

SUMMARY OF SELECT MAJOR ISSUES IN DOL H-2A FINAL PROGRAM RULE

Final Rule Effective November 14, 2022
for applications with start date of February 12, 2023 or later

Wages Surveys and AEW

States will now have more flexibility in conducting prevailing wage surveys. DOL declined to adopt the proposal that employers get a 14-day grace period to implement new wages. DOL also included a requirement that employers may not reduce wages during the contract, even if the AEW or prevailing wages go down below the rate originally included in the contract.

Housing

Hotels or motels used as H-2A housing now must meet certain federal OSHA temporary labor camp standards (attached) where state or local standards do not address the issue - for example, minimum square footage per person. DOL declined to implement the provision that would have allowed employers to self-certify housing for up to 24 months.

*If you use motels to house H-2A workers, make sure you review the federal OSHA standards and are familiar with whether local standards address those issues and your SWA's inspection procedures.

Transportation

DOL declined to adopt the proposal that employers would pay workers' inbound and outbound travel only from the U.S. consulate. Instead DOL is keeping the current requirement that employers must reimburse or provide travel from the workers' homes. DOL is also requiring that employers include in the ETA 790 the types of vehicles and method of transportation being utilized for inbound/outbound travel and for transportation between housing and worksite.

Farm Labor Contractors

H-2A FLC bond amounts have increased significantly based on the average national AEW and the number of workers employed. DOL is maintaining their longstanding position that non-FLC employers who are found by DOL to be joint employers with their FLC can be held liable for the FLC's violations. DOL will permit FLCs to submit their surety bonds to DOL electronically rather than by hard copy.

Joint Employment

DOL has codified the ability of employers to jointly file H-2A applications without utilizing an association. DOL has also changed their position and will now consider all employers who jointly file an application to be "joint employers" for purposes of liability. The joint employment includes H-2A, as well as U.S. workers in corresponding employment. Additionally, DOL has changed its position and now says that Associations will be held jointly liable for its members' violations when filing a Master Application.

*Be certain that you are knowledgeable about the employment practices of any employer that you are joining on an H-2A joint contract, or any FLC you utilize, as you may be held liable for their violations.

Abandonment Reporting

DOL will now require employers to submit an abandonment report for any U.S. worker who is not eligible for rehire, and therefore will not have to be contacted as part of the recruitment efforts with the next year's H-2A application.

Full text of the rule available at <https://www.federalregister.gov/documents/2022/10/12/2022-20506/temporary-agricultural-employment-of-h-2a-nonimmigrants-in-the-united-states>