



'Tis The Season - H-2B Temporary Worker Program Under Fire From the USDOL Wage and Hour Division

Insights

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During the holiday season, many companies supplement the year-round workforce with temporary workers, including foreign workers employed under the H-2B temporary worker program. The United States Department of Labor Wage and Hour Division (USDOL) has been ramping up its investigation and audit process for H-2B program users. If your company relies on the H-2B program to meet seasonal or peak needs, make sure that you are in compliance with all program requirements.

In order to employ H-2B temporary workers, an employer must prove to the USDOL that the H-2B job is temporary (seasonal, peak-load, intermittent need or a one-time occurrence), that no U.S. workers are available to fill the temporary positions (accomplished by conducting specific recruitment steps), and that the wages and working conditions of U.S. workers will not be adversely affected by the employment of H-2B workers.

Over the last six months, the USDOL has significantly increased the number of audit notifications issued to H-2B program users. The audit notices seek:

- earnings records for both H-2B and U.S. workers in the temporary position (including the worker's home address, number of hours worked, rate of pay, total earnings for the pay period, amount and reason for any deductions, and an explanation for any differences in wages between workers performing the same duties);
- an explanation of how you fulfilled your work obligations in the event that you did not employ the number of temporary workers the USDOL certified;
- evidence that the job opportunity was open to qualified U.S. workers and the reason(s) why you rejected any U.S. worker applicant;
- copies of agreements with foreign labor contractors or recruiters showing that you prohibit that entity from seeking or receiving payments from prospective employees (except for deductions that are allowed by law);
- a copy of the job order placed with the State Workforce Agency in the area of intended employment; and
- copies of the required advertisements placed in a newspaper or professional, trade, or ethnic publication.

Failure to provide all of the requested information could result in supervised recruitment for up to two years, revocation of a H-2B certification, and/or debarment from participation in the program for up to five years. Employers are required to retain H-2B documents for a three year period.

The USDOL also may conduct investigations into a company's use of the H-2B program (which could result from the audit process or based on a complaint). If the USDOL finds violations during an investigation, including willful misrepresentation of a material fact during the labor certification process (e.g., misrepresenting the date of need or the number of workers needed), substantial failure to comply with the terms and conditions of the program (e.g., placing workers at locations or in jobs not listed on the labor certification application or failing to notify the USDOL and the U.S. Citizenship and Immigration Services of premature departures of H-2B workers), or willful misrepresentation of a material fact during the visa application process, it could access sanctions for recovery of unpaid wages, for civil money penalties (CMPs) up to \$10,000 per violation, and/or debarment for up to five years. When determining the amount of any CMPs or recommending debarment, the USDOL takes into consideration any history of previous violations, the number of H-2B workers affected by and the seriousness of the violations, and whether U.S. workers were harmed as a result of the violations.

If your holiday season workforce (or at any other time during the year) includes H-2B temporary workers, it is critical that all program requirements are being met and that you can show good faith compliance. If the USDOL comes down the chimney this year, make sure you are on their "good" list.