

# How to Employ Legal Temporary Labor?

## H-2B and H-2A Program

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## Disclaimer

- The materials in this presentation are general in nature and are for informational purposes only; they are not offered for and do not constitute specific legal advice. Nothing provided within this presentation should be used as a substitute for the advice of your own independent counsel.

## Outline

- What is the H-2B program?
- What's new for the H-2B program?
- Requirements to participate in H-2B
- H-2A program differences
- Benefits of H-2 Temporary Work Visa
- FEWA Membership

## What is the H-2B Program?

- H-2B Visa = Non-Immigrant Work Visa
- Employees can only work for YOUR company
- Bring as many or a few workers as needed
- Industries range from Landscape, construction, hotels, theme parks etc.
- Employer must have a Temporary Need for Labor
  - 9 months or less (*FY 2016 appropriations bill*)
- 66,000 per fiscal year (*FY 2016 appropriations bill*)

## Temporary Needs?

- **Seasonal, Peak Load, Intermittent or One-time Occurrence**
- **Seasonal Need**
  - Tied to a season by even or pattern (weather)
  - Predictable
  - Recurring
  - Examples (shrimper, Christmas décor, landscaping)
- **Peak load Need**
  - Must have permanent employees in the offered position
  - Temporary employees supplement permanent staff
  - Will not become part of your permanent staff
  - Examples (landscaping, construction workers)

## The H-2A/H-2B Process

- **Involves 4 U.S. Governmental Agencies**
  - State Workforce Agency (SWA)
    - ✦ Test the local labor market
  - U.S. Department of Labor (USDOL)
    - ✦ Determines (H-2B) prevailing wage and advisory to USCIS
  - U.S. Citizenship and Immigration Services (USCIS)
    - ✦ Final approval decision and notifies USDOS
  - U.S. Department of State (USDOS)
    - ✦ Issues visas to the worker in country of origin

## Overview of the 2015 H-2B Interim Final Rule

- Major Features of the Final Rule:
  - “National Electronic Job Registry for all H-2B job orders...”<sup>1</sup>
  - “Enhanced recruitment of U.S. workers...[which] requir[es] employers [to] hire...U.S. workers until 21 days prior to [their] date of need, and... former employees [if] available.”<sup>1</sup>
  - “Reinstatement of State Workforce Agencies (SWA)...role to assist employers...”<sup>1</sup>
  - “...[New] definition of corresponding employment...”<sup>1</sup>

<sup>1</sup> refers to the Major Features section of the 2015 H-2B Interim Final Rule

## Overview of the 2015 Interim Final Rule

- Major Features continued:
  - “Greater transparency by requiring employer disclosure of agency agreements and foreign labor recruiters in the solicitation of H-2B workers”<sup>2</sup>
  - “Extension of H-2B program benefits such as wages and transportation to certain U.S. workers...”<sup>1</sup>
  - “Strengthened worker protections...”<sup>1</sup>
  - “...Providing WHD with independent debarment authority, in addition to ETA, and providing revocation authority to ETA.”<sup>1</sup>

<sup>1</sup> refers to the Major Features section of the 2015 H-2B Interim Final Rule

## Timing of Recruitment in relation to Application

- “Employer completes required recruitment **after** filing the Application, and must demonstrate – not merely attest – that it was unable to locate a sufficient number of U.S. workers. Employer must submit recruitment report to ETA **after filing**, according to instructions from the Certifying Officer. State Workforce Agency (SWA) job posting and Department’s electronic job registry job posting stay active and employers must continue to accept U.S. applicants until 21 days before the date of need.”<sup>3</sup>

3 refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## H-2B Required Recruiting Activities

- “SWA job posting until **21 days** before the date of need
- Newspaper ad on 2 days, (one a Sunday) the call back of, and offer of **re-employment to former U.S. workers** (including those laid off) from the previous year, or contacting the bargaining representative
- If there is no bargaining representative **posting the job for 15 business days** at 2 conspicuous locations at every place of employment, other recruiting activities directed by Certifying Officer.
- The SWA performs two additional activities: contacts the union, where the occupation or industry is customarily unionized; sends the job order to DOL for posting on the national job registry.”<sup>3</sup>

3 refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Required Recruiting

- **No discrimination in hiring**
  - “The job opportunity was/is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. U.S. workers who apply will be rejected only for lawful, job-related reasons, and the employer will retain records of all rejections.” <sup>2</sup> \*\*
- **Minimum Productivity Standard**
  - “The employer has specified in the job order any applicable minimum productivity standard which the workers must meet in order to retain the job. With respect to any applicable productivity standard is normal and usual for non-H-2B employers for the same occupation in the area of intended employment.” <sup>2</sup> \*\*

<sup>2</sup> refers to the Form ETA-9142B-Appendix B

## Disclosure of Foreign Recruitment

- **“New:** When filing an Application, the employer and its agents and attorneys must provide **copies of any agreements with recruiters** engaged in recruiting H-2B workers.
- In addition, the employer and its agent and attorney must provide the **names and locations of sub-contractors hired by the recruiter** who will recruit H-2B workers. The employer must continue to contractually prohibit recruiters from seeking or receiving fees from prospective workers.” <sup>3</sup> \*\*

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Contracts with Recruiters

- “Employer must contractually **prohibit agents and recruiters (and any agent or employee of those agents and recruiters)** whom the employer engages **directly or indirectly** in [international] recruitment of H-2B workers from seeking or receiving fees/compensation from prospective workers.”<sup>3 \*\*</sup>

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Job Opportunity & Full-Time Threshold

- “Job Opportunity is a bona fide, full time temporary position. **Full Time defined as 35 or more hours per week.**”<sup>3 \*\*</sup>
- Additionally, a “workweek is defined as a regularly recurring period of 168 hours (seven consecutive 24-hour days).”<sup>3</sup>

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Corresponding Employment

- 2015 regulations defines “Corresponding workers as non-H-2B workers who perform either **substantially the same work** included in the job order or **substantially the same work** performed by the H-2B workers, with exclusions for certain long term incumbent workers and certain workers with a Collective Bargaining Agreement or individual employment contract. Corresponding workers are entitled to the same rights and benefits as H-2B workers. Defined at 29 CFR 503.4; enforcement identified at 29 CFR 503.15.”<sup>3</sup>
- *FY 2016 appropriations bill*

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Disclosure & Offered Wage

- **Disclosure (New Regulation):**
  - “Employers must disclose the job order to all H-2B and corresponding workers; must be in a language understood by the workers as necessary or reasonable.”<sup>3</sup> \*\*
- **Offered Wage:**
  - Equals or exceed the highest of the prevailing wage or Federal, State, or local minimum wage, and must be paid for the entire employment period of certified in the application.
  - “Employer must pay at least the offered wage free-and-clear, either in cash or in a negotiable instrument payable at par.”<sup>3\*\*</sup>

**Note: “Does not permit use of wage determinations...as wage sources to set the H-2B prevailing wage rate.”<sup>5</sup>**

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet & <sup>5</sup> refers to the Major Provision of the 2015 Wage Methodology Final Rule



## Frequency of Pay & Incentive Based Wages

- **Frequency of Pay (New Regulation)**
  - “Employer must pay the more frequently of: **every two weeks** or according to prevailing practice in the area of intended employment.”<sup>3</sup>
- **Incentive Based Wages**
  - 2015: “If earnings are based on commissions, bonuses, or other incentives, employer must guarantee to pay at least the offered wage **every workweek**. The 2015 regulations also address piece rates. An employer paying piece rate wage must guarantee to supplement that wage if, **at the end of the every workweek**, the piece rate does not at least equal what the worker would have earned under the hourly offered wage.”<sup>3</sup> \*\*

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Deductions

- **Deductions**
  - 2015: “Employer must make all deductions required by law (i.e. taxes). Other deductions must be disclosed and reasonable according to the Fair Labor Standards Act (FLSA) principles at 29 CFR Part 531. Also, explicitly allows **worker-authorized voluntary deductions** payable to third parties for the benefit of the worker. **Deductions not required by law that are not disclosed in the job order are prohibited.**”<sup>3\*\*</sup>

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Employer Provided Items & Three-Fourths Guarantee

- **Employer Provided Items (New Regulation)**
  - “Employer must provide, without charge or deposit, all tools, supplies, and equipment needed to perform the job.” <sup>3\*\*</sup>
- **Three-Fourths Guarantee (New Regulation)**
  - “Employer must guarantee to **offer employment** for a total number of work hours equal to at least three fourths of the workdays in every 12-week period (or, for job orders lasting less than 120 days, every 6-week period).” <sup>3\*\*</sup> *FY 2016 appropriations bill*

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Earnings Statements & No Strike or Lockout

- **Earnings Statement (New Regulation)**
  - “Employer must keep accurate pay and hours records and **supply workers with earnings statement** on or before each payday.” <sup>3\*\*</sup>
- **No Strike or Lockout**
  - 2015: “There may not be any strike or lockout in any of the employer’s worksites within the area of intended employment.” <sup>3 \*\*</sup>

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## No Layoffs

- “Employer has not and will not lay off any similarly employed U.S. worker in the occupation and area of intended employment during the period from 120 days before the first date of need **through the end of the period of employment.** Layoffs for lawful, job-related reasons (such as lack of work or the end of a season) no disqualifying if all H-2B workers are laid off before corresponding U.S. workers.”<sup>3\*\*</sup>

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Transportation and Subsistence Expenses

- 2015: “Employer is liable under H-2B for reasonable cost of **1.** inbound travel, including related daily subsistence expenses, for workers who complete 50% of the job order, and **2.** outbound travel, including related daily subsistence expenses for workers who work until the end of the job order or are dismissed early. In addition, if the worker is entitled to Federal minimum wage, then the **FLSA generally requires reimbursement of inbound costs in the first workweek.** All Transportation provided by the employer must comply with applicable Federal, State, and local laws and regulations.”<sup>3</sup>

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Visa & Visa Related Expenses

- Visa & Visa Related Expenses
  - 2015: “Employer is **required** to pay or reimburse in the first workweek the full cost of visa and visa related expenses.”<sup>3</sup>

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Prohibited Fees & No Preferential Treatment

- Employer and its agent, attorney, **and employees** may not seek or receive payment (including but not limited to, monetary payments, wage concessions, kickbacks, bribes, etc) for any costs associated with the certification or employment, including attorney/agent fees, Application costs, DHS Petition fees, recruitment fees.”<sup>3\*\*</sup>
- Additionally, “Employers may not impose on U.S. workers restrictions or obligations not imposed on H-2Bs.”<sup>3</sup>
- “This does not relieve the employer from providing H-2B workers with at least the minimum benefits, wages, and working conditions that must be offered to U.S. workers under H-2B regulations.”<sup>2\*\*</sup>

<sup>2</sup> refers to Form ETA-9142B-Appendix B & <sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## No Unfair Treatment

- **New Regulation**

- “The Employer has not and will not (and has not and will not cause another person to) intimidate, threaten, restrain, coerce, blacklist, discharge or in any other many discriminate against any person who, with respect to 8 U.S.C. 1184(c), 20 CFR Part 655, Subpart A, 29 CFR Part 503, or any other regulation promulgated thereunder: has filed a complaint; instituted or caused to be instituted any proceeding; testified or is about to testify; consulted with a workers’ center, community organization, labor union, legal assistance program or attorney; or exercised or asserted on behalf of himself/herself any right or protection.”<sup>3\*\*</sup>

3 refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Workers Rights Poster

- **New Regulation**

- “Employer must post a worker’s rights poster in English provided by WHD, and in other languages as needed and provided by WHD”<sup>3</sup>
- “The employer [must]request and post additional posters, as made available by the DOL, in any language common to a significant portion of the workers if they are not fluent in English.”<sup>2\*\*</sup>

2 refers to Form ETA 9142B-Appenix B & 3 refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Certified Occupation/Area

- “Employers may not place H-2B workers in a job opportunity not certified on the Application.”<sup>3</sup>
- “Employer may not place H-2B workers outside the area(s) of intended employment certified on the application.”<sup>3 \*\*</sup>

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## DHS/ETA Notification of Early Separation

- Employers must notify USCIS and ETA within two workdays of any H-2B worker who separates before the end of the certified period of employment.
- Additionally, “Employers **must notify ETA** within two workdays of **any corresponding worker** who separates before the end of the period of employment.
  - ✦ If separation is due to voluntary abandonment by the worker and proper notification is made the employer will **not be responsible for return transportation** and will not be liable for the three-fourths guarantee beyond the last, full 12-or 6-week period before termination.
  - ✦ if separation is due to dismissal for cause the employer will not be liable for the three-fourths guarantee beyond the last, full 12-or 6-week period before termination.”<sup>3\*\*</sup>

<sup>3</sup> refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Compliance, Violations, Penalties

- The “2015 rule also adds a prohibition against the employer and its agents knowingly confiscating, destroying or holding immigration documents.”<sup>3\*\*</sup>
- Employer with cooperate with any agent of the Secretary during an audit
- Employer with retain all documents pertaining to DOL for 3 years and make available within 72 hours after request from WHD.\*\*
- Violations include misrepresentation of a material fact with DOL, DHS, and DOS
- Violations includes substantial failures to conditions of the application
- Penalties up to \$10,000 per violation

3 refers to the WHD Side By side 2008 and 2015 Regulations Comparison Sheet

## Revocation & Debarment

- **New Regulation**
  - ETA may revoke labor certification for variety of reasons
    - × Fraud
    - × Willful misrepresentation of material fact
    - × Substantial failure of a term or condition of employment
    - × Failure to cooperate with DOL audit
  - WHD does have independent debarment authority
    - × For Employers, Agents, Attorneys
    - × Debarment could extend to other visa programs also
    - × Substantial failure of a term or condition of employment
    - × Debarment period between 1 to 5 years

## H-2A Differences

- **No Cap Limitations**
- **Corresponding employment still applicable**
- **Wage – highest in effect at the time work is performed**
  - AEWR – Michigan current \$12.02 per hour
  - Calculated based on hourly or piece rate (no less than hourly)
- **¾ Guarantee – based on entire work contract**
- **Housing provided at no cost**
  - SWA inspection
- **Meals provided**
  - Three meals per day to each worker OR
  - Furnish free and convenient cooking and kitchen facilities

## Why do Employers Use H-2A & H-2B Visas?

- **Abundant labor supply**
  - No labor shortage in Mexico or Central/South America
- **Documented LEGAL workers**
- **Loyal, Stable and Repeat workforce**
- **Higher productivity and less turnover**
- **Reduced training cost**
- **Only mechanism to bring LEGAL temporary non-ag laborers**
- **Work for only your company**



## Benefits of H-2B Visas (continued)

- **Prevents the use of illegal Coyotes!**
  - \$1,700 (MX)
  - \$5,000 (GT)
  - \$6,000 (ES)
- **Valid Social Security Number**
- **Driver's license (temporary only)**
- **Income tax return/refund**
- **Travel freely across the boarder**
  - Multiple entries
  - Safety

## Prospective H-2B Workers

- **Temporary intent to enter the United States**
- **Family or financial ties to country of origin**
- **H-2B not meant to legalize undocumented workers**
- **Referrals from your current workforce/community**
  - Relatives/friends currently residing in home country
  - Must obtain passport issued in home country

## How can FEWA Help You?

- **Personalized FEWA Guide** throughout entire process
- **Meet with your workers personally in Mexico and beyond**
  - Prevent unlawful charges by foreign recruiters or agents
- **Staff attorney at no additional charge**
  - Assistance with NOD, BALCA appeal, USCIS RFE, DOL Audits
- **Your Workers are Members too!**
  - Spanish/English worker communications
- **Voice in Washington, D.C.**
- **TRUST your H-2B process to FEWA**
  - The knowledge, **Reliable voice, Unique, Solutions, Team**

## FEWA Activities in Washington, D.C.

- **Executive Committee of The H-2B Workforce Coalition**
- **Trade Association Advisory Council for Immigration Works USA**
- **Member of Essential Worker Immigration Coalition (EWIC)**
- **Member of National Council of Agriculture Employers (NCAE)**
- **Member of H-2B Provider Coalition**
- **Affiliate member of Catholic Legal Immigration Network (CLINIC)**
- **Member of the U.S. Chamber of Commerce**

## Citations

- 1. "2015 H-2B Interim Final Rule: Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States." Office of Foreign Labor Certification. Accessed July 10, 2015. [http://www.foreignlaborcert.doleta.gov/pdf/H2B\\_2015\\_IFR\\_Factsheet\\_April\\_2015.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H2B_2015_IFR_Factsheet_April_2015.pdf).
- 2. "H-2B Application for Temporary Employment Certification: Form ETA-9142B-Appendix B." Office of Foreign Labor Certification. Accessed July 10, 2015. [http://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9142B\\_APPENDIX.pdf](http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142B_APPENDIX.pdf).
- 3. "Wage and Hour Division (WHD) H-2B Side-by-Side Comparison of the 2009 and 2015 Rules." U.S. Department of Labor. Accessed July 10, 2015. <http://www.dol.gov/whd/immigration/H2BFinalRule/H2BSideBySide.htm>.
- 4. "2015 Final Rule: Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program." Office of Foreign Labor Certification. Accessed July 14, 2015. [http://www.foreignlaborcert.doleta.gov/pdf/H-2B\\_2015\\_Wage\\_Final\\_Rule\\_Factsheet\\_April\\_2015.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H-2B_2015_Wage_Final_Rule_Factsheet_April_2015.pdf)
- 5. "Assurances and obligations of H-2B employers." 20 CFR 655.20 (g) 2015.

Please note that all regulations that were given a \*\* are regulations that directly correlate from the WHD Side by Side Comparison to the ETA 9142B that you agree to abide by as the employer.

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Thank you for your time  
Q & A



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