

IS H-2A FOR YOU?

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H-2A Applications On The Rise

- From 2014 to 2016, California employers almost doubled their hire of H-2A workers.
 - 2014: 6,043 positions certified
 - 2016: 11,106 positions certified
 - FY 2017 Q3: 12,292 positions certified
- California now has the 5TH highest number of employers using the H-2A program
 - *1st -4th: Georgia, Florida, North Carolina, and Washington*

SO WHY USE H-2A?

- Persistent and worsening labor shortages creates uncertainty
- H-2A eliminates uncertainty
- Reduce risk of losses (e.g., crop, opportunity, etc.) due to lack of labor
- Increased productivity
- No numeric cap

H-2A Workers Provide Competitive Advantage

- Companies that use H-2A program continue to use it year after year
- FLCs who use the H-2A program charge customers for the costs associated with the program
- Some of the costs of the H-2A program are balanced by the FICA tax exemption for H-2A laborers.

Obstacles to Using the H-2A Program

- Free housing and transportation
 - *Cost*
 - *Availability*
- Need an agent or an attorney
- Erosion of At-Will Doctrine
- “Temporary or seasonal” need
- Corresponding employment
- Prone to litigation and large penalties.

Housing, Transportation and More...

- Housing must also be provided to local U.S. corresponding workers who do not live within the normal commuting distance to the worksite.
- Employers responsible for in- and out-bound transportation, transportation between housing and worksites, food costs and visa fees.

Erosion of At-Will Doctrine

- DOL imposes regulatory requirements and their policy positions into the contract:
 - *Area of intended employment.*
 - *Job Qualifications*
 - *Background/Drug/Reference Checks*
 - *50% Rule*
 - *¾ Guarantee*

Temporary or Seasonal Need for Agricultural Labor

- To qualify for the H-2A program, the employer must have a “need for agricultural services or labor to be performed on a *temporary or seasonal basis.*”
- Recent cases illustrate a DOL trend to deny H-2A permits for year-round operations.

H-2A workers may be entitled to higher wages

- H-2A users must provide elevated wages/benefits for H-2A foreign workers and U.S. workers in the same jobs.
- 2017 “adverse effect wage rate for California: **\$12.57 per hour**

H-2A Program Costs

- *Agent's Processing Fees- \$3,000 – \$10,000+
- DOL Labor Certification: \$100 - \$1,000
- DHS Petition for Non-Immigrant Visa: \$460
- Newspaper Advertisements: \$700- \$1,000
- Visa Fees: \$190 per worker
- *Visa Facilitator Fees: \$100- \$150 per worker
- Inbound/Outbound transportation & subsistence: \$400-600 per worker

Application Process

- File Job Order with Employment Development Department (EDD): 60-75 days before date of need
- File H-2A Application for Temporary Employment Certification with Employment & Training Administration (ETA) of DOL: at least 45 days before date of need
- File Petition for Non-Immigrant Visa with U.S. Customs Immigration Services (USCIS): approx. 30 days before date of need
- Schedule appointments with U.S. Consulate: approx. 2 weeks before date of need

Major Compliance Challenges

- **Corresponding employment**—U.S. workers performing any work included in job order or any work performed by H-2A workers.
 - *U.S. workers in corresponding employment are entitled to H-2A wages and benefits*
 - *Job descriptions must be carefully written to avoid bringing entire workforce into corresponding employment*

Major Compliance Challenges

- **50% Rule**—an H-2A employer must hire any qualified U.S. worker seeking to work in H-2A job up through 50% of contract period
 - *DOL now requiring employers to hire unlimited number of U.S. worker as long as 1 H-2A worker is employed, regardless of limited need*
 - *This is a departure from past requirements*

Major Compliance Challenges

- **¾ Guarantee of Wages**—employer required to guarantee work equal to at least ¾ of work days of the total period of contract
 - *Accurate recordkeeping is critical.*
 - *Earnings and payroll statements must include the hours offered to workers, separate from any hours offered over and above the guarantee*

Major Compliance Challenges

- Deductions from wages—all deductions must be listed in job order and are unauthorized if not listed
- Deductions that are primarily for the benefit of the employer are unauthorized, including:
 - *In-bound transportation, subsistence and visa-related fees*
 - *Facilitator costs (recruiters in foreign countries)*
 - *Fees paid by H-2A worker to be selected for job (also are illegal under DOL and DHS rules)*

Major Compliance Challenges

- **Abandonment of job and termination for cause**—employer must comply with DOL and DHS notice requirements within 2 days if workers abandon job (defined as failure to come to work for 5 consecutive days) or termination for cause.
- Failure to provide notice can result in having to pay $\frac{3}{4}$ guarantee and up to \$1,500 civil money penalty to each worker, resulting in astronomical potential liability.

Major Compliance Challenges

- **Farm Labor Contractors (H-2ALC)**—must meet all requirements of grower plus the following additional criteria:
 - *Copies of contracts with each employer*
 - *Names and locations of all growers to which workers are provided*
 - *A copy of all MSPA-FLC registrations*
 - *Original surety bond - amount depends on number of workers employed*

Major Compliance Challenges

- Strike and lockout provisions - Precludes use of H-2A workers if 2 or more employees declare themselves on strike or are locked out
- Entering H-2A program heightens an employer's chance of being subject to DOL Letter Audit or On-Site Audit.

Navigating the H-2A Program —Best Practices

- Don't use unless committed to mastering program technical requirements
 - *Invest in training staff*
 - *Conduct regular self-audits*
 - *Rely on association resources and experts*
 - *Mistakes in application process can result:*
 - In deficiency notices, denials and delays
 - Costly back pay and civil money penalties
 - Potential debarment from program

Navigating the H-2A Program —Best Practices

- Carefully write your job order and application—they are treated as a contract
 - *They are critical in attempting to limit “corresponding employment”*
 - *Certain terms and conditions may lead to deficiencies and denials— must be able to justify them*

Navigating the H-2A Program —Best Practices

- DOL views all employer actions as potentially discriminating vs. U.S. workers
 - *Document all employment actions taken with regard to U.S. workers, i.e., why were they not hired? Why were they terminated? Why were they treated differently?*
 - *Be aware of and comply with detailed recordkeeping requirements*

Questions?

Thank you!

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