



Are You Ready For A DOL H-2B Audit?

During the dreaded DOL Audit, which you will eventually encounter, the DOL will request earnings records and recruitment information from a prior season. Because it can be considerably overwhelming to gather the required documents for prior years, it is imperative that your payroll and earnings records comply with DOL regulations and contain all required information.

I. Wage Requirements under H-2B

The H-2B regulations require that you employ workers on a **full-time basis**, which the Department of Labor defines as at least **35 hours** per week. You are required to pay all workers the prevailing wage rate listed on the application for all hours up to 40 hours per week. Under the Fair Labor Standards Act, for any hours over and above 40 per week, you must pay workers the overtime rate of time and ½.

“Corresponding Workers”: Please note that DOL will expect you to pay ALL workers in the same or similar position (“corresponding workers”) the same hourly rate of pay as your H-2B workers unless you can offer a legally valid reason for a difference in payrate for workers performing the same duties. This issue has come up in recent DOL H-2B Audits. You would need to be able to justify any differences in wage rates among similar employees.

An employer employing H-2B workers and/or workers in corresponding employment under a certified Application for Temporary Employment Certification (Application) must agree as part of the Application to comply with the following conditions.

What workers are considered “corresponding workers”?

Corresponding workers are defined as non-H-2B workers employed by an employer that has a certified Application who perform either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, with the exception described below. To qualify for corresponding employment, the work must be performed during the period of the job order, including any extension approved by the Department.

What exceptions are there to corresponding employment?

The following category of workers is not included in the definition of corresponding employment.

1. Incumbent employees:

- a. who have been continuously employed by the H-2B employer performing the work described above during the 52 weeks prior to the date of need in the job order;
- b. who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks, as demonstrated by the employer's payroll records (except that the employer may take credit for hours that were reduced by the employee voluntarily choosing not to work due to personal reasons like illness or vacation); and
- c. whose terms and working conditions of employment have not been substantially reduced by the employer during the period of the job order.

II. Can an H-2B employer pay its employees using methods other than an hourly rate?

Yes, an employer may use commissions, bonuses, or other incentives. However, in any workweek where the employee does not earn the equivalent of the prevailing wage, the employer must supplement the employee's pay so it equals what he or she would have earned had the pay been computed based on the offered hourly wage. **This should be done per pay period, not at the end of the season.**

III. Deductions from Worker's Pay

What deductions are permitted?

The employer must make all deductions from the worker's paycheck required by law. The job order/H-2 application must specify all deductions not required by law which the employer will make from the worker's pay. Deductions not disclosed are prohibited.

Authorized deductions are limited to:

- Deductions which the employer is required to withhold by law or court order;
- Deductions for the reasonable cost of board, lodging, and facilities furnished to the employee; and
- Deductions where the employee previously and voluntarily authorized payment to a third party, which may include union dues paid in accordance with a collective bargaining agreement. Such deductions may not be made if the employer, agent, or recruiter (or any affiliated person) derives any payment, rebate, commission, profit, or benefit, either directly or indirectly.

The principles applied in determining whether deductions are reasonable and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR Part 531.

What deductions are prohibited?

The job order/H-2 application must specify all deductions NOT required by law which the employer will make from the worker's pay. Deductions not disclosed are prohibited. An employer will not meet the wage payment requirements when unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the required amount or where the worker fails to receive such amount free and clear because the worker "kicks back" directly or indirectly to the employer (or to another person for the employer's benefit) all or part of the wages. The principles applied in determining whether payments are received free and clear are explained in more detail in 29 CFR Part 531.

IV. Tax Withholding Issues

According to IRS regulations, you are required to pay all regular local, state and federal payroll taxes, including Social Security and unemployment (FICA, FUTA and SUTA). You are also responsible for assisting your workers in obtaining Social Security cards upon their arrival.

V. Payroll/Earning Records Information Requirements

Under the U.S. Department of Labor H-2B regulations, you are required to provide ALL workers, even if not on the H-2B visa program, with weekly pay statements/earnings records that include the following information – this is the usual information found on an employee's paystub, but includes more detailed information:

- Employer name, address, and phone number
- Employee name and foreign address
- Dates covered by payment
- Basis of payment (hourly, salary, etc)
- Rates paid (regular and overtime)
- Hours worked (regular and overtime)
- Allowances or credits (meals, uniforms, etc)
- Gross Wages
- Any deductions from wages
- Net wages

Please be sure you keep copies of all pay statements in the event of an Audit by DOL.

VI. Record Keeping

The employer must retain, for a period of three (3) years, the H-2B recruitment report, resumes (if any), advertising, and evidence of contact with applicants.

VII. What information does DOL request in an Audit?

The typical audit will request the following information:

1. Earnings Records for each temporary worker (both H-2B and domestic) employed in the H-2 position for the following periods:
 - First 30 days that work was performed under the contract
 - Midway through season
 - Last 30 days that work was performed under the contract

Records must clearly distinguish between H-2B and Domestic Workers AND include the following information:

- Beginning and end date of employment for each temporary workers;
 - Worker's name and home address (foreign address)
 - Number of hours worked by worker per week
 - Rate of pay
 - Total earnings per week
 - Amount and reason for any deductions
 - If applicable, an explanation for any differences in wages between workers performing the SAME duties
 - If applicable, explanation for any differences in wages between what was advertised in the newspaper ads and what was actually paid to workers
2. An employer is expected to employ the number of workers indicated in the application certified by DOL. If the employer did not employ the number of temporary workers for which it was certified and/or those workers that were employed did not perform the services or labor for the entire period of certified employment, the employer must provide an explanation, with supporting documents, demonstrating how it fulfilled its work obligations in light of these shortages.

For this reason, it is important to notify the Department of Labor and USCIS of any worker departures prior to the end of the season as follows:

You must report the termination or departure of any H-2B workers for cause and abandonment to both the USCIS and USDOL in writing within 2 business days of the termination, or discovering abandonment. Emails are to be sent to the USDOL at H2B.Abandonment&Termination.chicago@dol.gov, or by facsimile to (312) 886-1688, Attention H-2A Abandonment and Termination.

You may notify USCIS by email at VSC.H2BABS@dhs.gov. You should include the following information with your notification:

- Reason for notification (absconder, termination, early completion, etc)

- USCIS receipt/case number
 - Petitioner name, address, phone number and FEIN
 - H-2B worker name, date of birth, place of birth, last known address
3. Evidence of Recruitment and Results (Attorney will have this information)
 - Resumes
 - Recruitment Report
 - Advertising
 4. Signed statement confirming that no foreign labor contractor/recruiter was used (Attorney can provide)
 5. Copy of Job Order placed with the State Dept. of Labor (Attorney will provide)