

The Wage and Hour Division of the U. S. Department of Labor (“DOL”) will conduct investigations of agricultural employers to enforce compliance with the Fair Labor Standards Act (“FLSA”), the laws and regulations applicable to the employment of H-2A workers, and the Migrant and Seasonal Agriculture Protection Act (“MSPA”), and in some cases, the field sanitation requirements of the Occupational Health and Safety Act (“OSHA”).

Overview of Investigation Process

If an investigation is the result of a complaint received by the DOL, the investigators will generally begin the investigation process by reviewing the complaint and interviewing the individual who filed the complaint. The investigator will then come to the employer’s office or worksite to request records and documents related to compliance with the FLSA, H-2A and MSPA. The investigators will inspect the worksite, the housing facilities provided to H-2A workers and workers subject to MSPA, and interview individual workers as part of its investigation. When the investigation is complete, the investigator will meet with the employer to discuss the results of the investigation and any violations which the investigator believes have been found. In the case of minor or technical violations, the investigator may simply require that the employer correct the violation. With respect to more serious violations, the DOL may assess penalties or fines against the employer, in which case the DOL will send the employer a letter outlining the violations and indicating the amount of the fine. The employer may appeal the fine by filing a notice with the DOL within ten (10) days of the date of the letter. The employer can then negotiate with the DOL for the reduction of any fines, and may have a hearing before an administrative law judge if the amount of the fines cannot be resolved through negotiation.

In an investigation, the DOL investigators will review the employer’s compliance with the following laws which may be applicable:

H-2A. If the employer has any H-2A workers, the investigators will examine the employer’s compliance with the requirements of the H-2A program, such as requirements related to housing, transportation, recordkeeping, payroll practices, and workers’ compensation insurance.

FLSA. The Fair Labor Standards Act (“FLSA”), which generally requires the payment of the minimum wage and overtime pay to workers, and imposes basic payroll and employment recordkeeping requirements.

MSPA. The Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”) applies to any of the employer’s workers who are non-H-2A migrant or seasonal workers. MSPA establishes employment standards related to wages, housing, transportation, disclosures, and recordkeeping.

OSHA Field Sanitation Standards. The field sanitation standards under the Occupational Health and Safety Act (“OSHA”) impose certain sanitation requirements if an employer’s workers are engaged in “hand labor” field work. Most agricultural activity in Kentucky is not subject to the OSHA field sanitation standards.

The following is a more detailed outline of the DOL investigation process.

1) **Initial Contact/Meeting With The Employer.**

- a) **Initial Contact.** In most cases, the employer's first notice of an investigation will be when two or more DOL investigators appear at the employer's farm.
- i) The investigators are not required by law to provide any prior notice to the employer before appearing at the farm. The investigators have a legal right to enter an employer's property where individuals are working and make determinations regarding compliance with labor laws, and are not required to obtain a search warrant.
 - ii) When the investigators appear at an employer's farm, they should present credentials verifying their identity as investigators for the U. S. Department of Labor, Wage and Hour Division. If the investigators do not provide appropriate identification upon request, the employer should request that the individuals leave the property, and contact the sheriff or other local law enforcement if the individuals do not leave immediately.
 - iii) The investigators should provide the employer with a short overview of the scope of the investigation, discussing the records that will be requested, employee interviews, any housing inspections, and a formal meeting with the employer at the conclusion of the investigation to review the results and findings.
 - iv) At this initial meeting with the employer, the investigators will want to review records and ask the employer a number of questions. The FLSA requires production of records within 72 hours of notice. H-2A employers, under the terms of their H-2A contract, agree to produce records on demand.
 - v) At this point the employer must determine whether he or she desires to have legal representation in connection with the investigation.
 - (1) The employer has a right to be represented by counsel in all phases of the investigation process.
 - (2) If the employer wants to be represented by an attorney in the investigation, the employer should (i) state to the investigators that the employer is represented by counsel and (ii) indicate that the employer's legal counsel will contact the investigators to cooperate with the investigation, and request that the investigators leave the employer's property.
 - vi) If the employer is not going to retain counsel for the investigation, the employer may request that the investigators leave and return at a better time if the employer has a legitimate and compelling basis for doing so. However, the investigators are not required to agree to any delay in the initial meeting with the employer. Even if the investigators agree to meet with the employer at another time, they usually will want to begin to interview workers.

b) Initial Meeting. In the initial meeting with the employer, the investigators will generally inquire regarding the following subjects:

- i) Information regarding all individuals and any business entity (such as a corporation, limited liability company, etc.) which owns or is involved in the farming operation;
- ii) The Employer Identification Number (EIN) if the employer is a business entity or the social security number of the individual if the employer is an individual;
- iii) Information regarding the employer's recordkeeping practices, such as whether records are kept by hand or electronically, who maintains the records and where they are located;
- iv) Whether the employer hired the workers himself or used an agent or contractor;
- v) How many workers the employer has employed in the last three years and the workers' pay rates and the frequency of payroll;
- vi) The total dollar volume of the employer's business in the last three fiscal or calendar years (this information is requested to determine whether the employer meets the \$500,000 per year threshold for applicability of the FLSA to all employees);
- vii) In connection with H-2A compliance, the investigators will inquire whether any workers have left;
- viii) In some cases, the investigators will request copies of Form I-9s for the workers.
- ix) The investigators cannot request copies of the employer's tax records without a subpoena. If the investigators do ask for tax records, the employer should refuse to provide them without a subpoena.

2) Interviews with Workers.

a) General. As part of the investigation, the investigators will conduct interviews with the employer's workers.

- i) The employer can refuse to allow the investigators to interview workers while the employer is away, for safety and liability reasons. The employer should not allow the investigators to interview workers or inspect housing without the employer being present on the property, and the employer should accompany the investigators for housing inspections.
- ii) As the investigation proceeds, the employer should ask the investigators what issues or problems the investigators may be finding and take notes of their responses. The investigators are not required to disclose any violations or findings before the final

conference, but many investigators will provide that information to the employer if asked. It is very important that the employer make notes regarding any count or any issues raised.

- iii) The investigators cannot directly disclose what has been told to them by workers in interviews. However, the employer can often determine what complaints or issues were raised in the interviews based on the findings and the violations cited by the investigator in the final conference.
 - iv) Investigators will normally have a bilingual investigator with them to interview workers. The interviews will be conducted privately and the specific information related to the investigators by the workers is confidential.
- b) Interview Questions/Topics. Generally, the investigators will ask the following questions to workers and inquire regarding the following subjects:
- (1) Name, address, and phone number of the worker,
 - (2) Where and how the worker was contacted about the job, and who contracted them;
 - (3) What the worker was told regarding the job;
 - (4) How the worker traveled to the worksite from his country of origin;
 - (5) The date the worker arrived;
 - (6) The date the worker began work;
 - (7) What the worker was told regarding the nature of the work and pay;
 - (8) How the worker keeps track of time and how time is recorded;
 - (9) Whether time records are kept accurately by the employer;
 - (10) Whether the worker or any other workers keep their own time records (in order to determine whether the employer was maintaining accurate records);
 - (11) When/how frequently the worker is paid by the employer;
 - (12) Whether the employer missed any payday or was late with pay, and if so, whether the employer corrected any missed or late payroll;
 - (13) Whether the amount of the worker's pay is correct;
 - (14) Whether the worker was given receipts by the employer;

- (15) Whether the worker received a copy of the H-2A contract;
- (16) Whether the worker has been working and the type of work the worker has been doing for the employer;
- (17) Whether the worker has done work for any other farmers or on any other farms;
- (18) Whether any workers have left;
- (19) Whether anyone told the worker what to say in the interview or threatened or attempted to influence the worker's statements to investigators;
- (20) Where the worker lives;
- (21) Whether all the other workers also live there;
- (22) Whether the worker is required to pay any amount for housing, and if so, how much;
- (23) Whether there are any problems with the workers' housing, heat, cooling, cooking, bathing, and washing facilities;
- (24) Whether the worker has seen a poster regarding MSPA and/or H-2A;
- (25) What transportation the worker uses to travel to town and whether the worker is required to pay for it;
- (26) How the worker is transported to the fields for work;
- (27) The number of days the worker works each week and the number of hours each day.

c) Employer's Role in Interviews.

- i) While the employer is not permitted to be present or participate in the actual interviews with the workers, the employer should be on the premises while the interviews are conducted and attempt to facilitate and arrange the worker interviews.
- ii) The employer should take steps to insure that workers arrive at the interview location and should encourage the workers to speak truthfully to the investigator. Cooperation and demonstrating a willingness to be forthcoming with the investigators is very important, as the investigators' determination that the employer was cooperative and forthcoming (rather than appearing to attempt to intimidate workers or conceal

violations) will allow for more latitude in the settlement/reduction of any possible fines which may be assessed for violations.

- iii) The investigators will generally give great weight to statements from workers regarding how many hours they worked and the amount of pay they received, even the if employer's records conflict with these statements. Therefore, the employer should always be truthful and forthcoming should the employer be aware that payroll practices may not have been in compliance. If the investigator believes the employer is attempting to conceal violations, the investigator may dig deeper and increase his scrutiny of all aspects of the employer's operations.
- iv) While the oral statements made by workers in interviews do not have to be disclosed, any written interview statements will generally be available to the employer in the event of litigation or court action.

3) **Recordkeeping.**

- a) **General.** The FLSA, H-2A, and MSPA all require employers to maintain records. As part of the investigation, the investigators will request to review the employer's records relating to compliance with these laws.
- b) **Records Reviewed by Investigators.** Generally, investigators will request to review records related to the following:
 - i) *Payroll Records.* The employer must maintain records of all wages paid to workers. The employer may pay workers in cash, but the employer must have some form of a receipt to document that the worker received the cash. Generally, payroll records should show: (1) the hours offered, (2) the hours worked, (3) work week dates, (4) date the wage was paid, (5) rate of pay, (6) total gross pay, (7) any and all deductions and the reason or purpose of the deduction, (8) net pay, and (9) a signature of the worker acknowledging that they received the pay and a copy of the pay sheet. The receipt does not have to be in Spanish. It should also include the name of the employer and the employer's address.
 - ii) *H-2A Contract.* The investigators will request a copy of the employer's H-2A contract. When first contacted by the investigators, an employer should immediately notify their H-2A agent, and the best practice is to simply refer the investigators to the employer's H-2A agent to obtain a copy of the H-2A contract.
 - iii) *MSPA Disclosure Statement.* The investigator will request a copy of the MSPA Disclosure Statement if MSPA is applicable. MSPA requires an employer to disclose all working conditions to the workers in writing and in their native language, and the employer should have each worker sign the Disclosure Statement and maintain a copy of the signed Disclosure Statement in a secure place. The employer should provide a copy (but not the original) of the signed Disclosure Statement when requested.

- iv) *I-9 Forms*. The investigators may or may not request to review the employer's Form I-9s. Generally employers are required to maintain Form I-9s on all employees (both H-2A and U.S. citizens).
- v) *Volume of Business*. In connection with FLSA, the investigators will ask the employer for the total dollar volume or total business done by the farming operation.
 - (1) If the employer does not know the figures, the employer should indicate to the investigator that the employer does not know but will determine the total volume and provide the information to the investigators.
 - (2) The employer should not provide any tax records to the investigators, such as the employer's business or personal tax returns. If the investigators determine that tax records are necessary, they must obtain a subpoena in order to obtain them.
 - (3) If an investigator requests to see copies of the employer's tax records, the employer should absolutely refuse, and emphasize that the employer is not refusing to provide the dollar amount for business volume, but only objecting to direct access to the employer's tax records.
- c) Review Period. Generally, these records must be maintained for a period of three years. Investigations generally cover a two-year period from the day the investigators appear at the farm, beginning with the last completed pay period going back two calendar years. All H-2A investigations are full two-year investigations, coupled with FLSA, MSPA, and OSHA field sanitation if applicable.
- d) Record Review Process. As the investigation begins, generally one investigator will begin reviewing the employer's records, while the other investigator will interview workers.
 - i) It is important to remember that while the investigator has the right to review and inspect an employer's records, the employer is not required to make copies of records to give the investigator, nor is an employer required to allow investigators to leave the premises with any of the employer's records.
 - ii) An employer should not make copies of the employer's records for the investigator or allow the investigator to leave the employer's premises with original records, even if the investigator offers a receipt for them. Instead, the employer should allow the investigator to review records on the premises in the employer's presence, and the investigator may make whatever manual notes regarding the records which the investigator desires.
 - iii) An employer should not allow the investigator unfettered access to all the employer's records, but rather should provide the investigator with the particular records requested and maintain other records securely under lock and key. If the investigator requests records which the employer has stored electronically on a computer, the

employer should print out copies of the records, but not allow the investigator to leave the premises with the copies.

- e) Access to Records. As a general matter, employers should maintain their records in a secure place under lock and key in order to avoid the loss of records, or the possible copying or alteration of records. Generally, no individual or entity has the right to inspect or review an employer's records, except for government agencies which have been conferred that right by law (such as the DOL) or if the employer is subject to a subpoena or other court order requiring disclosure. An employer cannot prevent workers from recording their own time or the time of other employees, but the employer can and must maintain their records in a secure manner.

4) Housing.

- a) General. The investigators will inspect the housing provided for workers to insure compliance with H-2A or MSPA. The investigators will also question the workers in interviews regarding housing conditions and issues.
- b) H-2A Housing Inspection. H-2A requires that employers furnish housing at no cost which meets applicable OSHA safety standards. Generally, the investigators will not scrutinize the housing too closely, because the housing has presumably already been inspected by the State of Kentucky in accordance with H-2A requirements.
 - i) The investigators will conduct a walk-through of the housing and look for obvious items such as smoke detectors, hot water, beds off the floor, screens in place, garbage picked up, trash cans emptied, bathrooms working properly, standing water, open wiring, general cleanliness, adequate cooking and refrigeration, and simple square footage for the number of people housed. If the housing is a trailer, the investigator will look at the skirting in place.
 - ii) Generally the investigators will look for obvious issues and not scrutinize the housing to a great extent, but they will dig deeper if they do see problems.
 - iii) If the employer is providing well water to the workers, the employer must have a copy of the well water testing certificate to verify that it is appropriate for drinking water, and the well water must be tested yearly.
- c) MSPA Housing Inspection. If MSPA is applicable, there is usually not a pre-housing inspection, so the investigator's walk-through will be more in-depth. The investigators will question the workers in their interviews regarding the housing conditions to confirm that it matches what the investigator sees in the inspection. Under MSPA, housing does not have to be furnished and the employer can charge a reasonable fee for housing as well as utilities, at the employer's cost, if it is being used as a part of wages (which must be disclosed to the worker prior to the worker's employment).

- d) Employer's Role in Housing Inspection. The employer should not permit the investigators to do an inspection of the workers' housing without the employer being present. The employer should take notes of any issues pointed out by the investigators which require correction and insure that the employer understands exactly what should be corrected. It is the responsibility of the employer to maintain the housing in a condition which meets safety requirements. The employer is not required to clean the housing, and can require the workers clean prior to getting their pay on payday. Many employers will go weeks without checking on the housing conditions only to have investigators show up and the housing is in poor condition, for which the employer will be held accountable.
- e) Problems Identified in Housing Inspection. The consequences of any problems identified by the investigators in the housing inspection will depend on the seriousness of the violations.
- i) If the housing conditions are bad enough to indicate an imminent danger to health and safety, the employer will be required to provide immediate alternative housing that is safe for the workers.
 - ii) Otherwise, the employer will generally be required to fix or correct the problems identified by the investigator. Investigators will usually provide the employer with a period of 7–10 days to correct the violations. If the issues are minor and the investigators believe the employer is credible, the investigator may simply ask the employer to send the investigator a letter confirming that the problems have been corrected. If there are a number of violations and/or violations which are more serious, the investigators will re-inspect the housing to insure that all issues have been corrected.
 - iii) In addition to requiring correction of the violations, fines may also be assessed against the employer for the violations. Fines can range from a few hundred dollars to several thousand dollars depending on the nature and extent of the violations. If violations are found which present an imminent danger, such as exposed wiring, open sewage, or rodent infestation, the fines will likely be in the thousands of dollars.
- f) Particular Problems. One issue which often arises in the housing inspection is the practice of workers placing used toilet paper in a can beside the toilet rather than flushing it down the sewer. In Mexico, the sewer system cannot handle toilet paper and it is instead placed in a can by the toilet. Because this is a cultural issue ingrained in the workers, they will often place used toilet paper in a can by the toilet. Some investigators will fine the employer for the practice. The employer should attempt to make the workers flush toilet paper down the toilet, but it is often difficult to untrain years of cultural customs, and the employer's best strategy may be to simply insure that the can is emptied on a daily basis.

5) **Transportation.**

- a) Generally, the employer must provide workers with transportation from their housing to the worksite and back, as well as to town to obtain supplies.
 - i) The transportation used for the workers must meet safety standards. For example, if the employers are using a minivan for transportation, the investigators will inspect the vehicle and look for seatbelts, good tires, working lights, a seat for each person, and whether the vehicle is in basic safe running order. The employer should accompany the investigators on the inspection and take notes regarding any issues identified by the investigators.
 - ii) The employer is required to have insurance on the vehicles used to transport workers. The employer should maintain a copy of the automobile insurance policy, as the investigators will request to see it and may contact the insurance company to verify that the policy is still in effect.
- b) Because of the history of a large number of workers killed or injured in automobile accidents while being transported, the fines are generally substantial for failure to provide safe transportation.

6) **Final Conference and Appeal.**

- a) At the conclusion of the investigation, the investigators will schedule a time to meet with the employer to have a final or closing conference to discuss the investigators' findings. The employer may have legal counsel or any other person they desire present at the conference. At the final conference, the employer must take thorough notes of all the issues identified by the investigators. In some cases the employer may receive an assessment letter after the conference which outlines violations which were not discussed at the final conference. Therefore, it is very important that the employer take good notes regarding the meeting.
- b) The employer must insure that he or she fully understands the violations which are being charged, and asks questions if it is not clear. For example, if the investigator indicates that the employer is being charged with failure to meet the $\frac{3}{4}$ guarantee under H-2A, the employer should ask how the employer failed to meet the requirement and what particular employees were affected by the failure.
- c) If the investigators have computed any back wages due to the workers, the employer is entitled to a copy of the computations and should ask for copies if not offered.
- d) During the final conference meeting, the investigator will usually go through a checklist of compliance requirements for each law (FLSA, H-2A, MSPA, and OSHA field sanitation if applicable) and confirm the areas in which the investigator verified compliance, and then discuss the issues and violations which were found.

- e) If the employer disputes a violation raised by the investigator, and the employer believes he has evidence to prove the violation did not occur, the employer should present the evidence at that time so that the employer may avoid being charged with the violation.
- f) Generally the investigator will answer any questions related to the various laws at issue and will discuss with the employer what the employer needs to do to correct the violation, and how to be in full compliance with the law. The employer can and should ask questions to insure the employer understands how to comply with the law, and should take notes regarding what the investigator says.
- g) At the conclusion of the final conference, the investigator will ask the employer a formal question, which is whether the employer will comply with the law in the future. Even if the employer believed he was in compliance in the past, or disagrees with the investigator's findings, the employer must answer yes to this question. If the employer does not answer yes, the DOL will pursue an injunctive action in federal court to compel compliance with the law, which will require periodic meetings with investigators and regular visits to insure compliance.
- h) At the very end of the meeting, the investigator will generally advise the employer that an assessment of civil money penalties (fines) may be assessed against the employer for the violations. Generally the decision whether to assess fines will be made by the investigator's superior, and the employer will receive a letter from the investigator's manager if any fines are assessed. The letter will outline each violation and the fine associated with the violation. The employer has the right to dispute the assessment of fines by responding to the letter in writing within ten (10) days stating the employer's disagreement with the findings and requesting a hearing. The employer's letter may be faxed or mailed, but it must be received within the required time period. If the employer does not contact the manager in the required time period to protest the assessment and request a hearing, the assessment of the fines will become final and will not be reduced.
- i) If the employer disputes the assessment and requests a hearing, it will often lead to negotiations between the manager and the employer regarding the possibility of reducing the amount of the fines. Generally the employer will receive an acknowledgment letter from the manager indicating that the appeal was received. The manager will contact the employer for a meeting to attempt to administratively settle the case, at which time the parties will negotiate a reduction of the fines.
 - i) If the assessment of fines cannot be resolved and settled between the employer and the manager, a hearing will be held before an administrative law judge. Generally the administrative law judge will not uphold substantial fines which are based on technical errors where no real harm has come to the workers. Many appeals are settled administratively without a hearing.
 - ii) However, if a violation has led to harm to a worker, such as a worker being assaulted, becoming ill, being injured or even dying, the DOL will seek to take harsh measures against the employer.