the number of daily work hours identified in the work contract.

Agriculture and Agricultural Labor

The statute defines agriculture.

- "Agricultural labor" is defined and applied according to Section 312(g) of the Internal Revenue Code (IRC).
- "Agriculture" is defined and applied according to Section 3(f) of the Fair Labor Standards Act (FLSA).
- "The pressing of apples for cider on a farm" is included as an agricultural activity due to an amendment of the INA.
- "Logging employment" is included as agricultural labor or services within the scope of H-2A.

Tree planting and reforestation are not within the scope of agriculture under H-2A and remain activities enforceable under the H-2B regulations.

The H-2A regulations further note that an occupation included in a *statutory definition* shall be considered "agricultural labor or services," *notwithstanding the exclusion of that occupation from the other statutory definitions.*

IRC Definition
Note that the IRC definition of "agriculture" differs in some respects from the FLSA definition of "agriculture" by including:

- the raising of wildlife;
- the ginning of cotton
- a 50% test for handling, packing, processing, etc. products from other farms

"Agricultural labor or services" under H-2A only incorporates the FLSA and IRC definitions of agriculture and not MSPA's 3rd definition. The scope of "agriculture" for MPSA is generally broader than it is for either H-2A or for FLSA.

b. Logging Employment
It is defined as the felling and moving of trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing and transporting machines, equipment and personnel to, from and between logging sites

Note: Forestry (including reforestation) is not agriculture under FLSA (except secondary AG). Predominately manual reforestation work (predominately manual work that includes, but is not limited to, tree planting, brush clearing, pre-commercial tree thinning, and forest fire fighting) is AG for MSPA, so FLCs engaged in such reforestation activities must be registered.

c. Minor and Incidental Work
There is no tolerance in the regulations for an H-2A worker to perform minor and incidental work (i.e., *other work typically performed on a farm that is not specifically listed on the application that is less than 20 percent of the total time worked and incidental to the agricultural labor or services for which the H-2A worker was sought).*

d. Christmas Trees
Christmas tree production can fall within the scope ofH-2A agriculture if it qualifies as either agriculture under the FLSA or the IRC.

e. Temporary and Seasonal
For the purposes of the H-2A regulations, employment is of a seasonal nature where it is tied to a celiain time of the year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.

f. Dairy Farms
Dairy fanners who perform milking operations do not qualify for an H-2A labor certification. To qualify for an H-2A labor certification an employer must establish a need for the agricultural services or labor to be performed on a seasonal basis. Although the Department considers each

employer's specific circumstances on a case-by-case basis, the Department's program experience has consistently shown that the majority of daily activities, and milk production in particular, are year-round and therefore cannot be classified as either temporary or seasonal.

APPLICATION PROCESS and RECRUITMENT REQUIREMENTS

The H-2A application process involves several entities and is described below:

1. Employer determines positions cannot be filled.
2. Employer files a *job order* and an Application for Temporaly Employment Certification (Form 9142) with Employment & Training Administration (ETA).
3. Chicago National Processing Center (NPC) processes the application.
4. NPC transmits a copy of the ETA Form 790 to the State Workforce Agency (SWA) with jurisdiction.
5. The potential H-2A employer prepares, signs, dates, and submits a written recruitment report on a date specified by the certifying officer (generally 32 or 31 days before the start date of need).
6. The NPC will issue a determination to certify or deny the H-2A application.
7. If approved, the NPC will notify the employer in writing to continue to cooperate with the SWA in recruiting U.S. workers until the end of the designated recruitment period. SWAs will refer to the employer all qualified applicants who have been apprised of the material terms and conditions of employment.

Procedures for Filing an Application

When an Agricultural Employer (AGER) or H-2A Labor Contractor (H-2ALC) detem1ines that positions cannot be filled with the supply of available U.S. workers, the employer files a *job order* and an Application for Temporary Employment Certification with ETA using the ETA Form-9142. By completing and signing the form, the applicant *"assures"* that he/she will abide by the guarantees in the *job offer* and the ETA Form- 9142. The employer will be required to make all applicable attestations in the 9142 application.

Upon receipt of the H-2A application, the OFLC Chicago National Processing Center (NPC) will process the application. NPC will review the application for obvious inaccuracies or omissions, as well as compliance with the criteria for ce1iification. Additionally, the NPC will transmit a copy of the ETA Fonn-790 to the SWA having jurisdiction over the area of intended employment.

The H-2A rate is set after applying and is according to the highest of the applicable rates: the Adverse Effect Wage Rate (AEWR), prevailing wage, State minimum wage, Federal minimum wage, or a collective bargaining agreement rate.

The Certifying Officer or SWA may require the employer to submit the following documentation substantiating the appropriateness of any qualification contained in the ETA Form-9142:

- Job Order:

The temporary labor certification applications (also referred to as "Clearance Orders" or "Job Orders") must include a "job offer" that delineates all of the material terms and conditions of the proposed employment, including those relating to wages, working conditions, and other benefits. The job offer, when

accepted by a worker, creates a contract between the employer, who has made application for and been granted certification for H-2A workers, and the employee(s). Workers admitted on H-2A visas may only fill the jobs described in the sponsoring employer's approved clearance order.)

- The Work Contract between the employer and the employee(s):
Material terms and conditions of employment, which may be a separate written document but *at a minimum* will be the terms of the Job Order.

- ETA Form-9142 and Form-790:
In the *job order,* the employer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to the H-2A worker. Further, employers may not impose on U.S. workers any restrictions or obligations that will not be imposed on H-2A workers. The *job order* may contain ONLY job qualifications and requirements that are bona fide and consistent with the nonnal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. Put simply, job qualifications included in the *job order* may not be skewed in any way to discourage U.S. workers from applying for employment.

The potential H-2A employer must prepare, sign, date, and submit a written recruitment report. Under the Regulations, the report must be submitted on a date specified by the Certifying Officer *(generally 32 or 31 days before the start date of need).* The names of all the people referred by the SWA and any "walk-in" applicants are to be listed on the recruitment report. The initial recruitment report must be received by the Certifying Officer before a temporary labor certification may be granted.

The recruitment report must contain the following information:

- Identification of each recruitment source by name;
- Name/contact information of each U.S. worker who applied for the job and whether each worker was offered the job, and/or was hired;
- Confirmation that former U.S. employees were contacted and by what means; and
- Explanation of the lawful job-related reason(s) for each U.S. worker not hired *(if applicable).*

The recruitment report should be referenced by the WHI to determine if the employer hired all qualified U.S. workers who applied for the job.

Traditional Labor Supply States

As it is the intent of the H-2A regulations to ensure that no U.S. workers are displaced due to the H-2A program, potential H-2A employers must demonstrate that they have attempted to recruit and hire available U.S. workers prior to certification for H-2A employment. Employers must assure that they have attempted to recruit U.S. workers, not only in the *intended area of employment,* but also in states that that have a traditional or expected labor supply.

The NPC designates states of traditional or expected labor supply for positive recruitment by the employer on a case-by-case basis during the transition period.

Recruitment and Hiring Obligations

Employers are required to engage in **positive recruitment** of U.S. workers (advertising and soliciting prior to the start of the job order) and are required to hire eligible U.S. workers. Under the regulations, the employer is obligated to hire eligible U.S. workers up to the 50 percent point of the contract (the "50 percent rule").

This is a key protection for U.S. workers under the regulations. This rule ensures that U.S. workers have access to all work identified in the *job order* so they may apply until 50 percent of the *work contract* period has elapsed. This obligation allows an H-2A employer to displace any H-2A worker for the first half of the contract period due to the obligation to hire an eligible U.S. worker.

This rule further requires that employers place an advertisement on two separate days, one of which must be a Sunday, in a newspaper of general circulation in the area of intended employment. If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the ETA Certifying Officer (CO) may direct the employer, in place of a Sunday edition, to advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

Advertisements must satisfy the requirements of 20 CFR 655.152 and must be published after the Notice of Acceptance and before the H-2A workers depart for the place of work or the third day preceding the start date of work, whichever is earlier. Advertisements must include:

- Employer's name
- Geographic area(s) of employment with specificity to apprise U.S. workers of any travel requirements
- Description of job opportunity
- Anticipated start and end dates of work
- Wage offer or range of applicable wage offers
- Three-fourths guarantee
- Indication the job is "temporary"
- Total number of job openings
- A statement that work tools, supplies, and equipment will be provided at no cost to the worker *(if applicable)*

Advertising must reflect the terms and conditions of the job order and the information contained in the ETA Form-9142 application. Copies of this information should also be provided to the H-2A workers and to any workers in corresponding employment.

The job offer must also include:

A statement that transportation and subsistence expenses to the worksite will be provided upon completion of 50 percent of the work contract, or earlier, if appropriate;

- A statement that housing will be made available at no cost to workers, including corresponding workers who cannot reasonably return to their permanent residence at the end of each working day;
- SWA contact information and job order number, if available; and

• A statement directing applicants to apply at the nearest local office of the SWA in the State in which the advertisement appeared.
H-2A employers requiring interviews must conduct those by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited at little or no cost to the worker. [See Feb. 12, 2010 Fed. Reg. p 6929]
The employer must also contact folmer U.S. workers employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job by mail or other effective means. However, the employer is not required to contact employees who were either dismissed for cause or who abandoned the worksite.

The employer must contact these former employees after the Notice of Acceptance and before the H-2A workers depart for the place of work or the third day preceding the start date of work, whichever is earlier. The employer must also retain documentation sufficient to prove that contact in the event of an ETA audit or a WHD investigation. The employer is required to conduct positive recruitment within a multi-state region of traditional or expected labor supply.

Methods of recruitment must be no less rigorous than the normal efforts of non-H-2A employers of comparable or smaller size in the area of intended employment; and must be of the kind and degree of recruitment which the employer made to obtain foreign workers. These requirements are directed by the Celiifying Officer and will become part of the employer's recruitment report.

The regulations also state that the SWA is no longer required to conduct I-9 employment eligibility verification for the workers the SWA refers in response to the *job order.* Under these regulations, the employer is responsible for verifying the employment eligibility of all workers employed.

Exemption from Hiring Requirement
An investigator may encounter an H-2A employer who meets the 500 man day test and would not be subject to the 50 percent rule requirement under the regulations.

This is the same 500 man day test used for FLSA 13(a)(6)(A) exemption from MW & OT and for the MSPA 4(a)(2) small business exemption.

To be exempt from the 50% rule hiring obligation, the exempt H-2A employer must meet the following requirements:

- Did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor; and
- Is not a member of an association which has filed for H-2A celiification; and
- Has not associated with other employers who filed for H-2A certification.

Such employers would still be required to hire any qualified U.S. workers who apply for employment during the "recruitment" period prior to the start date of the contract.

No preferential treatment of H-2A workers - Violation item 1

Preferential treatment given to H-2A workers is prohibited.

- The employer's job offer must offer U.S. workers **no less than the same** benefits, wages,

and working conditions that the employer is offering, intends to offer, or will provide to the H-2A workers.

- No job offer may impose on U.S. workers any restrictions or obligations (such as productivity standards or experience requirements) that will not also be imposed on the employer's H-2A workers. Note that any such restriction or obligation must be stated in the job offer for it to be applicable to any worker, whether U.S. or H-2A.

U.S. workers may be offered more or paid more than H-2A workers and/or provided greater benefits and/or better working conditions. There is no intention, for example, to require an employer to lower the wages of a long-term or year-round U.S. employee to an H-2A required wage simply because such U.S. worker is engaged in corresponding employment. In addition, the employer is not required to raise the wage rate of all H-2A workers - and then by extension all workers in corresponding employment- if a long-term U.S. being paid a higher wage is engaged in corresponding employment.

Background Checks

Employers can include a requirement in the job opportunity that the applicant pass a specific background check and/or drug test. However, the requirement that the worker pass a particular background check or drug test will be reviewed on a case-specific basis against the regulatory standard of review that all job requirements must be bona fide and consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.

The results of a background check or drug test may not be used to automatically reject a U.S. worker for agricultural work. Rather, the results of the background check or drug test may be used to reject a worker only if they provide a lawful job-related reason to do so. For example, while a sex offense conviction may be a lawful job-related reason to reject a worker who is applying to work at a "pick-your-own" fruit farm, a Driving Under the Influence (DUI) conviction is very unlikely to be. An employer requiring a background check or drug test should be prepared to provide documentation establishing the nexus between the background check or drug test to be conducted and the nature of the job oppo1tunity.

If an employer chooses to disclose in the job order that it will be conducting a criminal background check, the employer's job order must also identify the specific criminal issue(s) for which the employer could lawfully reject an applicant due to the nature of the job opportunity. A general statement about conducting a criminal background check without any further explanation is unacceptable, as it fails to adequately apprise U.S. workers of the job opportunity and applicable conditions of employment.

Examples of Preferential Treatment

1. Long-time H-2A workers are paid a higher, undisclosed rate that is not applied equally to corresponding employees.

2. Only H-2A workers are paid a bonus or provided some similar benefit. (Note that in such a scenario, if the bonus was not applied at least equally to corresponding workers, it would not matter if the bonus was disclosed.)

3. Corresponding workers are sent to work in less desirable rows or fields where they are not likely to meet production standards and/or not make as much money when paid by piece rate.

4. Only H-2A workers are offered more hours of work and/or the oppo1tunity to work on days that were not disclosed in the job order.

5. Only H-2A workers are provided certain transportation *(e.g.,* to the grocery store) when there are also corresponding employees living in the employer-provided housing.

Unlawful rejection of U.S. workers- Violation item 2

The employer must assure that qualified U.S. workers will be offered employment to perform work covered by the work contract. The obligation extends from the date the foreign workers depart for the employer's place of employment through the first 50% of the contract period. This is often refened to as the 50 percent rule. Use the date of need listed on the contract to detel mine when the 50 percent point of the work contract is/was reached. The WHD has explicit authority to investigate whether employment was offered to U.S. workers.

For as long as an H-2A worker is employed in a certified position during the first 50 percent of the contract period, the employer must provide employment to any able, willing, qualified and available U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed, regardless of the number ofH-2A workers covered by the employer's certification. An employer may continue to employ its H-2A workers under the work contract so Jong as it complies with all requirements of the H-2A program with respect to the H-2A workers and workers in corresponding employment. The employer may also choose to displace its H-2A workers with the newly hired U.S. workers so long as it pays for the H-2A workers' return transportation and subsistence in accordance with 20 CFR 655.122(11)(2). In the event the employer decides to displace its H-2A employees as a result of hiring U.S. workers, the employer is not liable for the payment of the three-fourths guarantee to the displaced H-2A workers.

Exception to the 50 percent rule

Absent written ETA-approved cancellation of the job order, the only exception to the 50 percent rule obligation is if the employer has certified to ETA in its application, and ETA has approved, that: a) the employer did not, during any calendar quarter of the preceding calendar year, use more than 500 man-days of agricultural labor (as defined under the FLSA); b) the employer is not a member of an association that has petitioned for certification for its members, AND c) the employer has not otherwise associated with other employers who are petitioning for H-2A workers. This means that the exception does NOT apply to any small farms that are members of an association filing a master application or othel wise associating with other employers.

If the employer did not certify to ETA in its application for certification that it is eligible for this exception to the 50 percent rule, the exception is not applicable and the employer must comply with the obligation to hire qualified, eligible U.S. workers who apply for employment through the 50 percent point of the contract.

Hired U.S. workers become unavailable

If all of the H-2A workers have been displaced, and some or all of the U.S. workers hired as a result of the 50 percent rule become unavailable, i.e., abandon the position or are terminated for cause, during the first 50 percent of the work contract period, the employer is under no obligation, but may continue, to hire any able, willing, qualified and available U.S. workers. However, so long as the employer continues to employ at least one H-2A worker in a certified position during the first 50 percent of the contract period, the employer must continue to hire any able, willing, qualified and available U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed, regardless of the number of U.S. workers hired under the 50 percent rule who become unavailable.

Who does this apply to?

The employer's obligation to offer employment refers, generally, to those eligible U.S. workers who applied or apply for the job. However, questions may arise as to what constitutes applying for the job. The requirement should not be construed as protecting only those workers who physically present themselves to the employer and complete an application at the place of employment. The employer must offer employment to workers who may not have actively submitted an application but may be interested in the job. The point of the recruitment requirements is to identify interested U.S. workers for the job. If a state workforce agency (SWA) sends a list of referrals of persons interested in the job to the employer, the employer should view this as a listing of persons interested in the job and should contact (or attempt to contact) all persons on the list. However, if the employer makes contact with the prospective U.S. worker and either sends the worker an application, which the worker does not return, or schedules an interview to which the worker does not show up, then the employer may construe the prospective U.S. worker's non-response as an indication the worker is no longer interested in the job. On the other hand, if the employer contacts a U.S. worker who has expressed an interest in the job and tells the applicant he will send an application but does not do so, or if the employer manipulates the situation to discourage the applicant from applying for or accepting the job *(e.g.,* continually rescheduling the interview or refusing to do a phone interview and instead requiring an otherwise qualified and eligible applicant to travel a long distance for the interview), then these circumstances should be fully documented in order to make a determination about whether the worker was unlawfully rejected.

It is important to remember that because a worker was not hired is not, in and of itself, proof that the worker was unlawfully rejected for employment.

Note that the obligation to offer employment to U.S. workers who apply for employment continues throughout the first 50 percent of the contract period as long as at least one position is filled by an H-2A worker.

Things to Note

- The employer may not reject U.S. workers for not being fully apprised of the job opportunity. The employer has an affirmative obligation to apprise all workers, including H-2A workers and workers in corresponding employment of all material terms and conditions of employment. The Department's regulations, additionally require each employer to provide its H-2A workers and workers in corresponding employment with a copy of the work contract (or in the absence of a separate work contract, with a copy of the application and job order) in a language understood by the worker. Finally, U.S.

workers who apply for the job may only be rejected for lawful, job-related reasons - not being aware of all the terms and conditions of employment is not a lawful, job-related reason to not hire an otherwise qualified and eligible U.S. worker.

- The employer may reject U.S. workers who tell them during the pre start-date interview that they cannot commit to beginning work on the application's start date or may not be able to work for the entire period of need. These workers are not considered willing and available to work. A willing and available worker anticipates being available on the start date and throughout the period of need.

Employers who are members of an association

An employer who is a member of an association, which has applied for a labor certification on behalf of its members, is not exempt from the 50 percent rule. Similarly, an employer who technically is not a member of an association but otherwise maintains a relationship with other employers who are either members of an association that has applied for a labor certification and/or who have individually applied for a labor certification, such that this employer together with the other employers forms an informal group that effectively operates as an association - i.e., shares employees - would be considered to have "otherwise associated with other employers" and thus would not be exempt from the 50 percent rule.

Reviewing the recruitment report

As part of evely H-2A investigation, the WHI must review the employer's recruitment report. This report should identify all U.S. workers who applied for the job openings or responded to solicitations, as well as confirmation that all former U.S. employees were contacted. The report should also state the employer's lawful, job-related reason for not hiring a U.S. worker. With respect to any U.S. applicant who was not hired, inquily should be made as to why the applicant was not hired. If possible, obtain signed interview statements from the rejected workers so that a determination can be made as to whether the workers were unlawfully rejected for employment. Effort should be made to find out what the U.S. workers' qualifications for the job are/were, what the employer told the worker(s) as to what the job entails, and why the worker was not hired.

Note that the employer's recruitment should begin when it receives the Notice of Acceptance from ETA. The Notice of Acceptance contains the recruitment instructions and the due date for the first recruitment report. However, the employer may not have time to complete all the required recruitment before submitting its first recruitment report to ETA. The regulation provides for the employer to continue recruiting after submitting the first recruitment report. Specifically, an employer must continue to maintain and update its recruitment report during the first 50 percent of the contract period and be prepared to submit the updated recruitment report, if requested.

Failed to contact prior U.S. workers - Violation item 35

The employer must contact former U.S. workers employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job by mail or other effective means. However, the employer is not required to contact employees who were either dismissed for cause or who abandoned the worksite.

The employer must contact these former employees after the Notice of Acceptance and before the H-2A workers depart for the place of work or the third day preceding the start date of work, whichever is earlier. The employer must also retain documentation sufficient to prove that contact in the event of an ETA audit or a WHD investigation.

The WHI should request to see the employer's documentation of contact (or attempted contact) of former U.S. workers, and attempts should be made to contact former U.S. workers who did not return to the job in order to ascertain whether they were actually contacted by the employer and, if contacted, why they did not return to the job. The WHI should ask the employer why each former U.S. worker was not contacted and solicited for employment. If it appears that the employer engaged in tactics to dissuade U.S. workers from returning, this issue should be further explored. (This may necessitate interviewing the worker to detelmine if contact was made and further if the employer engaged in tactics to dissuade the worker from returning.) Depending on the situation and what WHD is able to substantiate, it may be appropriate to consider make whole relief. For more information, see the section on unlawful rejection of U.S. workers.

Position vacant due to strike or lockout - Violation item 36

Section 218(b) of the Immigration and Nationality Act (INA) requires the Secretary to deny a labor certification if there is a strike or lockout in the course of a labor dispute. An employer seeking to employ H-2A workers must agree that it will abide by the requirements and assurances outlined in 20 CFR 655.135, including that the worksite does not have workers on strike or being locked out in the course of a labor dispute. This applies to any labor dispute involving two or more domestic workers. Any employer engaged in such a dispute at the time the employer seeks to apply for the labor certification may not apply to import H-2A foreign workers.

Therefore, if the employer's workers go on strike *after* the employer filed its application *but before* the labor certification is granted, the employer must notify the Department of the strike or lockout and/or withdraw its application until such a time as the labor dispute is resolved.

Absent material misrepresentation or fraud in connection with the application - meaning that the strike or lockout was not in effect at the time the employer applied for certification - the employer may continue to employ H-2A workers notwithstanding a strike by its non-H-2A workers. Also, if a lock-out meets the definition of a layoff and if it occurs within 60 days of the first date of need, section 20 CFR 655.135(g) requires that the U.S. workers be offered the job opportunity listed in the Application for Temporary Employment Certification before the H-2A workers. Therefore, unless the employer has sufficient work to be performed by all the laid-off U.S. workers and the H-2A workers, the employer will need to dismiss the H-2A workers.

Layoff or displacement of U.S. workers - Violation item 37

The employer must assure during the application process that it has not laid off and will not lay off any similarly employed U.S. worker in the occupation and in the area of intended employment in which the employer is seeking to hire H-2A workers within 60 days of the date of need.

Note that layoffs for lawful, job-related reasons such as lack of work or the end of the growing

season are permissible when all H-2A workers are laid off before any U.S. workers in corresponding employment are laid off.

Failed to accept SWA referrals -Violation item 38

During the application process, the Chicago National Processing Center (NPC) will notify the employer in writing to continue to cooperate with the SWA in recruiting U.S. workers until the end of the designated recruitment period. SWAs will refer to the employer all eligible, qualified applicants who have been apprised of the material terms and conditions of employment. Note that the regulations state that the SWA is no longer required to conduct I-9 employment eligibility verification for the workers the SWA refers in response to the job order. Under these regulations, the employer is responsible for verifying the employment eligibility of all workers employed.

If the SWA is/was the source of information regarding a potential violation of this requirement and if the evidence substantiates the violation, this information must be communicated to the SWA so that the SWA can decide whether to deny its services to the employer. Also note that in some states, if the U.S. worker registers for the job opportunity with the SWA's automated system and the worker's information and interest in the job is communicated to the employer, the employer must accept the referral as an application for the position.

Note that a violation of this requirement is not the same thing as an unlawful rejection of US workers even though the violations can arise from the same circumstance(s).

Also note that an H-2A employer who has been certified by ETA for the exception to the 50% rule is still required to hire any qualified U.S. workers who apply for employment during the recruitment period prior to the start date of the contract.

Failed to satisfy requirements of the job order by not stating the actual terms or conditions - Violation item 39

The job order must be signed and state all the material terms and conditions of the employment, including:

I) The crop;
2) The nature of the work;
3) The anticipated period and hours of employment;
4) The anticipated starting and ending date of employment and the anticipated number of days and hours per week for which work will be available;
5) An assurance that:
    (a) The employer will provide to workers referred through the clearance system the number of hours of work... for the week beginning with the anticipated date of need, unless the employer has amended the date of need at least IO working days prior to the original date of need... by so notifying the order-holding office. The State agency shall make a record of this notification and shall attempt to inform rejected migrant workers of the change in accordance with the following procedure:
    (b) All workers referred through the clearance system, farm labor contractors on behalf of migrant workers or family heads on behalf of migrant family members rejected through the clearance system shall be notified to contact a local job service office, preferably the order-holding office, to verify the date of need cited

no sooner than 9 working days and no later than 5 working days prior to the original date of need cited on the job order; and that failure to do so will disqualify the rejected migrant worker from the assurance provided in paragraphs (a) and (d) of this section.

(c) If the worker referred through the clearance system contacts a local office (in any State) other than the order holding office, that local office shall assist the referred worker in contacting the order holding office on a timely basis. Such assistance shall include, if necessary, contacting the order holding office by telephone or other timely means on behalf of the worker referred through the clearance system.

(d) If the employer fails to notify the order-holding office at least 10 working days prior to the original date of need the employer shall pay eligible (pursuant to paragraph (b) of this section) workers referred through the clearance system the specified hourly rate of pay, or in the absence of a specified hourly rate of pay, the higher of the Federal or State minimum wage for the first week starting with the originally anticipated date of need.

(e) Employers may require workers to perform alternative work if the guarantee in this section is invoked and if such alternative work is stated on the job order.

(f) For the purposes of this assurance, "working days" shall mean those days that the order-holding local office is open for public business.

6) The hourly wage rate or the piece rate estimated in hourly wage rate equivalents for each activity and unit size;

7) Any deductions to be made from wages;

8) A specification of any non-monetary benefits to be provided by the employer;

9) Any hours, days or weeks for which work is guaranteed, and, for each guaranteed week of work... , the exclusive manner in which the guarantee may be abated due to weather conditions or other acts of God beyond the employer's control;

10) Any bonus or work incentive payments or other expenses which will be paid by the employer in addition to the basic wage rate, including the anticipated time period(s) within which such payments will be made. No such payments, however, shall be made contingent upon the worker continuing employment beyond the period of employment specified in the job order or, in the case of any worker with children, beyond the time needed to return home for the beginning of the school year;

11) An assurance that no extension of employment beyond the period of employment specified in the job order shall relieve the employer from paying the wages already earned, or if specified in the job order as a term of employment, providing transportation or paying transportation expenses to the worker's home;

12) Assurances that the working conditions comply with applicable Federal and State minimum wage, child labor, social security, health and safety, farm labor contractor registration and other employment-related laws;

13) An assurance that the employer will expeditiously notify the order-holding local office or State agency by telephone immediately upon learning that a crop is maturing earlier or later, or that weather conditions, over-recruitment or other factors have changed the terms and conditions of employment. For orders submitted in conjunction with requests for foreign workers, an assurance that the employer will follow-up the telephone notification in writing.

14) An assurance that the employer, if acting as a farm labor contractor ("FLC") or farm labor contractor employee ("FLCE") on the order, has a valid FLC certificate or FLCE identification card; and

15) An assurance of the availability of no cost or public housing which meets the Federal

standards and which is sufficient to house the specified number of workers requested through the clearance system. This assurance shall cover the availability of housing for only those workers, and, when applicable, family members who are unable to return to their residence in the same day.

16) An assurance that outreach workers shall have reasonable access to the workers in the conduct of outreach activities pursuant to §653.107.

Misrepresentation can be asserted when H-2A employers make a misrepresentation of material fact in the H-2A application to ETA (the government) or with the required employer obligations/assurances and contents of the job order. Items that may be misrepresented on the job order include:

- Duties
- Location
- Period of employment
- Hours per week
- Productivity standards
- Experience requirements
- Higher rates of pay or bonuses
- Any other benefits or incentives

Failed to provide copy of work contract-Violation item 26

Determining the contents of the work contract and identifying what information was disclosed to the workers is a vital step in initiating an H-2A investigation. The regulation requires that H-2A workers be disclosed the terms and conditions of employment before or at the time the worker applies for his or her visa. This requirement provides workers with information to make a decision of whether to accept a job offer before traveling to the United States. Corresponding workers must receive disclosure no later than on the day work commences.

Corresponding workers and MSPA disclosure

All agricultural investigations should incorporate all applicable Wage and Hour enforced laws, including MSPA. Corresponding workers are likely to be covered under MSPA. As such, the H-2A employer is obligated to follow MSPA requirements for corresponding workers.

- If the worker is a migrant agricultural worker covered by MSPA, disclosure is provided in writing at the time of recruitment.
- If the worker is a seasonal agricultural worker covered by MSPA, disclosure must be made at the time of the employment offer and provided in writing if requested.
- Once employed, a worker covered by MSPA may request a written copy of the disclosure at any time.

Note that if the employer uses the H-2A work contract as written disclosure, the employer is obligated to ensure all required MSPA items be disclosed, such as those listed on the WH-516, particularly regarding workers' compensation information.

Subsequent employment or modifications

For an H-2A worker going from one H-2A employer to a subsequent H-2A employer, the copy

of the new contract must be provided no later than the time an offer of employment is made by the subsequent H-2A employer. There will also be occasions where an H-2A employer may seek to extend the job order. If such a modification is approved by ETA OFLC after the worker received the original job order or contract, disclosure of the revised terms and conditions must occur as soon as practicable.

Language requirement

The regulation requires that a copy of the work contract between the employer and the worker must be in a language understood by the worker as *necessary or reasonable.* The Department believes that employers should provide the terms and conditions of employment to a prospective worker in a manner that permits the worker to understand the nature of the employment being offered. The Department intended for employers to make translations of the work contract into major languages and not every dialect. MSPA disclosure requirements also have a language requirement - "disclosure must be in a language common to the workers."

Contents of the disclosure

At a minimum, the work contract must contain each of the provisions required such as:

- Wages and frequency ofpay;
- Deductions;
- Housing;
- Transportation;
- Meals;
- Tools;
- Workers' compensation;
- ¾ Guarantee; and
- Other provisions.

In the absence of a separate, written work contract between the employer and the worker, the required terms of the job order (ETA Form-790) and the certified *Application for Temporary Employment Certification* (ETA Fonn-9142) will be the work contract.

Failed to post H-2A poster - Violation item 51

The employer must post and maintain in a conspicuous location at the place of employment, a poster (WH 1490), in the language common to a significant portion of the workers, which sets out the rights and protections for workers. The WH 1490 is currently available in the English and Spanish language.

This poster is important because it provides information not only to H-2A workers but it also provides information to U.S. workers, including workers who otherwise may not know that they are engaged in corresponding employment and are entitled to the terms and conditions ofH-2A employment.

Failed to provide housing at no cost (wage related violation)- Violation item 6

If the employer provides housing but there is a cost incurred by the workers for the housing, it is a violation of this item.

Providing housing at no cost to workers eligible for such housing under the H-2A program is an employer obligation, so a deduction or cost incurred by an eligible worker for housing is a violation even if it does not take the worker below the H-2A required wage. Housing deductions under H-2A are treated differently than how an FLSA 3(m) deduction for housing would be addressed under the FLSA.

Note: A homeless shelter does not qualify as a person's "residence" because a shelter, by its vely nature, is temporary. Therefore, in an instance where a worker is living in a homeless shelter, the employer must offer such worker housing.

Unlawful charges for public housing - Violation item 9

It is illegal for an H-2A employer to deduct rent from H-2A employees or corresponding workers who cannot return to their permanent place of residence at night. If the employer obtains public housing and charges are required, the charges must be paid by the employer directly to the housing management.

Charges normally required for use of the public housing do not include such things as cable television hook-up and monthly service fees, or telephone service installation and monthly usage charges. Note, however, that if the employer requires a phone so the employer can contact the employees to repolt for shifts, etc, then this cost must be borne by the employer.

Charges for necessities such as water, electricity, gas, or trash removal must be provided by the employer at no cost to the worker(s) and therefore must be paid directly by the employer to the housing's management. Payment by the employer for necessities is an H-2A requirement; therefore costs deducted from the worker's wages do not have to take the wages below the H-2A required wage to be a violation. Any deduction - no matter how small or large - is a violation.

Unlawful deposits for bedding and other items - Violation item 10

Charges in the form of deposits for bedding or other similar incidentals related to housing cannot be charged to the workers.

Note that the employer may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been responsible for damage that is not the result of normal wear and tear related to habitation.

Employer-provided items - Violation item 13

The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

The rule plainly and unequivocally states that the employer must provide these items without charge. Moreover, employees must receive the required wage rate free and clear. Therefore, unless specifically authorized by the regulations, employees may not provide or have their pay docked for any item that is an employer business expense where doing so would reduce their wages below the required wage rate.

The WHI may need to develop whether the item was required by the employer (and should have been disclosed), by law, or by the nature of the work (and therefore also should have been disclosed). Developing whether the item was necessitated by the nature of the nature of the work is the most challenging part. OSHA may require protective equipment, USDA may require a clean outer garment, but beyond these examples the WHI will need to develop how the equipment is required by the job.

Failed to provide meals or kitchen facilities -Violation item 14

The employer must provide three meals per day at no more than a DOL-specified daily cost or must furnish free and convenient cooking and kitchen facilities that enable the workers to prepare their own meals. The employer must petition for and document the need for fees for meals that are higher than the DOL-specified cost.

The amount of the allowable daily meal charge is governed by 20 CFR 655.173. It changes annually based on the Consumer Price Index and is published in the Federal Register when the new AEWR is published.

- The allowable meal charges in 2016 (effective as of Febmary 26, 2016) may not exceed $12.09 for providing the workers with three meals per day.
- The rate in 2015 was $11.86 per day.
- Note that this is the amount per day - not per meal.

The work contract must state the charge, if any, to the worker for such meals.

The employer may only charge the workers for the actual cost of the meals and may not profit from the provision of food. If the employer is deducting from employee's wages the allowable meal charges, then the actual costs incurred by the employer may not be less than the amount be deducted. Apply the same analysis as a FLSA Section 3(m) meal credit deduction.

(Note: See separate discussion regarding the rate used for reimbursement of subsistence in connection with inbound and outbound transportation.)

What constitutes a meal

An employer providing three meals a day to its workers must provide a reasonable balance of food groups and nutrients intended to supply sufficient nutrition to the workers three times a day. The Department advises employers to consult the United States Department of Agriculture's Dietary Guidelines for Americans 2015-2020 repo1t) that may be accessed or downloaded through the following web site: http://www.cnpp.usda.gov/2015-2020-dietary-guidelines-amencans.

Special situations

- If the worker elects not to eat the meal(s) for personal reasons, the employer may still deduct the amount(s) specified in the job order provided there is no separate agreement to the contrary.

- Some job orders require the employer to provide free transportation from the living quarters to the store so that workers can purchase food. If such a benefit is offered in the

job order but not provided, there may be a violation for failing to state the actual terms and conditions in the job order.

- Consider whether there is any preferential treatment with respect to the meals. An employer who provides free meals to H-2A workers must also provide free meals to corresponding workers who are eligible for employer-provided housing. If an employer delivers a meal to the H-2A workers in the field, the employer must also make the meal available to such corresponding worker(s) and it must be offered and provided at the same charge made to the H-2A workers.

- If an employer provides meals by a variety of methods *(i.e.* caters one meal and provides facilities for the workers to cook the other two meals for themselves), the employer may charge for the meals, prorated on a 1/3 basis per day for each meal provided.

- The regulations do not address the quality or quantity of food offered or provided.

TRANSPORTATION

There are three different issues concerning transportation relating to H-2A and corresponding employees:

- **Inbound transportation**
  - Must pay or provide for the costs related to the employee's inbound trip to the worksite when the employee completes 50% of the work contract period.

- **Outbound transportation**
  - Must be paid for employees to return to "the place [from which] the worker has come" upon completion of the work contract.

- **Daily transportation**
  - Must provide daily transportation to and from the employer-provided housing and the worksites for workers living in employer-provided housing.

All employer-provided transportation must comport with the applicable Federal, State or local laws and regulations - and at a minimum, must meet the same transportation safety standards, driver licensure, and vehicle insurance requirements found under MSPA regulation sections 29 CFR 500.105 and 29 CFR 500.120 to 500.128.

Inbound transportation - Violation item 15

The longstanding H-2A requirement has been for employers to reimburse workers for inbound transportation and subsistence expenses upon the worker completing 50% of the contract period; the employer could pay or provide such transportation up front.

The 11th circuit held in Arriaga v. Florida Pacific Farms, L.L.C. held that H-2A growers violated the FLSA minimum wage by failing to reimburse farmworkers during their first workweek for travel expenses (and visa and immigration fees) paid by the workers under the H-2A program.

The preamble to the H-2A regulations explains that the inbound transportation costs are primarily for the benefit of the employer. Such costs therefore cannot take the worker's wages below FLSA minimum wage. This position is based on the analysis in the *Arriaga* decision.

The employer must pay or provide for inbound transportation, or reimburse the worker for inbound transportation expenses incurred by the worker in the first week of employment. However, the employer - if proper disclosure is made - may deduct the costs of inbound transportation expenses paid to or provided to the worker until the 50% point of the contract is reached, so long as the deduction does not take the worker's weekly wages below the FLSA minimum wage. Once the worker has completed 50% of the contract, the employer must reimburse all inbound transportation and subsistence expenses.

Therefore, there are three methods of providing for the inbound transportation and subsistence costs:

1. The employer arranges and provides transp01iation directly to the worker;
2. The employer advances the money needed for the worker to pay for transportation costs; or
3. The employer reimburses the worker for actual incurred costs in the first workweek (at least up to FLSA minimum wage if FLSA applies).

Transportation items to note

- The employer is responsible for reimbursing transportation costs "from the place the worker has come" which has historically been interpreted to mean "from the place of recruitment," which would be "home" if home is where the worker was recruited. Therefore, the exact location from which transportation and subsistence entitlement begins can vary from individual to individual and must be established with the evidence, typically through interviews of workers.

- The interviews of the workers must address where the worker was recruited from in order to establish this for computation purposes.

- The reimbursement requirement includes both inbound transportation costs and subsistence, which includes the reasonable cost of meals and lodging (ifincurred on behalf of the employer).

- The amount of the transportation payment can be no less than the most economical or reasonable common carrier transportation charges for the distances involved.

- The 2016 minimum subsistence reimbursement for food is set at $12.09 per day (see separate discussion of daily meal reimbursement rate under the *Failed to provide meals or kitchen facilities* section).

- Daily subsistence includes, but is not limited to, the reasonable cost of food and lodging incurred during the worker's inbound trip from the point of recruitment to the employer's worksite, notwithstanding any unauthorized detours, and during the worker's outbound trip from the employer's worksite to the worker's home or subsequent employment, notwithstanding any unauthorized detours, whichever is applicable.

- The 50% point for reimbursement purposes is the midpoint between the first day of work after the worker arrives at the place of employment (on or after the start date of the job order - whichever is later), and the last day of the contract (including all approved extensions).

- When it is the prevailing practice ofnon-H-2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H-2A workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in c01Tesponding employment who are traveling to the employer's worksite.
- See discussion in the *Unlawful cost-shifting* section addressing employer (or association) required trips for medical exams or similar requirements prior to the final trip to cross the border. Such required trips are employer expenses.

- The FLSA applies independently of the H-2A requirements.

Interaction with the FLSA

Inbound transportation is understood to primarily benefit the H-2A employer; therefore, the costs must be borne by the employer. However, if properly disclosed in the work contract, the employee's pay may be reduced down to the FLSA minimum wage because H-2A does not require reimbursement until a worker completes 50 percent of the contract period. (FLSA Regulations at 29 CFR 531.35-.36) At the completion of 50 percent of the contract period, any recouped cost of inbound transportation and subsistence must be reimbursed to the worker to meet the H-2A requirement.

For example:
H-2A Required Wage Rate: $10/hr
FLSA MW: $7.25/hr
Inbound Transportation Costs: $500
Length of Contract: 30 weeks
HW in First Workweek: 50

The amount that may be deducted in the first week and in subsequent weeks until the employer has recouped the entire transpo1iation cost ($500 in this example) but no longer than the 50% point of the contract is:

- H-2A wage - FLSA MW* HW = amount ofdeduction
- Or $10.00 - $7.25 = $2.75 * 50 = $137.50
- If the employee completes 15 weeks of work, the $500 must be reimbursed to the employee.

Under the FLSA, there is no legal difference between deducting a cost from a worker's wages and directly shifting a cost to the worker. An employer may not deduct from an employee's pay for facilities that are primarily for the benefit of the employer if it brings pay below the FLSA mm1mum wage.

Examples

(1) A group of U.S. workers in Miami, FL, contact by phone an H-2A employer in New York State. The workers are hired by the employer but not advanced transp01iation and subsistence. When the workers complete 50 percent of the contract period, the employer must reimburse the workers for transportation and subsistence for the trip from Miami.

(2) Three U.S. workers who are residents of Lubbock, Texas, travel on their own to Boise, Idaho. In Boise, they visit the job service office and are referred to an H-2A employer in Hamer, Idaho. In such a scenario, the employer is not obligated to advance transp01iation and subsistence. When the workers complete 50 percent of the contract period, they must be reimbursed for the transportation and subsistence costs from Boise (the place of recruitment) to Hamer.

(3) A worker whose permanent residence is in New Zealand receives an offer from an H-2A celiified employer to work in the U.S. on a certain date, but goes to England to work before traveling on to the U.S. to work on the H-2A contract. When the worker has completed 50% of the contract period in the U.S., the employer then owes the transportation and subsistence costs from New Zealand (the place of recruitment and offer) to the United States. The employer is not responsible for paying for the transpo1iation from New Zealand to England and from England to the U.S.

(4) 25 workers recruited to work in the U.S. rep01i to the U.S. Embassy in Monterrey, Mexico for their H-2A visa appointments, but due to a scheduling error by the employer's representative the workers are instructed by embassy staff to return the next morning at 10:00 a.m. Because of this delay the workers are taken to a nearby motel, where they each have to pay the equivalent of $10 for one night at the motel. The next day, the workers get their visas and depart in the afternoon for the place of employment in the U.S. At the 65% point of the contract, a WHI is investigating the employer's operation, and discovers that although the employer reimbursed the H-2A workers for inbound transportation and meals, the employer did not reimburse the workers for the night at the motel in Monterrey, Mexico. The WHI informs the employer that the workers must be reimbursed for this expense as it was a cost directly related to obtaining the visa and was therefore a cost to be borne by the employer.

Visa Travel

Where a worker must travel to obtain a visa so that the worker may enter the U.S. to come to work for the employer, the employer must pay for the transportation and daily subsistence costs of that part of the travel as well. The Department has interpreted the regulation to require the employer to assume responsibility for the reasonable costs associated with the worker's travel, including transpo1iation, food, and, in those cases where it is necessary, lodging.

If not provided by the employer, the amount an employer must pay for transp01iation and, where required, lodging must be no less than (and is not required to be more than) the most economical and reasonable costs. Moreover, the employer is responsible for those costs necessary for the worker to travel to the worksite if the worker completes 50 percent of the work contract period, but is not responsible for unauthorized detours or unnecessary costs, and if the worker completes the contract, return transpo1iation and subsistence costs. For example:

- The employer is not responsible for the cost of a worker's lodging when the worker chooses to arrive earlier than required for a visa appointment at the U.S. Consulate. If the appointment is so early in the morning, that the worker could not reasonably be expected to travel to the consulate that same day, the employer will be liable for the cost of lodging the night before the appointment.
- The employer is responsible for the cost of a worker's lodging where, after the worker attends a required appointment at the U.S. Consulate, the worker must remain nearby overnight while waiting for the U.S. Consulate to issue the visa.
- The employer is responsible for the cost of a worker's lodging from the time the worker leaves the U.S. Consulate to the time he arrives at the worksite. The employer is also responsible for the worker's return transportation and subsistence costs upon the worker completing the work contract.

Outbound Transportation - Violation item 18

Transportation from the last place of employment to the place from which the H-2A worker has come is considered to be the place of recruitment. The employer must pay for the worker's outbound transportation and subsistence costs when the worker completes the work contract period and has no immediately subsequent H-2A employment.

Subsequent employment

When a worker contracts for subsequent employment, the responsibility for paying or providing transportation and subsistence can be shared between the two employers according to the following scenarios:

(1) *H-2A Employer to H-2A Employer:* A subsequent H-2A employer ("H-2A Employer 2") has the option to pay or provide the transportation and subsistence from the sending employer's ("H-2A employer 1") worksite to the receiving employer's worksite ("H-2A employer 2") - essentially the outbound from H-2A employer 1 and the inbound for H-2A employer 2. IfH-2A employer 2 opts not to pay or provide such transportation, H-2A employer 1 must pay these travel costs. In that case, H-2A employer 1 has met its transportation obligations and will not be responsible for the worker's subsequent travel costs back to the place from which the worker came to work for H-2A employer 1; that responsibility now lies with H-2A employer 2.

(2) *H-2A Employer to Non-H-2A Employer, With an Agreement:* With regard to non-H-2A workers only, if the subsequent employer is not H-2A celiified and agrees to pay or provide the travel costs for the non-H-2A workers from worksite to worksite, the initial (sending) H-2A employer is no longer responsible for any of the travel costs. The travel costs from the intervening (receiving) employer's worksite back to the place from which the worker came to work for the initial employer is then the non-H-2A worker's responsibility.

(3) *H-2A Employer to Non-H-2A Employer, Without an Agreement:* With regard to non-H-2A workers only, if the intervening employer is not H-2A celtified and does not agree to pay or provide the travel costs from worksite to worksite, the initial (sending) H-2A employer is responsible for the travel costs to the subsequent employer's worksite. The travel costs from the subsequent (receiving) employer's worksite back

to the place from which the worker came to work for the initial employer is then the non-H-2A worker's responsibility.

(4) *H-2A Employee Changes Out ofH-2A Status:* After the end of the contract period if the H-2A worker contracts for subsequent employment with another employer, and legally changes out ofH-2A status (to another visa status, for example), all H-2A entitlements cease, including the reimbursement for travel costs to the place from which the worker came to work for the initial employer. If, however, the change of status takes place with the same employer, then that employer remains responsible for the travel costs back to the place from which the worker came to work for the employer.

Important items to note

- The employer is responsible for reimbursing transportation costs "from the place the worker has come" which has historically been interpreted to mean "from the place of recruitment," which would be "home" if home is where the worker was recruited. Therefore, the exact location from which transportation and subsistence entitlement begins can vary from individual to individual and must be established with the evidence, typically through interviews of workers.

- The outbound transportation requirement includes both return transportation costs and subsistence, which includes the reasonable cost of meals and lodging (if incurred on behalf of the employer).

- The amount of the transportation payment can be no less than the most economical or reasonable common carrier transportation charges for the distances involved.

- The 2016 minimum subsistence reimbursement is set at $12.09 per day.

- We have encountered employers extending the H-2A workers onto subsequent job orders, at times without the workers knowledge or agreement, then declining to pay for the workers outbound transpotiation for the second job order saying that the hasn't completed the 2nd job order. If this occurs, determine what was disclosed to the worker at the outset and then what may have been disclosed (or not) subsequently.

Examples (continued of the inbound examples)

(1) When the workers from Miami complete the contract in New York State, the employer must provide or pay for their transportation and daily subsistence for their return to Miami.

(2) When the three workers complete the full contract period in Hamer, Idaho, the employer is obligated to pay only their transportation and subsistence to Boise, Idaho (the place from which the workers came to work for the employer), regardless of where the workers are going after that. For example, if the workers have contracted with an H-2A employer in California and that employer has not advanced or paid for the workers transportation to California, the employer in Hamer, Idaho would still

only be obligated for the transportation and subsistence to Boise.

(3) When the New Zealand worker completes the full contract period in the U.S., the employer owes the worker transportation and subsistence costs from the U.S. back to New Zealand (the place of recruitment).

Daily Transportation -Violation item 16

The employer must provide transportation between housing provided or secured by the employer and the employer's worksite at no cost to the worker.

This requirement is not applicable to workers who are local residents and return home at the end of the work day.

Important items to note

- Any cost that is passed on to the workers who are eligible for transportation to and from the worksite is to be treated as an unlawful deduction even if the deduction did not take the worker's wages below the H-2A required wage. Reimbursement of the monies to the workers should be sought.

- Sometimes one (or more) of an employer's employees will charge fellow workers for transporting them back and forth between the employer-provided housing and the worksite

Transportation Safety-Violation item 17

All employer-provided transportation must comply with all applicable Federal, State, or local laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance required under (MSPA statute and regulations). If workers' compensation, in lieu of vehicle insurance, is used to cover transportation, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation and the employer must have property damage insurance.
This means that all transportation - not only between the worksite and the housing - provided to the employees, i.e., to a store for food, to the post office, inbound and outbound transportation, etc. must be properly covered by insurance.

Additional safety standards - potential applicability

Vehicle use must also comply with other applicable Federal and State safety standards.

- State Law: Seat belts, CDL licensing requirements, speed limits
- FMCSRs (DOT Federal Motor Carrier Safety Regulations - similar vehicle criteria used now in 213(b)(l))
    > To be used in the occurrence of an accident when 29 CFR 500.104/500.105 are not applicable but FMCSR applies (as noted in the police report)

Prima facie evidence that safety standards have been met will be shown by the presence of a

current State vehicle inspection sticker. However, such a sticker does not relieve the H-2A employer from the responsibility of maintaining the vehicle.

Insurance requirements

There are a variety of insurance options that meet H-2A requirements. Regardless of who may be responsible, the Investigator must determine which policies, bonds, workers' compensation coverage, etc. are applicable to the individual worker in the transportation situation. Under H-2A, if workers' compensation is used to cover transportation in lieu of vehicle insurance, the employer must either ensure that the workers' compensation insurance covers ALL travel, or that the vehicle insurance exists to provide coverage for travel NOT covered by workers' compensation and they must have property damage insurance.

Option 1

- Vehicle Liability Insurance
- $100,000/seat
- $5 million maximum for any one vehicle

Option 2

Workers' Compensation policies are only effective for the employer who carries the policy. For instance, if a grower carries the policy for an H2ALC, then that policy is not in effect when the H2 ALC goes to work for another AGER.

Workers' Compensation only provides protection for people; the $50,000 property damage insurance provides protection for their property.

The liability insurance / liability bond is required for those transportation circumstances that are not covered by the Workers' Compensation insurance. For example, passengers who are not employees; and transportation trips to the Laundromat or grocery store; or home to work transportation. Be sure to check with the insurance carrier to determine the limits and applicability of coverage for that State's Workers' Compensation policies.

Option 3

This provides insurance for up to $500,000 for damages to persons or property for vehicles owned or operated by the employer and for any vehicle of which the owner causes the operation.

Non-discernible harm violations

Violations that are purely technical in nature *(i.e.,* non-discernible harm) are to be documented and explained to the employer or employer's designated representative. In addition, an agreement to come into compliance with the requirements is to be sought from the responsible party.

Discernible harm violations

Such violations include: a) those that pose a serious potential (or actual) impact to safety of

workers exposed to the condition; and b) those that are particularly egregious and either pose or posed an immediate threat to the safety of workers exposed to the hazard. Note: the impact of substantive violations may also be amplified by non-compliance with other requirements.

3/4 guarantee -Violation item 19

The¾ guarantee assures that the worker will earn at least 75 percent of the wages being offered for employment. The ¾ guarantee also in part protects the period for which employment is being offered. This obligation applies to both H-2A and corresponding workers.

The regulations use language found in the 1987 Rule which stated the employer was obligated to "guarantee to offer the worker employment for at least three-fourths of the workdays." As a result, the guarantee will not have been met if the employer merely offered some work to employees on *three-fourths of the days* in the contract if the workday did not consist of *the full number of work hours* disclosed in the job order [2010 Preamble p.6912]. The regulations requires a guarantee to offer the worker employment for a total number of hours equal to at least three fourths of the work days of the total period and requires that hours offered on a workday only count if a full work day was offered.

The¾ guarantee does not apply to H-2A workers displaced due to referrals of U.S. workers after the employer's date of need; however, workers must be certified "displaced" by the ETA certifying officer. Displacement is only applicable during the 50 percent rule period (the period after the date of need but within the first 50 percent of the contract period). The employer is still considered liable for the displaced H-2A worker's return transportation.

The guarantee period begins on the first workday after the worker arrives at the place of employment (or the contractual first date of need, whichever is later). It ends on the date the contract expires (including contract extensions).

Note: The wording "or the advertised contractual first date of need... " addresses the issue of an employer requiring workers to show up before the actual date of need.
The contract may only be shortened or extended with the written approval of the ETA celiifying official.

Because the guarantee covers the period from the first workday to the date the contract expires, it may normally only be tested at or after the conclusion of the contract period. This means in most cases, the guarantee that will need to be checked during an investigation will be for the contract covering the previous year's work.

A "work day" does not include the worker's Sabbath or federal holidays. Each workday must consist of the full number of hours of work time as specified in the work contract.

Hours actually worked and paid at the H-2A required rate count toward the guarantee as well as "hours offered." Bona fide "hours offered" are hours of work offered within the work contract daily hours to the worker but which the worker did not work; these can count toward the ¾ guarantee.

> Example: The contract states the workday is 8 hours and the employer offers 8 hours but the employee works only 6 hours; the 2 hours not worked, but offered, count towards the ¾ guarantee.

Example: The contract states the workday is 8 hours, the employer offers 12 hours, and the employee voluntarily works the additional 4 hours; all 12 hours count towards the¾ guarantee.

Any hours beyond what is disclosed in the contract cannot be counted towards the ¾ guarantee as "offered" if the employee declines to work the additional hours; the employee cannot be required to work beyond the hours disclosed in the contract, nor on federal holidays nor on the worker's Sabbath.

Example: The contract states the workday is 8 hours, the employer offersl2 hours of work, and the employee declines to work the additional 4 hours; only the 8 hours disclosed in the contract may be counted toward the ¾ guarantee

Regarding work out of scope of the contract (i.e., work in a different state or performing a different job for the H-2A certified employer), hours worked at a rate equal to or higher than the H-2A required rate count toward the ¾ guarantee. This out of scope work cannot be paid at a rate lower than the H-2A required wage. If work is performed by the H-2A worker for an employer *other than the one certified for the contract,* that work does not count toward the¾ guarantee regardless of the type of work performed or the rate at which it was paid.

- Employers must maintain accurate records of hours offered

- Failure to meet this recordkeeping provision would require an employer to supplement workers' pay to meet the¾ guarantee

The record of hours offered must be kept on an ongoing basis and may not be filled out retroactively.

The calculation to determine whether the employer has complied with the ¾-guarantee cannot, ordinarily, be done until the contract is completed. This means that, generally, a WHI will be examining records from the prior season to determine whether the employer complied with the ¾-guarantee requirement for the prior season's contract. However, if the investigation is being conducted near the end of the contract, it may be possible to discern whether the employer complied with the requirement on the current contract.

If an employer offers a workday for less hours than required *(e.g.,* the contract says a workday is eight hours and employer only offers four hours) the workday does not count towards the¾ guarantee obligation.

The ¾-guarantee period begins on the first workday after the worker arrives at the place of employment (or the contractual first date of need, whichever is later). It ends on the date the contract expires (including contract extensions).

Note: The phrase *"or the advertised contractual first date of need ..."* addresses the circumstance of an employer requiring workers to show up before the actual date of need.

The ¾-guarantee either does not apply or applies differently under the following circumstances:

(a) *Abandonment/Termination for Cause.*

(b) *Contract Impossibility/Act of God.*

(c) *Displaced H-2A Worker.* A U.S. worker can displace an H-2A worker in the job position until 50% of the contract period is completed. If this occurs, the displaced H-2A worker is no longer entitled to the ¾-guarantee. However, such workers must be celiified "displaced" by the ETA certifying officer. The DO should seek this information through ETA's iCert Portal, and if it is not available there, contact the Chicago National Processing Center through the Regional Agriculture Coordinator. The employer is still liable for the displaced H-2A worker's outbound transportation.

The following is an example of a ¾-guarantee computation:

Calculate how many days there are in the period of employment based on the contract dates (60 days from 6/1 to 8/1). Subtract from the total number of days the worker's Sabbath and any Federal holiday during the contract period (9 Sabbaths and I Holiday). The difference equals the maximum number of days offered (50 days). Multiply the maximum number of days offered (50 days) by the "normal hours per day" listed on the job order (8 hours) to obtain the maximum hours offered (400 hours). Multiply the maximum hours offered (400 hours) by¾ and equals the maximum number of hours guaranteed (300 hours).

60 days in the contract period - 1O days (Sabbath and holidays in the contract period) = 50 days (the maximum days offered) x 8 (the normal hours per day listed in the job order)= 400 hours offered x .75 = 300 hours guaranteed in the contract period.

Hours worked voluntarily in excess of the normal hours per day or hours worked on a worker's Sabbath or a Federal holiday may be counted by the employer towards meeting the guarantee. For example, if the job order lists eight hours per day, and the employer offers 10, and the worker works and is paid for 10 hours at the H-2A required wage, then 10 hours are counted toward the ¾-guarantee.

However, if an H-2A worker or corresponding worker worked fewer than the 300 hours in the example above, the following factors must be considered:

(a) *Failure to work:* If the worker fails to work any of the bona fide hours offered, up to the maximum number of daily hours listed in the job order, those hours are credited to the guarantee (e.g., 300 hours offered, 260 hours worked, but 40 hours were not worked by the worker, so this does not result in a violation).

(b) *Individual worker's start date:* The start date for the ¾-guarantee calculation is the first work day after the worker arrives at the place of employment (on or after the approved start date of the job order). For example, the contract start date is June l; however the worker arrives at the workplace on June 5. The ¾-guarantee calculation is based on the worker's arrival date of June 5.

Once the hours required by the ¾-guarantee are determined, multiply those hours by the proper rate of pay. In the case of a piece rate, regardless of total compensation, the ¾

guarantee hours need to be compensated at either the average hourly piece rate earnings or the required hourly wage rate, whichever is higher.

(c) Contract termination date:

Some work contracts contain language that provides, at the employer's prerogative, for an earlier termination of a contract period than specified in the ETA-approved job offer. As this practice is contrary to the regulations, WHD does not recognize this notation in the worker contracts when investigating whether a worker received the appropriate ¾-guarantee. This earlier termination date is not permissible and if it is found. The ¾-guarantee is computed according to the dates found in the job order, except as provided above where the worker arrives after the start date - or when a contract impossibility is certified by ETA.

Regarding work out of the scope of the contract for the H-2A certified employer *(i.e.,* work in a different state or performing a different job), hours worked at a rate equal to or higher than the H-2A required rate in the contract count toward the ¾-guarantee. A certified employer cannot pay a rate lower than the H-2A required wage for an H-2A worker for work outside of the scope of the contract. If work is performed by the H-2A worker for an employer other than the one certified for the contract, that work does not count toward the ¾-guarantee regardless of the type of work performed or the rate at which it was paid.

Worker Abandonment

A worker who fails to report for work at the regularly scheduled time for five consecutive working days, without the employer's prior consent, is considered to have abandoned the job. This includes a worker who fails to report for employment for the first five consecutive working days of the contract period. When a worker does not appear on the first day of the contract period, ETA suggests that the employer contact the worker and, in the case of a U.S. worker, the State Workforce Agency (SWA) to resolve any confusion about the start date and confirm whether the worker will report to work or is no longer available for the job opportunity.

The employer must provide ETA with written notification when any worker voluntarily abandons or is terminated for cause from the job before the end of the certified work period. The written notification must be done within two (2) working days of the abandonment or termination from the job. If the worker is an H-2A worker, the employer must also notify USCIS.

After submitting the written notification of abandonment, if the workers who abandoned the job were in H-2A visa status, the employer may submit a request to USCIS to replace the workers. If, however, the workers who abandoned the job were U.S. workers and the employer's labor certification had been denied or reduced by the number of U.S. workers hired, the employer may submit a request for a new temporary labor certification determination to the ETA's Chicago National Processing Center (NPC).

Contract Impossibility

The employer, upon receiving approval from the Chicago National Processing Center Certifying

Officer, may terminate its work contract before the end date if the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible. The regulations refer to this as the "contract impossibility" provision. Since the contract impossibility provision obligates the employer to celiain actions and affects the wages and working conditions of the workers it employs, the employer must disclose this provision in the job order that is submitted to the SWA as well as work contracts to prospective applicants.

To help employers appropriately disclose the contract impossibility provision, the following suggested language can be included in the job order as well as work contracts with its employees:

> "Contract Impossibility: The work contract may be terminated before the end date of work specified in the work contract if the services of the workers are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes fulfillment of the contract impossible, as determined by the U.S. Department of Labor. In the event that the work contract is terminated, the employer assures that the three-fourths guarantee will be fulfilled for the time that has elapsed from the start date of work specified in the work contract to the date of termination. The employer also assures that it will make efforts to transfer the worker to other comparable employment acceptable to the worker and, where applicable, consistent with existing immigration laws.
>
> In situations where a transfer is not affected, the employer will return the workers at the employer's expense to the place from which the worker, disregarding intervening employment, came to work for the employer or transp01t the worker to his/her next certified H-2A employer, whichever the worker prefers. The employer will also reimburse the worker the full amount of any deductions made by the employer from the worker's pay for transportation and subsistence expenses to the place of employment, and pay the worker for any transportation and subsistence expenses incurred by the worker to that employer's place of employment.
>
> The amounts the employer will pay for subsistence expenses shall be a minimum of $____ per day and a maximum of$____ per day for workers with documentation of actual expenses. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The requirement will be nullified if the worker has contracted with a subsequent employer who has agreed to provide or pay for the worker's transportation and subsistence expenses from the present employer's worksite to the subsequent employer's worksite."

For the minimum and maximum amounts for subsistence expenses, the employer can find the current amounts to be included in the job order on the OFLC website at http://www.foreignlaborcelt.doleta.gov/meal travel subsistence.cfm

Requesting relief

The employer may e-mail its request for relief under the "Contract Impossibility" provision directly to the Chicago NPC using the address: TLC.Chicago@dol.gov with the words "H-2A Contract Impossibility Request" contained in the subject line of the e-mail.

Employers without internet access may also fax a request to (312) 886-1688 (ATTN: H-2A Contract Impossibility Request) or by U.S. mail to the following address:

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification,
Chicago National Processing Center
11 West Quincy Court
Chicago, IL 60604-2105
ATTN: H-2A Contract Impossibility Request

Important Reminders:

- An employer continues to be responsible for its obligations under the work contract until receiving a favorable "contract impossibility" determination from the CO.
- In the event that the CO makes a finding of contract impossibility, the employer should document its efforts to comply with each aspect of the contract impossibility provision. Specifically, the employer should document that it:
    - Fulfilled the three-fourths guarantee for the time that has elapsed from the start date of work specified in the work contract to the date of termination;
    - Made efforts to transfer the worker to other comparable employment acceptable to the worker, consistent with existing immigration laws; and
    - In situations where a transfer did not occur:
        - Returned the workers at the employer's expense to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to his/her next certified H-2A employer, whichever the worker prefers. Note: This requirement does not apply if the worker has contracted with a subsequent employer who has agreed to provide or pay for the worker's transportation and subsistence expenses from the present employer's worksite to the subsequent employer's worksite;
        - Reimbursed the worker the full amount of any deductions made by the employer from the worker's pay for transportation and subsistence expenses to the place of employment, and
        - Paid the worker for any transportation and subsistence expenses, including any lodging expenses incurred on the employer's behalf, incurred by the worker to that employer's place of employment.

Failed to pay the required rate of pay - Violation item 27

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.

Background

The AEWR is calculated for each State within a region as the annual average combined hourly wage for field and livestock workers derived from the United States Department of Agriculture's (USDA) National Agriculture Statistic Service (NASS) quarterly Farm Labor Survey (FLS). The AEWR is computed to approximate the equilibrium wage that would result absent an influx of temporary foreign workers. The purpose of the AEWR is to avoid adverse effects on currently employed workers by preventing wages from stagnating at the local prevailing wage rate. ETA determines and publishes the annual AEWR for each state.

The Prevailing Wage is the hourly or per piece rate (e.g., per load, bin, pallet, bag, bushel) determined by the SWA to be the prevailing rate typically paid to an agricultural worker in the local, regional, or statewide area. If the prevailing wage changes during the work contract, and ETA makes proper notification, the employer must pay the higher wage.

In most cases the published AEWR will be the correct baseline wage. However, sometimes the prevailing wage for the crop and location or the CBA wage rate or the Federal or State minimum wage rates will be higher than the AEWR, in which case the employer must pay the higher rate. If an employer wishes to pay a piece-rate, it must guarantee that workers will be paid a minimum equal to the appropriate hourly wage.

The employer must offer, advertise, recruit at, and pay the highest of the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate (if an employer is subject to a collective bargaining agreement (CBA)), or the Federal or State minimum wage rate, in effect at the time work is performed, for evely hour or portion of an hour worked during a pay period, except where a special procedure is approved for an occupation or specific class of agricultural employment. The employer must also list the highest of these applicable rates on the job order. If the employer is subject to a CBA, then it must attach a copy of the CBA to its job order.

The wage rate listed on the work contract must be the same wage rate as the rate listed on the job order and approved by the SWA. If the employer intends to sign work contracts before the SWA accepts the job order for intrastate clearance and the SWA subsequently directs the employer to modify the wage rate listed on the job order, the employer will be required to also modify its work contracts to reflect the approved wage rate.

Important items to note

- The required minimum rate of pay enforced by WHD is typically listed on the job order (ETA Form 790) certified by ETA, or on the written work contract.

- An employer may advertise or disclose a piece rate that is not a prevailing piece rate; however, if there is a prevailing piece rate for such work, the advertised or disclosed piece rate cannot be less than the prevailing piece rate. The piece rate earnings must not yield less than the required minimum hourly rate of pay listed on the job order or contract.

- If the AEWR is increased by ETA during the period of employment, an H-2A employer becomes bound by the new rate from the effective date of the change.

- A job order or work contract may contain more than one applicable wage rate. For example, a prevailing rate set forth in the job order may apply to the picking or harvesting of a crop, but a separate rate, often a "catch-all" rate, may apply to other miscellaneous activities which the worker may be required to perform. The worker must be paid at least the AEWR or the applicable Federal or state minimum, whichever is higher, for any miscellaneous duties not encompassed by the prevailing rate, whether or not a separate rate is expressly specified in the job order.

    (1) A higher than required rate paid for one activity may not offset the wages that are required for another activity that are paid at a rate lower than required. For example, an employee is hired to harvest a crop and the applicable prevailing rate is $5.00 per row. The employee is also a mechanic, and from time to time works on the employer's buses. The employee is paid $12.00 per hour for the mechanic work. The required "catch-all" rate is the AEWR, which is $10.00 per hour. In one week, the employee works 40 hours harvesting the crop, for which he is paid $320 or the equivalent of $8.00 per hour. He also works another 10 hours in the same week as a mechanic. The additional $2.00 per hour paid above the "catch-all" rate for the mechanic work may not be offset against the employer's obligation to pay at least $10.00 per hour for the time spent harvesting the crop. Therefore, the employer must pay an additional $80 to the worker to bring the worker up to the AEWR.

    Note that Klinghoffer as applied to FLSA in non-overtime workweeks does not apply to H-2A.

    (2) Where there is a work contract between the employer and worker, specifying rate(s) higher than the required wage rates, the higher rate(s) set by the contract must be paid. Failure to do so will be cited as a violation.

(b) Some contracts require that a worker be paid benefits that exceed those required by the job order (such as bonuses, vacation pay, etc.). Such benefits cannot be used to offset the required wage rate specified in the job order.

(c) The following is WHD's position with respect to certain specific issues:

    (1) Which rate applies when the H-2A or corresponding worker is employed in an area that is not listed on the application?

    20 CFR 655.122(1) provides that H-2A workers must be paid at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or Federal or State minimum wage rate in effect at the time work is performed, whichever is highest, for every hour or portion thereof worked during a pay period.

    (2) Do the H-2A wage rates (and other protections) apply to H-2A workers when

an H-2A employer employs such workers in non-agricultural jobs?

As long as the job order/contract is still in effect, WHD can enforce the H-2A protections for those H-2A workers regardless of the location of the work and the type of work the worker is ordered to perform by the employer as a contractual obligation. H-2A corresponding employment does not extend to non-H-2A workers performing the same non-agricultural work alongside such H-2A workers.

(3) Can MSPA apply to H-2A workers?

Although MSPA specifically excludes H-2A workers from coverage, MSPA will apply to these workers if the certified H-2A employer continues to employ the foreign workers in agriculture after the expiration of the labor certification. In this situation, the H-2A required rate would be treated as the rate due under MSPA to the H-2A workers-unless the employer disclosed a new rate to the H-2A workers (in which case this disclosure would indicate willfulness on the part of the employer). MSPA can also apply to the foreign workers if they stay past the end of the H-2A ce1tification period and continue to work in agriculture.

(4) Are domestic workers who do not meet the experience requirements in the job order entitled to the H-2A wage rate and other protections?

An employer who applies for H-2A workers may include a prior experience requirement in the job offer, but the requirement needs to be approved by ETA during the application process. In order to meet the requirement for positive recruitment of U.S. workers, the employer would have to adve1tise for local workers and specify that the workers must have prior experience. If the U.S. worker applicants do not meet the experience requirement, the employer is not obligated to hire the workers. However, if the employer hires or employs a worker in corresponding employment who does not possess the requisite experience, the employer is considered to have waived the experience requirement for all subsequent applicants. The employer may not arbitrarily apply the requirement to some applicants and not to others - it must be consistently applied. The same principal applies when a productivity standard is contained in the job order/work contract.

(5) May an employer require productivity standards if the work is paid on a piece-rate basis?

Yes. If the employer pays by the piece rate and specifies the productivity standard in the job offer. Any productivity standard required by an employer may be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for an H-2 temporary labor certification after 1977, such standards must be no more than those nom1ally required by other employers for the activity in the area of intended employment at the time the employer filed its first application.

(6) The new annual Adverse Effect Wage Rate (AEWR) has been published and

the AEWR applicable to the job opportunity has gone down. What is the employer required to pay?

The employer is required under the regulations to offer, advertise, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the agreed upon collective bargaining wage, or the Federal or state minimum wage, in effect at the time the work is performed. Where the new AEWR is still the highest rate, an employer may pay the new, lower AEWR. If, however, the new AEWR is lower than the prevailing hourly wage or piece rate, the agreed upon collective bargaining wage, or the Federal or State minimum wage in effect, the highest of the those wage rates will become the employer's new minimum wage rate requirement.

How does the Department notify employers when the prevailing wage rate changes after certification?

When the prevailing wage rate for a specific crop in a specific State changes after a certification has been granted the Office of Foreign Labor Cel iification posts the new prevailing wage rate, including the effective date, on its Web site in the Agricultural On-Line Wage Library (AOWL), available at http://www.foreignlaborcert.doleta.gov/aowl.cfm. Also, the Chicago National Processing Center (NPC) sends a letter to all potentially affected employers notifying them of the change.

Because the Office of Foreign Labor Certification receives new wage findings from States for different crops/occupations on a rolling basis, employers are encouraged to periodically check the AOWL to ensure that they are paying the appropriate required wage throughout the certified period of employment.

Unlawful deductions - Violation item 28

Deductions under H-2A can fall into three categories:

- **Prohibited:** no deduction for these items is permitted
- **Allowable:** Disclosed and reasonable deductions
- **Inbound Transportation** (discussed separately)

Prohibited Deductions

The following deductions are specifically prohibited:

- Employer's attorney fees, application fees, and recruitment costs;
- Tools, supplies, and equipment required to perform the assigned duties;
- Housing; and
- Daily transportation to and from the fields and the employer-provided housing.

The regulations specifically prohibit employers or agents from seeking or receiving payment of any kind for any activity relating to obtaining the H-2A labor certification including employer's attorney fees, application fees, and recruitment costs.

Allowable Deductions

The employer may only make deductions from the worker's wages that are reasonable, specified in the job offer, or required by law (other than prohibited items discussed above and inbound transportation costs discussed *below) Undisclosed deductions are impermissible.*
Deductions for expenses that are for the primary benefit of the employer may not bring an employee' s wages below the *H-2A required wage rate*. A deduction is not reasonable if it includes a profit to the employer.

Use the same FLSA principles in for determining if deductions are:

- reasonable,
- paid free and clear, and
- allowed as assignments to third parties.

However, the deductions are tested against the H-2A rate not against the FLSA minimum wage.

Voluntary Assignment of Wages

An employer may make reasonable deductions from wages, such as for insurance, where the employee has voluntarily assigned a sum to another party (such as a creditor, or other third party).

An employee's voluntary assignment of wages may not include a profit to the employer or any affiliated person, and may not be primarily for the benefit or convenience of the employer.

Tax Withholding

WHD does not interpret IRS laws but can show others where to find IRS guidance.
Questions regarding the taxation and Federal withholding from H-2A workers fall under the

jurisdiction of the Internal Revenue Service (IRS). IRS guidance states that foreign agricultural workers temporarily admitted into the United States on H-2A visas are exempt from Federal Unemployment Tax, U.S. Social Security and Medicare taxes on compensation paid to them for services performed in connection with the H-2A visa. Additionally, IRS guidance states that compensation paid to H-2A workers for services performed in connection with the H-2A visa is not considered to be "wages" for purposes of Federal income tax withholding, and is therefore not subject to mandatory withholding.

The IRS requires an employer to begin backup withholding if the H-2A worker does not have a Social Security Number or Individual Taxpayer Identification Number and the aggregate annual payments made to the worker are $600 or more. For more information on Federal withholdings for H-2A workers, see the IRS website at http://www.irs.gov/businesses/small/international/article/0,,id=96422,00.html. Employers should consult the IRS website to ensure that the IRS has not updated their guidance in regards to this issue.

An H-2A worker may request voluntary Federal income tax withholding. Such a request must be evidenced by a signed form W-4 provided by the worker to the employer. Note: Only Federal income tax is to be withheld. Withholding for Social Security or Medicare is not permitted, and the employer may be held responsible for reimbursement of improperly withheld amounts (see below).

Since State income tax law varies, the employer should consult with the appropriate State tax authorities to determine whether the wages of H-2A workers are subject to state income taxes.

It is important to remember that the H-2A regulations at require the H-2A employer to pay wages when due and to ensure that all wage payments to H- 2A workers are received free and clear of any improper deductions. Wages either improperly withheld or withheld based on a voluntary agreement but not remitted to the appropriate agency may be considered improper deductions.

Frequency of pay - Violation item 29

- Must state in the job offer the frequency of pay
- Must be at least twice monthly
- Must pay according to the prevailing practice in the area of intended employment, if this occurs more frequently than twice monthly
- Must pay wages when due

Unlawful cost-shifting- Violation item 41

The employer and its agents have not sought or received payment of any kind from the employee for any activity related to obtaining labor certification, including employer's attorney's fees, application fees, or recruitment costs. Payment includes monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

This does not prohibit the employer or agent from recouping certain costs fronted for the primary benefit of the employee such as government required passport fees (since a passport can be used

for personal purposes).

Costs that may be included

Application fees charged by the government cannot be passed along to the worker.

- Department of State currently charges a $26 fee through a contractor for setting up the application appointment and taking biometrics, and a $13I for the interview at the consulate. A $100 reciprocity fee was charged for workers entering from Mexico, but both governments stopped charging this fee in 2010.
- ETA charges a $100 application certification fee for an H-2A 9142 and a $10 per worker certification fee (to a maximum fee of$1,000 per application+ per worker)
- United States Citizenship and Immigration Services (USCIS) charges an I-129 Petition Fee (per petition) of $320 [with an OPTIONAL I-907 Premium Processing (per petition expedited) of $1,000].

All government required fees leading up to the application/petition approval are application fees and prohibited, and once the application/petition is approved, any subsequent fees (border crossing) are not outright prohibited but cannot take the worker below the H-2A required wage.

Our language prohibiting recruitment fees mirrors DHS's regulations (see 8 CFR 214.2(h)(5)(vii)), and based on DHS's explanation of the prohibition on recruitment fees, the following is our position:

I) that if an applicant could go to anybody for assistance in the process and that person charged a fee, that was not a prohibited fee;

2) that if the applicant went to (as matter of practical reality if there was no other means of getting on this particular petition) or had to go to the employer's (or employer's agent's) foreign recruiter and was charged a recruitment fee, this would be prohibited;

3) that if the applicant had to go to or went through the employer or the employer's agent and they charged a recruitment fee.

Note that inbound transportation costs include the actual trip the worker takes from the place of recruitment to the place of employment. Trips that the worker may take from his hometown to the place of recruitment for reasons other than departing to U.S., such as reporting for a medical exam or any other pre-employment test, will be treated as recruitment costs and must be borne by the employer.

Department of Homeland Security Regulations

Note that required assurances and obligations required under DOL regulations are both independent of and complimentary to those of other Federal agencies with responsibilities under the H-2A program *(i.e.,* DHS and Department of State). The DHS regulations prohibit the payment of job placement fees or other compensation as a condition of H-2A employment. DHS also references that the actual costs of transportation, government-mandated passport, visa, or inspection fees are not prohibited under DHS regulations to the extent that the payment of such costs and fees is not prohibited by DOL regulations.

RECORDKEEPING

Failed to record why HW < hours offered - Violation item 20
The employer must make a record of the hours offered each day by the employer to the worker (broken out by hours offered both in accordance with and over and above the ¾-guarantee). This violation applies when the employer recorded hours offered but failed to include why the hours worked were less than the hours offered. Recording hours offered benefits the employer in meeting their ¾ guarantee obligation.

Earnings record requirements - Violation item 22

As with the FLSA, the employer must permit the Wage and Hour Division to review his or her records within 72 hours following notice of the request to do so, and records must be maintained for a period of 3 years.

The H-2A employer must keep, at a minimum, the following 8 records with respect to each worker:

1. Field tally records and records showing the nature and amount of the work performed
2. Hours offered each day
3. Hours worked each day
4. Time work began and ended each day
5. Rate of pay
6. Earnings per pay period
7. Worker's home address
8. Amount of and reasons for any deductions

Failed to make required records available - 20 CFR 655.122(j)(2); Violation item 23

This violation only applies when the employer created the required records but did not make them available. If the records are maintained at a central recordkeeping office other than at the place or places of employment, the records must be made available for inspection and copying within 72 hours following notice from WHD (or the worker and worker's designated representative).

Failed to keep records for 3 years - Violation item 24

This violation applies when the employer created the required records but did not keep them for the required three years.

Pay statement requirements - Violation item 25

The employer must also furnish hours and earnings statements ("pay statements") on or before each pay day, which must be at least as often as semi-monthly unless Special Procedures apply. Special Procedures apply to certain industries such as Sheepherders and Custom Combiners, where they are often paid on a monthly basis.

The pay statement for each worker must contain all 8 requirements (if applicable) each pay period:

1. Total pay period earnings
2. Rate of pay

3. Hours offered
4. Hours actually worked
5. Itemization of all deductions
6. Piece rate units produced daily, if applicable
7. Beginning and ending dates of the payroll period
8. Employer's name, address and FEIN

HOUSING

Failed to provide housing- Violation item 4

This violation applies when the employer does not provide any housing to eligible workers (H-2A workers and U.S. workers who are unable to reasonably return to their residence within the same day). Housing must be provided through one of the following means:

- Employer-provided housing, or
- Rental and/or public accommodations.

If the employer provides housing but there is a cost incurred by the workers for the housing, this is a violation of "failed to provide housing at no cost," violation item 6.

This violation is encountered most frequently in the context of U.S. workers who are denied housing by the employer and are unable to reasonably return to their residence within the same day.

The requirement to provide housing at no cost to the workers applies throughout the certified work contract period, including any ETA-approved contract extensions.

Failed to get housing pre-occupancy inspection - Violation item 7

This violation occurs when the employer fails to obtain a pre-occupancy inspection for each housing facility that used during the certified period of employment.

Family housing required but not provided - Violation item 8

Violations of this requirement should only be asserted if there is proof that: a) workers with families requested family housing, and b) that it is the prevailing practice in the area of intended employment and the occupation to provide family housing. Ordinarily, information as to whether it is the prevailing practice in the area of intended employment and the occupation to provide family housing can be obtained from the SWA.

Failed to notify SWA of change in certified housing - Violation item 11

If the certified housing becomes unavailable for reasons outside the control of the employer, there is guidance in 20 CFR 655.122(d)(6) for employers to follow. Compliance with the requirements of this section of the regulations ensures that housing provided to workers meets the applicable standards. Note that this is not the same thing as a failure to provide housing.

Housing failed to meet safety and health requirements - Violation item 5

The imposition of sanctions for violating housing safety and health standards is intended to serve two purposes: (a) as punishment for having exposed people to hazardous conditions through an act of commission or omission; and (b) to incentivize compliance.

LEGAL REQUIREMENTS

Workers' compensation - Violation item 12

The employer must provide, at no cost to the worker, workers' compensation insurance in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide insurance that provides benefits equal to those provided under the State's workers' compensation law for comparable employment.

This is a statutory requirement. The INA requires the employer to provide satisfactory assurances of workers' compensation insurance coverage. The WHD does not enforce workers' compensation insurance; rather, it is a requirement of certification.

Proof of workers' compensation insurance coverage, including the name of the insurance carrier, the insurance policy number, and proof that coverage is in effect during the dates of need, must be provided to ETA in order to obtain the certification.

This requirement can be violated in several ways:

(1) the employer fails to provide worker's compensation coverage to all workers employed under the job order;

(2) the employer cancels compensation insurance coverage on any covered worker during the period of the worker's employment

(3) the employer transfers to the employee any portion of the cost of providing worker's compensation insurance;

(4) the employer impermissibly takes an H-2A-covered worker to perform work in a state that was not listed on the job order and for which the employer does not have coverage; or

(5) the employer transports covered workers under conditions in which worker's compensation coverage is not effective (as when the transportation occurs outside the scope of employment, such as transportation from a labor camp to a laundry facility). A workers' compensation policy is like any other insurance - it contains specific restrictions on coverage.

Sought waiver of rights from workers - Violation item 32

Any agreement by an employee purporting to waive or modify any right given to the employee under section 218 of the INA or the applicable regulations shall be void as contrary to public

policy except when: (a) a waiver or modification of rights or obligations afforded the employee favor the Department will be valid for enforcement purposes; or (b) the agreement is part of a settlement of private litigation.

Failed to cooperate with investigation - Violation item 33

As a matter of enforcement policy, a failure to cooperate shall be deemed a sanctionable offense if the failure prevents the WHI from being able to make a determination as to the investigation subject's status of compliance with an applicable statutory or regulatory requirement.

Failed to follow all applicable federal, state, and local laws and regulations - Violation item 40

The employer must comply with all applicable federal, state, and local laws and regulations, including health and safety laws.

WHD-enforced laws

If the employer is also subject to the FLSA, OSHAct, and MSPA (in the case of U.S. workers in corresponding employment), and the WHI determines that the employer failed to comply with applicable requirements of the statute or regulation in question, then there is a violation of this requirement.

Other laws

The employer may also be found in violation of this requirement when another enforcement agency (such as the State) determines that the employer has violated a requirement applicable to workers employed pursuant to the certification.

It is also a violation of this provision to hold or confiscate workers' passports, visas, or other immigration documents in violation of the William Wilberforce Trafficking Victims Protection Act of2008 (P.L. 110-147, 18 U.S.C. 1592(a)).

Failed to contractually forbid cost-shifting - Violation item 42

To make such an assurance necessitates that the employer (either directly or through its agent) took affirmative, specific action to contractually prohibit such parties from seeking or from receiving such payments. The existence of a properly executed, legally binding written contract that contains these prohibitions, will be considered prima facie evidence of compliance with the requirement to contractually forbid the passing of prohibited fees to prospective workers.

The fact that no prohibited fees were sought or received from workers does not mean the employer fulfilled this obligation. If the WHI cannot document that the employer's agent (or other persons acting on the employer's behalf to recruit H-2A worker(s)) were contractually forbidden to charge workers fees (or other monies) for obtaining there employment, then there may be a violation of this provision.

Discriminate, intimidate, threaten, etc. - Violation item 44

It is prohibited for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has done any of the following under or related to Section 218 of the INA (8 U.S.C. 1188):

- Filed a complaint;
- Instituted or caused to be instituted any proceedings;
- Testified or is about to testify;
- Consulted with an employee of a legal assistance program or an attorney on matters related to Section 218 of the INA (8 U.S.C. 1188); or
- Exercised or asserted on behalf of himself or others any right or protection afforded under Section 218 of the INA (8 U.S.C. 1188).

H-2ALC ONLY VIOLATIONS

H-2ALC provided invalid fixed-site information -Violation item 48

During the application process, the H-2ALC is required to provide the name and location of each fixed-site business to which the H-2ALC expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALC will be providing the workers to each fixed-site, and a description of the crops and activities the workers are expected to perform at such fixed-site.

H-2ALC provided invalid MSPA FLC information- Violation item

If the H-2ALC is required to register as an FLC under the MSPA - since this person is required, as a condition of seeking H-2A certification, to recruit U.S. workers who may also be workers covered by MSPA - the H-2ALC must submit a copy of the MSPA FLC certificate of registration to ETA during the H-2A application process. The WHI should verify the accuracy of the information provided to ETA/OFLC at the time ofH-2A application. OFLC allows H-2ALCs to assure they will renew their MSPA FLC certificate if it expires during the H-2A contract period.