

## Fact Sheet #26B: Section H-2A of the Immigration and Nationality Act (INA)

**This fact sheet provides general information concerning the application of the H-2A requirements to the agricultural industry for H-2A applications submitted prior to January 17, 2009. For applications submitted on or after March 15, 2010, see Fact Sheet 26. For applications submitted between January 17, 2009 and March 14, 2010, see Fact Sheet 26A.**

### Introduction

The Immigration and Nationality Act (INA) authorizes the lawful admission into the United States of temporary, nonimmigrant alien workers to perform agricultural labor or services that are temporary or seasonal in nature. Such workers are known as H-2A workers after the visa category created for them in section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act. Employers of such workers and U.S. workers who perform work covered by the job order or contract are obligated to comply with the terms and conditions specified in the job order/contract, and all applicable statutory and regulatory requirements.

### Overview of Employer Contractual Obligations

Any employer who has been certified by the Employment and Training Administration of the U.S. Department of Labor for a specific number of H-2A jobs must have initially attempted to find U.S. workers to fill these slots. Even after H-2A workers are recruited, employers must continue to engage in "positive recruitment" of U.S. workers. The employer must agree to accept U.S. workers until 50% of the certified contract period has been completed.

**Rates of Pay:** The employer must pay all workers working in certified jobs the higher of either: (a) the Adverse Effect Wage Rate [AEWR] or (b) the Prevailing Rate for a given crop/area. Neither of these rates may be less than the Federal minimum wage. Wages may be calculated on the basis of hourly or "piece" rates of pay. However computed, they must not be less than the rate specified in the job offer/worker contracts.

**Job Clearance Order/Worker Contracts:** Every worker must be provided a copy of the worker contract or, as a substitute for the worker contract, a copy of the job clearance order. If worker contracts are provided, they must specify at least those benefits required by the job order and DOL Regulations. The job clearance order is the "official" document since it is the one submitted by the employer and approved by DOL. The job clearance order/contract must state:

- the beginning and ending dates of the contract period

- any and all significant conditions of employment -- such as payment for transportation expenses incurred, housing and meals to be provided (and related charges), specific days workers are not required to work (i.e., Sabbath, Federal holidays)
- the hours per day and the days per week each worker will be expected to work during the contract period
- the crop(s) to be worked and/or each job to be performed
- the applicable rate(s) of pay for each crop/job
- any tools required and that the employer pays for same
- that workers' compensation insurance will be provided per State law of the State where work is performed

**Guarantees to All Workers:** H-2A certified employers must provide each covered worker an offer of at least 75% of the hours in the contract period. This is referred to as the "three-fourths guarantee." For example, if a contract is for a 10-week period, during which a normal workweek is specified as 6-days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (e.g., 10 weeks x 48 hours/week = 480-hours x 75% = 360). Wages for the guaranteed 75% period are calculated at not less than the AEWR for the State in which the work was being done. (This rate will be stated in the certified job order or worker contract.)

Housing that meets the applicable substantive health and safety requirements, both prior to and throughout the period of occupancy, must be provided at no cost to covered workers.

**Transportation Costs/Reimbursement:** Every non-local worker employed on an H-2A contract is entitled to be paid for all transportation costs and daily subsistence related to travel from the place from which the worker has come to work for the employer, and the return trip (provided the worker completes the work contract period). This includes both foreign and U.S. workers. Workers are "non-local" if they cannot reasonably return to their permanent residence every night. The H-2A program requires expenses to be reimbursed according to the following schedule:

- For transportation and daily subsistence to the place of employment, the employer must repay the worker when 50% of the contract period has been completed.
- For transportation and daily subsistence "home," the worker must complete the agreed upon contract period. Otherwise, the employer has no obligation to pay return expenses, unless some special provision in the Worker's Contract so provides.

**Records Required:** Employers certified under H-2A must keep records of the hours each worker actually works. In addition, the employer must retain a record of time "offered" to the worker but which the worker "refused" to work. Each worker must be provided a wage statement showing hours of work, hours refused, pay for each type of crop, the basis of pay (i.e., whether the worker is being paid by the hour, per piece, "task" pay, etc.). The wage statement must indicate total earnings for the pay period and all deductions from wages (along with an explanation as to why deductions were made).

**Termination or Abandonment of Employment:** Employers must maintain records concerning any worker whose employment was terminated and the reason for such termination. The employer, in order to negate a continuing liability for wages and benefits to workers, must notify the local State Workforce Agency (SWA) office by providing a report on any termination(s), the date of the termination, and the reason for each. In cases of job abandonment, the SWA must be notified within 48 hours of when the

employer found out about the abandonment. The employer should also indicate if replacement(s) will be sought for such worker(s).

## **Where to Obtain Additional Information**

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations. You may view relevant regulations at 20 CFR Part 655 Subpart B and 29 CFR Part 501.

For additional information, visit our Wage-Hour website: <http://www.wagehour.dol.gov> and/or call our Wage-Hour toll-free information and helpline, available 8am to 5pm in your time zone, 1-866-4USWAGE (1-866-487-9243).

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