

# Wage and Hour Investigation Findings

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## MSPA & H-2A

### South Carolina 2016

- 27 investigations
  - 21 MSPA with 90% violation rate
  - 6 H-2A with 66% violation rate
- 85% with civil money penalties (23 cases)
- 7.5% with back wages (2 cases)
- \$43,435 in back wages for 70 workers
- \$254,668 in civil money penalties
- \$11,072 average CMP per case
- \$620.50 average BWs per worker

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## MSPA

- REGISTRATION
- DISCLOSURE
- TIME AND PAYROLL RECORDS
- WAGES
- HOUSING
- TRANSPORTATION

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## H-2A

- REGISTRATION
- DISCLOSURE (COPY OF CONTRACT)
- INBOUND TRANSPORTATION (reimbursement 1<sup>st</sup> workweek)
- CORRESPONDING DOMESTIC WORKERS
- TIME AND PAYROLL RECORDS
- ADVERSE EFFECT WAGE RATE (AEWR)
- HOUSING
- TRANSPORTATION
- ¾ GUARANTEE
- OUTBOUND TRANSPORTATION

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## MSPA

- ONLY hire registered farm labor contractors with unexpired authorizations
- Provide working terms and conditions before work begins
- Make and keep accurate time and payroll records. Always consider waiting time. Double check lunch break deductions. Correctly calculate hours worked regardless of number of "pieces."

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## MSPA

- Always pay wages on time – delays in payment constitute a violation
- While processing payroll, double check the hours worked – do they make sense? Workers that arrive and leave on the same bus should generally have the same hours.
- Wage statements – make all attempts to provide simple, easy-to-understand wage statements. Explain wage statements to workers.

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## MSPA

- Always remember to disclose housing terms and conditions, including rent charges (if any).
- After housing is certified, remember to conduct "walk-throughs" throughout the season – weekly, if possible.
- Providing really good housing should not be "above and beyond" these days – it should be the norm. A well rested worker is a better worker.
- Triple-check FLC cards and housing authorization.

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## MSPA

- Transport workers in safe vehicles that have passed a proper inspection.
- Double check with your insurance company to ensure you have sufficient coverage. Having insufficient coverage is catastrophic in case of an accident.
- Use only qualified drivers – not just anyone who has a driver's license or "knows how to drive."
- Triple-check FLC cards and transportation/driving authorizations

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## H-2A

- ONLY hire registered farm labor contractors with unexpired authorizations
- A copy of the H-2A contract must be given to all H2A workers "no later than the time at which the worker applies for the visa" and for domestic workers no later than the first day of work. If using FLC, ask whether workers were properly disclosed!
- Employer has to pay for all inbound transportation costs. If worker pays up front, employer must FULLY reimburse the worker.
- There are two reimbursement requirements.....

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## H-2A

- **First workweek reimbursement:**
- Visa costs, or any other cost paid by workers, associated with the employer's process of obtaining H-2A workers. (H-2A Unlawful cost shifting and FLSA Minimum Wage)
- Any portion of transportation and subsistence costs paid by workers that bring their first workweek's wages below the federal minimum wage (FLSA Minimum Wage).

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## H-2A

- **First workweek:**
  - o This is an FLSA requirement. The worker's expenses will LIKELY bring a worker's earnings to below the federal minimum wage. You must bring that employee's pay back up to AT LEAST the federal minimum wage.
- **Example:**
  - o First workweek's wages: \$450.00
  - o First workweek's hours: 42
  - o Inbound travel expenses: \$300.00
  - o First workweek's minimum wage: 42 hours x \$7.25 = \$304.50
  - o First workweek's wages MINUS inbound travel expenses (\$450 - \$300) equals a net wage amount of \$150, which falls short of the required minimum wage earnings of \$304.50
  - o The worker is owed: (1) Their regular check of \$450, and (2) a minimum wage make-up check of \$154.50. This make-up pay constitutes a portion of the worker's inbound travel expenses
  - o Soooooooooo.....

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## H-2A

- **50% of the employment period reimbursement:**
  - o This is an H-2A requirement. The first workweek's minimum wage make-up took care of a portion of the worker's inbound travel expenses. At 50% of the contract, the worker is owed the rest.
- **Example:**
  - o Inbound travel expenses: \$300.00
  - o First workweek's minimum wage make-up: \$154.50
  - o Amount still owed to worker for FULL reimbursement of inbound transportation costs (\$300 - \$154.50 = \$145.50)
  - o At 50% of the contract (or before), the worker is owed an additional \$145.50
  - o **DO NOT "GUESSTIMATE" THESE AMOUNTS. FAILURE TO FULLY REIMBURSE WORKERS CONSTITUTES A VIOLATION.**

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## H-2A

- When you sign on the dotted line, you are certifying that ALL workers will be treated equally.
- Corresponding US workers are due the AEWR, the same working conditions, must be provided the same high-quality, no-cost housing and no-cost transportation (including inbound/outbound transportation if the US workers are coming from elsewhere to work for you), and be guaranteed  $\frac{3}{4}$  of the work hours in the contract – among all other H-2A requirements.
- Please ensure you keep an accurate recruitment log for US workers – whether worker is referred to you by the SWA or whether an "at the gate" worker.

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## H-2A

- Make and keep accurate time and payroll records. Always consider waiting time. Double check lunch break deductions. Correctly calculate hours worked regardless of number of "pieces."
- Keep an accurate record of hours offered.
- Example:
  - Hours on contract: 8 per day
  - Hours offered on a particular day: 6
  - Hours worked by worker: 6
  - Hours offered????: 6

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## H-2A

- Three-quarter guarantee is a major provision under H-2A.
- Not all hours offered count towards the  $\frac{3}{4}$  guarantee if they are not worked.
  - Hours offered and not worked on a holiday or a Sunday don't count.
  - Hours offered and not worked above and beyond than what's on the contract don't count.
- Gaps of no work are detrimental to your  $\frac{3}{4}$  guarantee. Analyze your need for workers carefully.
- There is a current trend to exaggerate the need for workers – both in numbers and in length of time.

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## H-2A

- Always ensure the AEWR is earned by ALL workers.
- At all costs, do not "back into" the AEWR by lowering the number of hours worked.
- Remember to include waiting time.

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## H-2A

- When housing workers, especially regarding the longer contracts, be mindful of living conditions – seemingly minor items like closet or drawer space can have an impact on workers.
- Long contracts turn "temporary housing" into "primary housing."
- Take the time to conduct spot checks. Don't hesitate to enter a housing camp – be respectful, but it's your housing, not the worker's.

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## H-2A

- Transportation of workers puts workers AND employers at high risk.
- Early mornings and late evenings are statistically the most accident-prone driving times.
- Insurance, insurance, insurance.
- Just as with housing, once a vehicle is inspected, conduct routine spot checks.
- Recent fatal accidents are grim reminders of the high risk of transporting workers.

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## H-2A

- Unlicensed Drivers Cause Injury and Death



**July 2016- Florida:** A converted 1979 Blue Bird school bus was traveling with 34 migrant workers when the driver ran a flashing light and crashed into a 2005 Freightliner semi. Five people were killed, dozens injured including women and children.

**June 2016- Virginia:** Six migrant workers killed including a juvenile in a van accident. The van ran off and came back onto the road. It hit a car that spun out of control. Driver unlicensed.




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## H-2A

- Some employers fail to provide outbound transportation or fail to FULLY provide funds to cover all costs of outbound transportation. DON'T GUESSTIMATE!
- Ensure that outbound transportation takes workers back to their residence, not just to the border.
- Remember that outbound transportation requirements also apply to US workers from beyond commuting distance.

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## H-2A

### And finally, a request...

- If you are a grower, please beware of labor contractors that promise to furnish a full crew of H2A workers for an extraordinarily inexpensive fee.
- Ask workers if they are in possession of their visas and passports.
- Ask workers what they know of their work at your farm. See if it matches with what you are offering.
- Ask workers if they have been reimbursed, and how much.

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## H-2A

- Cases with elements of forced labor and human trafficking are becoming more prolific in the Southeast.
- Cases will be referred to all appropriate agencies, including Dept. of Homeland Security, FBI, U.S. Attorney's Office, OIG, and State Dept.
- Consider becoming an H-2A grower.
- Consider relying on the National Employment Service for recruitment of workers.
- [mecanismo.movilidad@stps.gob.mx](mailto:mecanismo.movilidad@stps.gob.mx)

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THANK YOU

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