

H-2A ACCOUNTING, TAXES AND BENEFITS

JUST SCRATCHING THE SURFACE



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Topics of Discussion – H-2A Basics

- Accounting
- H-2A Employee/IRS Tax Status
- Employer and Taxes
- H-2A Worker Tax Responsibility
- Affordable Care Act and H-2A
 - Be aware statement of retirement benefits
- Summary/Good Practices
- H-2A Economics & Spreadsheet, ONLY IF TIME ALLOWS

Note

- Information found in this presentation should be consider general information for educational purposes and to raise your awareness.
- This is not professional legal, or tax advise. Please use a trusted tax and legal professional that is familiar with your specific situation.
- Seek out professionals that are 1) familiar with agriculture, 2) familiar with ag labor, and 3) familiar with non-resident legal alien (H-2A) tax law (this might be the most difficult individual to find).

Intro

- Knowledge of taxes and responsibilities.
 - You do not need to be an expert in taxes but know enough to ask the right questions and provide guidance of where and to seek counsel.
 - Tax structure in many Latin American countries are very different than in the U.S.
 - Most workers (especially those that are new to the system) have no understanding of U.S. taxes and their responsibility.
 - They may have been told “something” at the U.S. Consulate which then may be misinterpreted.

H-2A TAX

Paychecks and Paystubs

- H-2A workers must be paid at a minimum twice a month.
- Paycheck Paystub must contain a minimum of:
 - Pay Rate(s)
 - If piece rate is used, then you should have all the details of the piece rate received.
 - Recommendation: you should also show the comparison between piece rate vs. what the rate would have been on hourly alone. This will also act to make sure they are earning at least the minimum required.
 - Hours Worked
 - Deductions (best if there are multiple deductions, to list each one separately)
 - Earnings

Misc.

- All equipment and needed personal protective equipment (PPE) must be supplied at no cost to the worker.
- You cannot charge the H-2A worker for:
 - Costs obtaining the H-2A certification
 - Attorney, agent or recruitment fees/costs.
 - Housing
 - In-country transportation
- There are very specific rules as it relates to food and reimbursement of travel into and back to the U.S.

Guest Worker Basics

- H-2 workers are NOT contractors and should not receive a 1099!
- H-2 workers are W-2 wage earners.
 - They should fill out all the necessary employment and tax documentation just like any other employee.
- Payroll
 - Specifics on payroll statements
 - May require additional accounting/payroll software or additional compliance by a payroll company
- Required to pay workman's comp., even if state exemption (allowed in specific states only for farms not using H-2 program) was previously allowed.
- Still may need to meet Family Medical Leave Act (FMLA), Fair Labor Standards Act (FLSA)

Do H2A Employees have to File Taxes

- MAYBE!
- General rule is yes.
 - Must file income taxes, dependent on specific criteria i.e. Tax Treaty, amount of income received while in the U.S etc.
- H2A workers do not pay into Social Security, Medicare/Medicaid, etc.
- H2A workers have the same requirements to follow all tax laws as it relates to income taxes at the federal, state, and local municipal level.
 - If no taxes are being withheld, they may be required to pay quarterly estimates.

Guest Worker Basics - Taxes

- Employer
 - Not allowed to withhold any income tax unless requested by H-2A employee, and the employer agrees to the request.
 - Have a form already developed for an H-2 worker to fill out to make the request.
- H-2A Employee
 - If taxes are not being withheld, then employee may be required to pay quarterly estimates.
 - Employees are responsible to pay all federal, state and local municipal income taxes.
 - Must file income taxes, dependent on specific criteria i.e. Tax Treaty, meet minimum income level, etc.

Associated Tax Savings & Issues

- Employer
 - **Not allowed** to withhold any tax **unless requested** by H-2A employee.
 - Employer is still is not required to withhold even if requested
 - Do not need to pay employer portion of Social Security, Medicare, State Unemployment, FUTA
- I would consider it good HR protocol to withhold if requested to do so by the worker.
 - Part of onboarding process, explain to the H-2A workers the tax laws and their requirements as well as yours.
 - Have a formal written request form that can be filled out by the H-2A worker to request withholding.
 - Require a witness signature that is not associated with farm owners/management/supervisor, etc.

Challenges

- It is very difficult to find a tax practitioner that is knowledgeable and proficient in filing taxes for H2 workers.
 - Which forms need to be filed is based on equations and time spent in country over the past few years
 - There are many caveats when you get deep into taxes with regards to dependents, spouse, other income, spouse income, etc.
- Many tax professionals may unintentionally do more harm than good or may be downright unscrupulous (KNOW WHO YOU ARE DEALING WITH!).
- You may want to do some leg work to find some options if asked. Make sure you do not personally recommend anyone might maybe simply provide a list with a specific statement that you can not vouch for anyone listed as you do not want to be held accountable. This becomes very tricky.

Yes it still exists!

AFFORDABLE CARE ACT

General Benefits Statement

- If you offer certain benefits such as retirement, healthcare, etc. to your non-guest workers, you may need to include the H-2A in the offer as well.
 - This depends on the type of plan being offered.
 - How the H-2A worker is classified, i.e. seasonal, non-seasonal, etc.
- You should have a formal employee handbook developed with the assistance of a labor attorney that lays out expectations, consequences, benefits based on classification, etc.
 - If it is in the handbook, you **MUST** follow through or you will be open legal challenges.
- Also institute a formal review/annual eval of each worker and some form of exit interview process, even if it is a form that is filled out.

Guest Worker Basics - Healthcare

- Employer
 - If employer is designated as an Applicable Large Employer (ALE) then they are required to offer Healthcare to all Full-Time non-seasonal employees.
 - Must meet all ACA compliance criteria for:
 - Employee classification
 - Healthcare requirements, offers, etc.
 - OR pay an Employer Shared Responsibility Payment if requirements are not met.
 - **Remember to consider amount of time individual will be here in country working for you.
- Employee
 - Required by the ACA to have healthcare while in this country legally or face possible Individual Shared Responsibility Payment (ISR) unless exemptions are met.
 - 2019 and beyond, the ISR goes to \$0 under the Tax Cuts and Jobs Act (2017).

Basic ACA Rules

- Individuals in the country legally must maintain health insurance coverage or pay an Individual Shared Responsibility Payment (ISR) unless otherwise Exempt
 - The New Tax Bill
 - Brings the Individual Shared Responsibility (ISR) Payment to \$0 beginning for the 2019 Tax Year.
 - There is still an ISR for the 2018 tax year
- Applicable Large Employers (ALE) must offer health insurance coverage to eligible full-time (non-seasonal) employees or pay an Employer Shared Responsibility (ESR) Payment
 - **ALE's are presently receiving letters from the IRS about penalties from 2015 and 2016

ACA Top Definitions

Full-Time Employee

30 or more hours of service (includes personal days)

Full-Time Equivalent (FTE)

All of the p/t employee hrs. that equate to full-time workers (2 part-time employees working 15hrs. a week = 1 FTE)

Seasonal Worker

Works approx. 6 months or less, (Good Faith is applied)

ACA Top Definitions

- **Employer Shared Responsibility (ESR)**
 - The ACA provision that requires employers with 50 FTE's to provide health insurance to their full-time employees or pay a penalty.
- **Individual Shared Responsibility (ISR) Provision**
 - The ACA provision that requires all individuals to have health insurance for themselves and dependent children beginning January 1, 2014

General Rules of the ACA

- ACA applies to all employers
 - Private, non-profit, and government employers.
- Agricultural employers are included in all ACA provisions.
- No exemptions in ACA for agricultural employers (seasonal worker provisions apply to all employers).

What is an employer's average monthly number of employees?

- Employer Shared Responsibility Provision:
 - Employers employing **less than 50** full time **or** full-time equivalent employees **are not required** to offer health insurance to their **full time employees**.
 - Employers employing a total of **at least** 50 full-time **or** full-time equivalent employees **must either:**
 - (a) Offer **"affordable health coverage that provides a minimum level of coverage"** to **full-time employees** or
 - (b) Pay an Employer Shared Responsibility (ESR) payment.

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	
<u>Row 1</u> Number of <u>full-time employees</u> employed during the month: ^(a)													
<u>Row 2</u> Number of <u>hours</u> of service by all <u>non-full-time employees</u> employed during the month: ^(b)													
<u>Row 3</u> Row 2/120 equals the number of <u>full-time equivalents</u> employed during the month:													
<u>Row 4</u> Row 1 + Row 3 equals the number of employees employed during the month:													
							Sum of JAN to DEC Across Row 4 = ANNUAL TOTAL:						
							Annual Total/12 = NUMBER OF EMPLOYEES:						(c)

What is an employer's average monthly number of employees?

Definitions for counting employees:

Full-time employees

Full-time equivalent (FTE) employees

Independent contractors/leased employees

Seasonal employees

What is an employer's average monthly number of employees?

Definitions for counting employees:

- Full-time employees
 - 30 hours of service or more per week
- Full-time equivalent (FTE) employees
 - The total hours of service by all non-full-time employees (under 30 hours/ week) during the month (4-week) divided by 120 to equal the number of full-time equivalent employees.
 - 2 part time employees each work 15 hours/week = 30 hour total divided by 30 = 1 FTE

Who are full-time employees?

- An employee is counted as a full-time employee if he/she provides 30 or more hours of service per week on average.
 - For Hourly Employees: Count Actual Hours Worked!
 - For Non-Hourly Employees: Count
 - Actual Hours OR
 - Days Worked at 8 hours per day OR
 - Weeks Worked at 30 hours per week OR
 - 130 hours per month

Who are non-full-time employees?

- An employee is counted as a non-full-time employee if he/she provides less than 30 hours of service per week on average.
- Employer must count all the hours worked by each non-full-time employees and total across all non-full-time employees.
- The total is then divided by 30 (hours) and the number that is derived is the Full-Time Equivalent for that week.

Rehire & Break-in-Service Rules

- Break-in-Service
 - If an employee has a break in service and does not provide any service to the previous employer for at least 13 weeks then upon rehire they may be considered a newly hired employee vs. a continuing employee (exceptions for those in education/teachers).
- Rule of Parity
 - If an employee was employed for 4-weeks (or less) and no hours of service were credited to that employee for at least 4-weeks or more then the returning employee can be treated as a new hire.

Determining Employer's Number of Employees

1. Determine monthly number of full-time employees.
 - Employees working 30 or more hours per week.
2. Determine monthly number of FTE employees.
 - Employees working less than 30 hours per week.
3. Add total full-time and FTE employees for each month and calculate monthly average.
 - If you have less than 50 employees (even at 49.9), you are not required to offer health insurance to any employees.
 - If you have 50 or more employees, you are required to offer health insurance to full-time employees.

SEASONAL WORKERS

Seasonal Worker vs. Seasonal Employee

- **Seasonal Worker**
 - Relevant for determining whether an employer is an applicable large employer subject to the Employer Shared Responsibility provisions.
- **Seasonal Employee**
 - Relevant for determining an employee's status as a full-time employee under the look-back measurement method.
 - A seasonal employee means an employee who is hired into a position for which the customary annual employment is six months or less and for which the period of employment begins each calendar year in approximately the same part of the year, such as summer or winter.

What is an employer's average monthly number of employees?

Definitions

- Seasonal Employees
- ACA: Employee that is not employed more than 6-months (Good Faith should be followed)
 - Employee performs labor/services on a seasonal basis, defined by Dept. of Labor under 29 CFR 500.2(s)(1)
 - Labor performed...is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year.
 - A worker who moves from one seasonal activity to another while... performing agricultural labor, is employed on a season basis even though he may continue to be employed during a major portion of the year.

Seasonal Employee and the Look-Back

- Look-Back Measurement Method for determining employee full-time status
 - An employer may determine an employee's status as a full-time employee during a period (referred to as the stability period), based upon the hours of service of the employee in a prior period (referred to as the measurement period).
 - The Look-back period may be no shorter than 3 months or longer than 12 months
 - The look-back measurement method includes special rules that apply to new employees who are seasonal employees.
 - A seasonal employee means an employee who is hired into a position for which the customary annual employment is six months or less and for which the period of employment begins each calendar year in approximately the same part of the year, such as summer or winter.
 - Note that the look-back measurement method is not available for purposes of determining whether the employer is an applicable large employer.

What is an employer's average monthly number of employees?

- Look Back Period and Seasonal Workers
 - **Seasonal Employees** can be treated as **Variable Hour** employees to determine if they are full-time employee(s) and/or eligible for healthcare coverage.
 - As long as the seasonal employee leaves and does not provide work or receive benefits for at least 13-weeks they can then be treated as a new hire and can be required to go through the 12-month look back again.
 - Health Insurance does not need to be offered for those employees going through the initial 12-month look-back period.

What is an employer's average monthly number of employees?

Definitions

- Seasonal workers are exempt under ACA only **if**
 - Employer's workforce is 50 or more full-time employees for 120 days or fewer during a calendar year **AND**
 - The Employees that are at the 50 or more were employed during that period of no more than 120 days were seasonal workers.
 - FOR THIS PURPOSE ONLY, 120 DAYS CAN BE THE EQUIVALENT OF 4 MONTHS.
 - **IF** all the above is met then the seasonal workers **are not** included in the employers' number of employees`

Determining Employer's Number of Employees: Case: Seasonal Workers.

John Doe operates Greenacre Farms/Resort with the following employees:

Two paid employees work 40 hours/week

Six paid employees 15 hours/ week

450 paid seasonal employees each of whom works 40 hours/week for 120 days/4 months of the year

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COOPERATIVE EXTENSION

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
Row 1 Number of <u>full-time employees</u> employed during the month: ^(a)	2	2	2	2	2	2	2	2	2	2	2	2
Row 2 Number of <u>hours</u> of service by <u>all non-full-time employees</u> employed during the month: ^(b)	<u>Continual</u> 360	360	360	360	360	360	360	360	360	360	360	360
	<u>Seasonal</u> 0	0	0	0	0	0	72,000	72,000	72,000	72,000	0	0
Row 3 Row 2/120 equals the number of <u>full-time equivalents</u> employed during the month:	<u>Continual</u> 3	3	3	3	3	3	3	3	3	3	3	3
	<u>Seasonal</u> 0	0	0	0	0	0	600	600	600	600	0	0
Row 4 Row 1 + Row 3 equals the number of employees employed during the month:	5	5	5	5	5	5	605	605	605	605	5	5
								Sum of JAN to DEC Across Row 4 =				
								ANNUAL TOTAL:				2460
								Annual Total/12 =				205
								NUMBER OF EMPLOYEES:				
SEASONAL EXEMPTION:	(1) Did employer's workforce exceed 50 full-time employees <u>for 120 days (or four calendar months)</u> or less? (2) Were <u>employees in excess of 50</u> employed during that period as <u>seasonal employees</u> ?										If Yes to BOTH, then N = 5	

QUESTIONS?

Key Question 2: What are an employer's options for providing health insurance under ACA?

Employer Shared Responsibility Provision:

Employers employing **less than 50** full time **or** full-time equivalent employees **are not required** to offer health insurance to their **full time employees**.

Employers employing a total of **at least** 50 full-time **or** full-time equivalent employees **must either**:

- (a) Offer **"affordable health coverage that provides a minimum level of coverage"** to **full-time employees** or
- (b) Pay an Employer Shared Responsibility (ESR) payment

What are an employer's options for providing health insurance under ACA?

- ESR Provision Option (b) Definitions
 - Two forms of ESR payment penalties.
 1. Failure to offer health insurance coverage when required for 95%* or more of the full-time employees **OR**
 2. Failure to offer "affordable health coverage that provides a minimum level of coverage" to full-time employees.
 - Employer required to offer health insurance coverage for child dependents but are not required to share cost.
 - Penalties are triggered when an eligible employee registers and receives either a subsidy or tax credit.

What are an employer's options for providing health insurance under ACA?

- ESR Provision Option (b) Definitions
 - Two forms of ESR payment penalties.
 - Failure to offer health insurance coverage when required for 95%* or more of the full-time employees
 - Employer incurs penalty of \$2,750/year (estimated for 2022) for each employee
 - (the first 30 employees are excluded from payment penalty)*
 - Monthly ESR Payment = Number of fulltime employees (- 30) * (1/12 of \$2,750)
 - \$2,750 payment may increase based growth in cost of insurance premiums

What are an employer's options for providing health insurance under ACA?

- ESR Provision Option (b) Definitions

- Two forms of ESR payment penalties.
 - 2. Failure to offer “affordable health coverage that provides a minimum level of coverage” to full-time employees.
 - Employer incurs penalty of \$4,120/year (estimated for 2022) for each employee
 - Monthly ESR Payment = Number of employees certified as having received an applicable premium tax credit or cost sharing reduction for purchased insurance on the exchange
* (1/12 of \$4,120)
 - Penalty capped at the maximum of the Option (b)(1) (prior slide)
 - The cost of the payment(s) to increase each year-based growth in cost of insurance premiums

What are an employer's options for providing health insurance under ACA?

- Who must an employer cover if a monthly average of 50 FTE's is maintained?
 - Only required to offer to full-time employees (30 hrs./week avg.)
 - Must offer to the employee, cannot cost the employee more than 9.61% of their household income (box 1 – W-2)
 - Must make it available for the employee to purchase health coverage for their dependent children (up to age 26)*
 - The employer does not have to pay anything towards the premium for dependent children.
 - The employer does not have to offer any option of healthcare coverage for a spouse of an employee.

What are an employer's options for providing health insurance under ACA?

- If an employer offers health insurance coverage to full time employees, must the employer offer it to a new employee on the first day of work?
 - A maximum of a 90-day waiting period is allowed before having to provide health care coverage for large employers (ALE, 50 FTE's or more).

What are an employer's options for providing health insurance under ACA?

- If an employee is reasonably expected to work full-time and the employee is expected to be an on-going employee, the employer will not face an ACA penalty if the new worker is covered within 90 days of their start date.*
- The employee is permitted to obtain insurance on the Health Marketplace during the 3-month period.
- See: <http://www.fas.org/sgp/crs/misc/R41159.pdf>

What are an employer's options for providing health insurance under ACA?

- Nondiscrimination Rules
 - New regulation was supposed to take place 6 months following the signing of the ACA.
 - Employer cannot discriminate between employee class and the level of health care coverage offered or cost to the employee.
 - All group plans cannot favor the highly compensated/paid.
 - Tests both the eligibility and benefits that are provided.
 - Shareholder plans/benefits are vulnerable to this rule.
 - Penalty, possibly \$100/day per employee.

QUESTIONS?

Closing Thoughts

- All employers:
 - Decisions about labor usage should be based on the total labor management picture, not just health care.
 - If you cut hours to part time, can you really find additional employees?
 - If you eliminate health care for employees, will your competitors in the labor market do so?
 - Are you ready for an end to “job lock”?
- Your existing insurance agent should be able to help you work through your options. And above all...
- **STAY CALM!**

**H-2A ECONOMICS: ONLY IF TIME
WAS AVAILABLE**

Possible Contractor or Internal Processing

- Costs will vary dependent on what is being provided
 - Typically prepare for anywhere from an additional 10%-60% cash cost than a non-H2 worker
 - Dependent on time you have the worker employed it can become closer to similar cost to a non-H2 worker
- Some may find a savings through:
 - Less issues with turnover
 - Productivity
 - Higher harvest yield (and or grade), pack-out, etc.
 - Grade Specific harvesting
 - Efficiency of H2 workers allowing a reduction in total FTE's required
- The savings MAY actually (in real cash) not only pay for the initial difference but can create a greater return/revenue

Example, Let's go to the Spreadsheet

Summary

- **Best Management Practices**
 - Make sure your payroll system can meet the minimum requirements set for payroll stubs.
 - As part of the on-boarding process, explain to the workers their responsibility for taxes and the difference between income taxes and Social Security, Medicare (FICA), etc.
 - Have a pre-developed form for those wishing to request withholding.
- **ACA**
 - H2 employee may still need to have an offer of Healthcare coverage.
 - The employer may be responsible to offer healthcare coverage if an ALE or pay a penalty BUT run through the process to see for sure.
- **H2 Economics**
 - Know your numbers and don't shortchange yourself and the potential return for your dollar.
- **ALWAYS** work with **TRUSTED** advisors that specialize in the areas of need, not just those that say, "Yea I think I can do that."

Contact Information

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(Leave Voicemail or Text, make sure I know who you are,
where from, and what the call is about)

