

● IMMIGRATION AND NATIONALITY ACT (*TEMPORARY AGRICULTURAL WORKERS*)

STATUTORY CITATION: 8 USC § 1101(a)(15)(H)(ii)(a) and 8 USC § 1188

RELATED REGULATIONS: 20 CFR Part 655, Subpts. B and N

GENERAL SUMMARY: Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, as amended in 1986, authorizes the importation of non-immigrant foreign workers into the United States to perform temporary or seasonal agricultural labor, under conditions prescribed in Section 216 of the Act.

SPECIFIC TERMS AND CONDITIONS

INITIAL RECRUITMENT OF DOMESTIC WORKERS — No sooner than 75 days and no later than 60 calendar days before the first date on which a temporary or seasonal agricultural operation is expected to begin, a grower or growers' association that anticipates a shortage of U.S. workers and wishes to apply for temporary foreign labor under the so-called "H-2A" program must submit a formal job offer to the U.S. Department of Labor and the state employment service, and begin affirmative efforts to locate U.S. workers for the jobs described in the offer. Until such time as the need for foreign workers is certified and H-2A workers have departed for the place of employment, active recruitment of domestic labor must continue, including the placement of advertisements in general-circulation newspapers, and in a language other than English if deemed appropriate by the employment service.

EXTENDED RECRUITMENT OF DOMESTIC WORKERS — From the time H-2A workers depart for the place of employment until 50 percent of the specified employment period has elapsed, the employer must hire any qualified U.S. worker who applies for any of the positions for which the H-2A workers were approved. Moreover, no U.S. worker may be rejected for or terminated from such employment for other than a lawful job-related reason, and the employer must report every rejection and termination to the local employment office. The "50 percent rule" does not, however, apply to any farm operator or other H-2A employer who did not use more than 500 worker-days of agricultural labor in any calendar quarter of the preceding calendar year and who is not associated with other employers applying for or utilizing H-2A workers.

CONTENTS OF JOB OFFER — Among other elements, an H-2A job offer must contain certain minimum standards and guarantees, summarized in brief below, all of which must be incorporated into a written work contract and furnished to each worker no later than the first day of employment. Both the job offer and the contract must afford U.S. workers the same benefits, wages and working conditions as their H-2A counterparts.

Pay Rates — For every hour on the job in any pay period, each worker is entitled to receive no less than (1) the federal minimum wage, (2) the state minimum wage, (3) the federally prescribed "adverse effect wage rate" for H-2A employment in the state, or (4) the prevailing wage rate, whichever of the four figures is highest.

Guaranteed Paid Workdays — In general, each U.S. and H-2A worker employed in comparable jobs by an H-2A employer is guaranteed employment for at least 3/4 of the workdays in all periods during which the work contract is in effect. If work is not available for the minimum number of guaranteed days, and for the full number of hours of daily work time defined in the contract, the employer must pay the worker the amount that would have been earned had the individual actually worked the guaranteed number of defined workdays.

Wage Payments, Deductions, and Statements — Employers who utilize temporary foreign agricultural workers must pay both their foreign and U.S. workers at least twice a month, or more often if such is the prevailing practice in the area of employment. Employers are generally permitted to withhold from a worker's pay only those deductions that are required by law or are otherwise reasonable, provided the non-mandatory deductions are spelled out in the contract. On or before each payday, the employer must provide each worker with written documentation showing (1) the worker's total earnings for the pay period, (2) the hourly wage or piece rate, (3) the hours of employment offered to the worker and the hours actually worked, (4) each deduction from the worker's pay and its purpose, and (5) the worker's daily piecework production if paid on a piecework basis.

Workers' Compensation — At no cost to the worker, each H-2A employer is obligated to obtain workers' compensation or equivalent insurance to cover medical expenses and related benefits in the event of a worker's injury on the job or occupational disease.

Transportation — Each foreign or domestic worker who completes 50 percent of the work contract period is entitled to reimbursement for costs incurred by the worker for transportation and meals between the place from which the worker has come to work for the employer and the place of employment; transportation and meal costs must be advanced to the worker prior to the trip whenever it is common practice for non-users of foreign labor in the same occupation and the same area to do so. Likewise, if the worker completes the contract period, the employer is obligated to provide or pay for the worker's transportation and daily subsistence back to the place of origin or to the next place of employment. During the course of the contract, the employer must furnish transportation between the worker's living quarters and the worksite, without cost, if the worker is unable to return to his or her own home within the same day.

Housing — To those workers who are not reasonably able to return to their residence each day, the employer must provide housing without cost to the worker. Housing facilities owned or operated by the employer must meet applicable ETA or OSHA standards, while rental units or public housing must generally comply with applicable local, state or federal standards. When it is prevailing local practice to provide domestic farmworkers with family-type housing, family housing must be provided to those U.S. workers employed under an H-2A work contract who request it for themselves and their families.

Meals — An H-2A employer must either serve the workers three meals a day or furnish free and convenient cooking facilities to enable the workers to prepare their own meals. The cost of employer-provided meals may be assessed against the workers, but meal charges may generally not exceed the limit prescribed by regulation (currently \$10.64 per day).

Supplies and Equipment — Unless it is common practice in the particular locality and crop operation for workers to provide their own, the employer must furnish all supplies, tools and other equipment required to perform the assigned tasks, without any charge or deposit.

SPECIAL NOTES OR ADVISORIES

RETALIATION — A person may not discharge, discipline or discriminate in any manner against a worker because the worker has consulted with an attorney or legal services program personnel, filed a complaint, participated in a proceeding, or exercised any other right afforded by these provisions. Reports of unlawful retaliation should be filed with the Wage and Hour Division.

ADMINISTRATION AND ENFORCEMENT

PRIMARY ENFORCEMENT AGENCY — *Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210 (202-693-0072)*. The Wage and Hour Division is responsible for enforcing compliance with the required work contracts between certified H-2A employers and their foreign and domestic employees performing services under those agreements. When investigation discloses evidence of a violation, the Division may impose penalties, seek injunctive relief, and order specific performance of contractual obligations, including recovery of unpaid wages. Each violation of the work contract committed against a worker carries a maximum civil fine of \$1,500.

SECONDARY OR ASSOCIATED ENFORCEMENT AGENCY — *Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, Washington, D.C. 20210 (202-693-3010)*. OFLC is responsible for processing applications by agricultural employers seeking temporary foreign workers, and for certifying the number of such workers needed, if any. It is OFLC's role to assure that prospective H-2A employers have fulfilled their obligation to recruit and hire eligible domestic farmworkers prior to certification and during the first half of the contract period, that the associated job offers comply with statutory and regulatory requirements, and that employers refrain from using the H-2A program to replace farmworkers who are on strike or otherwise involved in a labor dispute. Non-compliance with pre-certification recruitment requirements may result in delay or denial of the H-2A application, and an employer's failure to abide by the terms and conditions of certification may lead to denial of all subsequent petitions for foreign agricultural labor for a period of up to 3 years.