U.S. Wage and Hour Division

U.S. Department of Labor Wage and Hour Division

H-2B Program Enforcement

U.S. Wage and Hour Division

WHD Enforcement *Source of Authority*

The Department of Homeland Security (DHS) requires that employers receive H-2B temporary labor certification from the Department of Labor (DOL). DHS also delegated H-2B program enforcement authority to DOL. DOL's Wage and Hour Division (WHD) enforces compliance with the conditions of an H-2B petition and DOL-approved temporary labor certification.

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WHD Enforcement
Responsibility

- Whether U.S. workers were offered employment.
- Whether U.S. workers were laid off or displaced.
- Payment of required wages and 3/4 guarantee.
- Other obligations of the job order and certification.

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WHD Enforcement
Authority

Conduct investigations, and when appropriate:

- Impose civil money penalties.
- Provide make-whole relief, such as back wages for U.S. or H-2B workers, or reinstatement of a U.S. worker wrongfully laid off or rejected for employment.
- Debar from future labor certifications.

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WHD Enforcement
Scope

Workers covered under the H-2B regulations:

- H-2B visa holders.
- Workers in corresponding employment.
- U.S. workers improperly laid off or not hired.

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Corresponding Employment

- The employment of workers who are **not** H-2B workers who perform:
  - substantially the same work as **in the job order** or
  - substantially the same work **performed by the H-2B workers**
    - Certain exceptions apply.
- To qualify as corresponding employment, the work must be performed during the period of the job order, including any ETA-approved extensions.

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Corresponding Employment *Exceptions to the Definition*

Exceptions are made for certain incumbent workers who perform the work described in the previous slide and who:

- Were continuously employed during the prior 52 weeks, worked or were paid for at least 35 hours in at least 48 of the previous 52 weeks, and averaged at least 35 hours per week over the prior 52 weeks, provided their terms and working conditions are not substantially reduced during the job order; or
- Are covered by a collective bargaining agreement or individual employment contract guaranteeing 35 hours of work per workweek and continued employment through the period of employment covered by the job order, except for dismissal for cause .

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Job Opportunity

- The job must be a bona-fide, full-time temporary position, with full-time defined as 35 or more hours per week.
- There must be no strike or lockout at any of the employer's worksites in the same geographic area.

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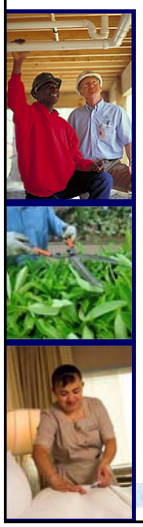
Offer of Employment to U.S. Workers



Preferential treatment of H-2B workers is prohibited.

- Employers must offer U.S. workers terms and working conditions at least as favorable as those offered or provided to H-2B workers.
- Employers must not impose any restrictions or obligations on U.S. workers that will not also be imposed on H-2B workers.

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Offer of Employment to U.S. Workers

- **Positive Recruitment**: Independently conduct DOL-specified recruitment activities and cooperate with the State Workforce Agency by accepting referrals of eligible U.S. workers.
- **Hiring period**: Provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 21 days prior to the date of need.
- **Rehiring:** Contact former employees from the previous year in the same occupation (unless they abandoned the job or were dismissed for cause) and offer them the job.

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Layoff and Displacement of U.S. Workers

- **No improper layoffs** from 120 days before the date of need through the end of the job order.
- If such a layoff has occurred, the employer must first offer the job opportunity to those laid-off U.S. workers before hiring any H-2B workers.
- Applies to any similarly employed U.S. worker in the same occupation and geographic area specified in the job order.
- During the job order period, permissible only if all H-2B workers are laid off before any U.S. worker in corresponding employment.

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Payment of Required Wages

- The offered wage must equal or exceed the highest of:
  - Prevailing wage obtained from ETA, or
  - Federal, State, or local minimum wage.
- Wages must be paid free-and-clear.
- Employers may pay based on commissions, bonuses, piece rates, or other incentives, as long as the employer guarantees that wages equal the offered wage rate calculated in every workweek, and has accurately advertised the pay rates in all required recruiting.

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Three-Fourths Guarantee

- Guarantee to offer the worker employment for a total number of hours equal to at least ¾ of the workdays on the job order in each 12-week period (or 6-week period, for job orders lasting less than 120 days).
- Each workday must consist of a full number of hours of work time as specified in the job order.
- Guarantee must begin the first day of the job order or the first workday after the worker arrives, whichever is later.

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Three-Fourths Guarantee

- Employers must maintain accurate records of hours offered and hours actually worked.
- Failure to offer three-fourths of the hours in any 12- or 6-week period would require the employer to supplement the worker's pay to meet the three-fourths guarantee.

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Transportation & Visa Fees

- **Inbound**: **Provide** *or* **pay for** transportation and daily subsistence (lodging, as necessary, and meals) to the place of employment *or* **reimburse** workers once 50% of the job order has elapsed.
  - Note: FLSA requirement for Federal Minimum Wage and reimbursement in first workweek.
- **Outbound**: **Provide** *or* **pay for** return transportation and subsistence if the worker completes the job order period or is dismissed early.
- Employer is always liable for **visa fees** & related expenses in or before the first workweek.

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Other H-2B Program Obligations *Place of Intended Employment*

- The employer must not place an H-2B worker outside the area of intended employment listed on the job order.
- The employer is also prohibited from placing H-2B workers outside the certified occupations.

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Other H-2B Program Obligations
No Retaliation

- Employer must not intimidate, threaten, discharge, or discriminate against any person who has exercised their rights under the regulations, including filing a complaint, testifying, consulting with an attorney, workers' center, etc.
- No person may be asked to waive or modify their statutory or regulatory rights under the H-2B program.

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Other H-2B Program Obligations
Deductions

- Employers must make all deductions required by law.
- Deductions must be disclosed in the job order – **undisclosed deductions are impermissible.**
- The amount of any other deduction must be reasonable.
- Deductions for expenses that are for the primary benefit of the employer <u>may not</u> bring an employee's wages below the H-2B required wage rate.
  - Examples: visa fees, border crossing fees, and other government-mandated fees related to employment.

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Other H-2B Program Obligations
Tools and Equipment

- The employer must provide workers all tools, supplies, and equipment required to perform the assigned duties at no cost to the worker.

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Other H-2B Program Obligations
Prohibited Fees

- The employer, its agent and its attorneys must not seek or receive payments from workers related to the certification, including agent or attorney fees and recruitment costs.
- The employer must contractually forbid any agent or recruiter from seeking or receiving payments from prospective workers.

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Other H-2B Program Obligations
Disclosure

- The employer must provide a **copy of the job order** to each H-2B and corresponding worker.
- Timing of job order disclosure:
  - H-2B workers who are abroad must receive the job order no later than when they apply for the visa.
  - H-2B workers already in the U.S. must receive the job order no later than when the job offer is made.
  - Corresponding workers must receive the job order no later than the first day of employment.
- Job order must be provided in a language understood by the worker.

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Other H-2B Program Obligations
Notification

- Notify ETA in writing within two days if a worker separates prior to the end date of employment certified in the Application. In addition, notify DHS if the separation is of an H-2B worker.
- Abandonment: Failure to report for work for five consecutive working days without the consent of the employer.

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Other H-2B Program Obligations
Notice of Worker Rights

- Posters which set out the rights and protections of H-2B workers and workers in corresponding employment must be posted at each worksite.
- Poster may be obtained from the DOL.
- Must be posted in English; must also be posted in another language as necessary and made available.
- Must be posted in a location where employees can readily see it.

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Other H-2B Program Obligations
Notice of Worker Rights

EMPLOYEE RIGHTS
UNDER THE H-2B PROGRAM

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

The Immigration and Nationality Act (INA) allows for the employment of temporary, non-immigrant workers in nonagricultural labor or services (H-2B WORKERS). Department of Homeland Security (DHS) regulations allow for the employment of **H-2B WORKERS** only if the wages and working conditions of U.S. workers would not be adversely affected.

Two types of workers have rights under this program:

- **H-2B WORKERS** and
- **OTHER WORKERS** performing substantially the same work included in the H-2B job order or substantially the same work as that performed by the H-2B workers, except for certain long-term existing employees and certain employees under a collective bargaining agreement or individual employment contract.

DISCLOSURE

- To receive accurate, **WRITTEN INFORMATION** about the wages, hours, working conditions, and benefits of the employment being offered
- To receive this information before getting a visa (in the case of H-2B workers outside the U.S.) but no later than the first day of work (for other workers)
- To receive this information in a language understood by the worker

WAGES

- To be PAID at least every two weeks at the rate indicated in the job order for all hours worked
- To be informed in writing of all **DEDUCTIONS** (not otherwise required by law) that will be made from the worker's paycheck
- To receive an itemized, written **STATEMENT OF EARNINGS** (pay stub) for each pay period
- To be guaranteed employment or payment for at least **THREE-FOURTHS** (75%) of the hours

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Other H-2B Program Obligations

- Furnish an **earnings statement** to each worker each payday (which must be the more frequent of: every two weeks or the prevailing frequency).
- Retain required documents for 3 years.
- Cooperate with WHD investigators.

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Remedies
Back Wages

- For H-2B and corresponding workers, recovery of unpaid wages (including improper deductions and prohibited payments).
- For U.S. workers improperly laid off or rejected for employment, make-whole relief.

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Remedies
Civil Money Penalties (CMPs)

- The maximum CMP allowed under the INA is $10,000 per violation.
- Most CMPs may be adjusted according to seven regulatory factors.
- Other CMPs are set equal to the amount of back wages assessed.

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Remedies
Debarment

- Applicable to employers, successors in interest, agents, and attorneys.
- WHD has the independent authority to debar from 1 to 5 years.

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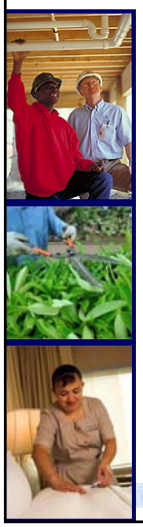
Other Remedies



- Make-whole relief for any person who has suffered discrimination.
- Instatement or reinstatement for any U.S. worker who has been improperly rejected, laid off, or displaced.

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Employer Appeal Rights

- Following a WHD H-2B determination, employers may request a hearing with an Administrative Law Judge and, subsequently, appeal to the Administrative Review Board.

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Additional Information

- Outreach materials, including fact sheets, workers' rights cards, FAQs, and posters, are available on the WHD website at http://www.wagehour.dol.gov
- WHD will continue to issue additional outreach material as more H-2B questions arise.
- Toll-free information and help line is available 8am-5pm in your time zone at **1-866-4US-WAGE** (1-866-487-9243)

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Disclaimer

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Thank You

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