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Is H-2A for your farm? Already in it? Thoughts on being ready—But *not* the whole story For the South Carolina Agricultural Labor Forum

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Nobody can comply with today's employment laws by accident.

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- We can provide some overviews and highlight some hot spots today.
- What we say will not be complete. It is not legal advice.
- You are welcome to visit our law firm website for *written* materials and access to *live and archived webinars* on laws and related issues of concern to employers.
- Our website address is:
<https://www.fisherphillips.com/>

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Finding labor, employment, immigration and other materials on the FP website.

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- Written materials are generally under "Resources."
- Webinars are under "News and Events," with archived materials at the end of the list of scheduled upcoming "Events."
- You may sign up to receive these materials and other "Alerts" and newsletters electronically without being an established client of the Firm and at no charge.
- Samples include:

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Sample materials you can access on our website.

- **Subject matter booklets:**
- <https://www.fisherphillips.com/resources-booklets>
- <https://www.fisherphillips.com/assets/htmldocuments/ADA%20The%20Employment%20Aspects%202013.PDF>
- <https://www.fisherphillips.com/assets/htmldocuments/AGE%20Discrimination%20in%20Employment%20Act%202015.pdf>

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Check out upcoming and archived webinars:

- **Out With Old, In With The New**
What Employers Need to Know About the New Form I-9 3.17.17
- **Is Your Drug and Alcohol Testing Policy Compliance with OSHA's New Rule:**
Webinar 3.24.17
- OSHA Recordkeeping and Efiling--archived:
<https://www.fisherphillips.com/newsroom-events-oshas-new-recordkeeping-and-e-filing-requirements>

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H-2A program requirements are more burdensome than other Federal laws and most states' laws.

- The H-2A program permits the employment of temporary foreign workers in *temporary or seasonal* jobs that are within the definition of either the Section 3(f) of the Fair Labor Standards Act or IRS Code Section 3121(g) definitions of agriculture, pressing apples for cider on a farm and logging.
- People do comply and manage the unique benefit requirements and wages that are generally higher than the FLSA and applicable State law requirements.
- H-2A requires compliance with all applicable Federal and State laws.

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Even after South Carolina approval, Federal DOL/OFLC sometimes requires changes.

- Check out the Federal DOL I-Cert website here for Federally approved ETA – Form 790 job orders and 9142A forms with attachments such as housing and work rules:
- https://lcr-pjr.doleta.gov/index.cfm?event=ehLCJRExternal.dspCert&doc_id=3&visa_class_id=8&id=101997
- Type in “DOL/OFLC I-Cert Portal” to find it.
- Look at job orders and attachments for other farms in your locale and industry.

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Public Job Registry

ETA Case Number: [] Job Title: []
 ETA Type: [ETA] Employer Name: []
 Status: []
 State or Territory of Interest: [South Carolina] Industry: []
 Job Location within: [] of ZIP code: []


ETA Case Number	Job Title	Case Type	Status	Employer	State	Work Start Date	Work End Date	Job Title	Job Cert
ETA101997-01
ETA101997-02
ETA101997-03
ETA101997-04
ETA101997-05
ETA101997-06
ETA101997-07
ETA101997-08
ETA101997-09
ETA101997-10

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Aside from what DOL demands:


- Put what’s important to protect your interests in the ETA 790 and ETA 9142A.
 - Work rules; housing safety and sanitation.
 - Food safety and customer requirements.
 - Decide if you and others want to challenge failure of DOL to allow minimum experience, reasonable production requirements – note that 8 USC 1188 says workers must be “able, willing and qualified” and “available at the time and place needed.”
 - Exclusion of hours on a worker’s Sabbath and Federal holidays from workdays against which the ¾ guarantee is calculated.

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In particular check out: 


- The detail with which the job duties and requirements are spelled out and consider the consequences of each task within the job description in “corresponding” employment.
- The ETA 9142A “H-2A Application for Temporary Employment Certification” Section E tells you who the lawyer or agent is who is helping the farmer with the application process.
- Take the time to read all the information requirements in the Job Order (ETA 790) and the ETA 9241A with all attachments AND
- Read at least all of 20 CFR 655.122 and 655.135— preferably all of 20 CFR 655.100 -.185

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Whoever signs on behalf of your farm entity or farm client: 


- Signs agreement to the terms of employment in the documents and to compliance with applicable local, state and Federal law and regulations.
- Sign for the entity, not yourself if the entity is a corporation.
- Be alert to inadvertent joint employment issues and the muddled state of affairs— with help from the *Consolidated Citrus* case in the Eleventh Circuit.
- State law in some states is much more stringent in *some* respects than Federal law – pay cards, check cashing, agreement to deductions, even for the worker’s benefit.
- *But* there are some Federal requirements under some Federal laws that are more demanding – for example with respect to a worker’s passport and related documents.

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As you are focusing on the H-2A Program, don't forget about MSPA. 


- “MSPA” is the Federal Migrant and Seasonal Agricultural Worker Protection Act.
- You sometimes see it called “AWPA” or “MSAWPA.”
- It excludes H-2A workers from coverage (but DOL adopted MSPA in the H-2A regs as to transportation.)
- It applies to U.S. workers - a broader term than you may think - who are or who will be engaged in “agricultural employment of a seasonal or temporary nature.”

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For example, MSPA and the H-2A program treat worker comp disclosures differently. 


- The H-2A job order 790 form Item 22 just asks if workers will be covered by workers' compensation insurance.
- The MSPA regulations require disclosure, either as part of the recruiting process for "migrant" workers or upon request for "seasonal" workers of detailed information including:
 - The name of the carrier
 - The name(s) of the policy holder(s) (per W-H 516 also include the policy-holder's address)
 - The name and telephone number of the person who must be notified of an injury or death
 - The time period within which such notice must be provided
 - You can add the MSPA-required information to your job order.
 - H-2A regulations appear to assume all U.S. workers are "local" workers.

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Some particular H-2A concepts to make sure you understand. 


- Keep records of everything; back up computers; my advice is protect employee records 3-5+ years.
- Corresponding employment— U.S. workers who perform work within the job description or any work the H-2A's shouldn't but do perform must receive job order/contract and all employment benefits.
- You may not "lend" your workers to someone else unless you are part of an H-2A joint employer association.
- The H-2A regs don't tell you the whole story on transportation reimbursements —*Arriaga, Fowler Bros., Truegreen*
- Maintenance of housing remains the employer's responsibility; make sure you can and do regularly check on safety, sanitation, and general upkeep even after approval and have a means by which residents can report any problem. (Smart even if not H-2A.)

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Some other basics you may not have heard before. 


- Employers are not permitted to make side deals with individual workers not to provide them FLSA wages, MSPA rights or AEWR pay and benefits they are entitled to receive under the H-2A program.
 - There are ways to settle bona fide disputes and law suits.
- Whether H-2A or not, your workers' guests and people who want to check out a job to see if they want to become employees are most likely "employees" if they're performing any work—even "just helping out" or "mostly watching." Think FLSA, wage payment obligations, MSPA, I-9 requirements, OSHA, worker comp for starters— A virtual law school exam of issues!

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Whatever you really mean or would actually do, you want to be careful what you say. 


- Even if you wouldn't really do it, anything that sounds like a direct or implied threat for an unlawful reason or sounds like a threat that would affect someone's ability to stay in this country if somebody reports a claimed violation can create multiple problems.
- Protect the ability to take lawful actions for lawful reasons. Give your operation the rights the regs permit by putting those rights in the official 790, 9142A and attachments and avoid anything that sounds like a threat.
- On-the-job and hiring, be sure you don't give anyone a reason to think you are discriminating against him or her because of race, nationality, citizenship, etc. Consider criminal conviction issues related to the job or living environment, accommodations to permit someone to do the job, etc.
- U.S. workers must be given priority in hiring above and even in lieu of H-2A workers.
- *Mercer Canyons* – affirmative disclosure, H-2A jobs; another issue – proof, attempted contact with former workers.
- Consider a third party complaint mechanism for employees to complain about wages, harassment, virtually anything that can create a problem for the employer.

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Some more things to think about. 



- Employees may not pay any fees or kickbacks for the job. Consider limiting how many workers even trusted long-term workers may refer.
- Employers must contractually forbid foreign agents from asking for, collecting, etc. any payment from workers or prospective workers. Consider that with respect to anybody your Farm deals with in the U.S.
- Notify H-2A workers of their obligation to leave upon the end of certified employment or if they quit or are fired.
- Make sure all posters are up.

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And finally– but this is not everything: 


- Expect to be investigated for compliance.
- No matter what agent your operation engages, there will be snafus and issues nobody has seen before.
- Keep meticulous records on referrals, applicants, why people are fired or not hired.
- Be sure you can prove OSHA training—heat, equipment operation, etc. and don't forget the general duty or the "new reporting" rules.
- Timely report terminations and employees who quit, U.S. (DOL) and H-2A (DOL and DHS).

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Final Questions

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