

H-2A Housing and Transportation

DEASON LAW

Rebecca Hause-Schultz
Of Counsel, Fisher Phillips LLP
rhause-schultz@fisherphillips.com
916.210-0391

Dax Deason
Principal of Deason Law PC
ddeason@deason-law.com
713.471.6082

January 20, 2022



Extra Rules for H-2A

- Housing Costs
- Meals/Kitchens
- Inbound/outbound transportation
- 3/4 Guarantee
- Failure to pay required rate of pay
- Unlawful deductions
- Frequency of payment requirements
- Unlawful cost shifting

Potential H-2A Violations Checklist		U.S. Department of Labor Wage and Hour Division		
Name and address of person investigated				
<p>A review of your business operations relating to the requirements applicable to the employment of H-2A and other workers under the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act, disclosed the potential violations shown on this preliminary report. The investigation report of the Wage and Hour Investigator(s) will be reviewed to establish whether there were H-2A violations and what, if any, further action will be taken by the Wage and Hour Division.</p> <p>If it is subsequently determined that civil money penalties are to be assessed against you for any or all of the H-2A violations disclosed, you will be advised by letter concerning specific violations involved and the civil money penalty amounts to be assessed.</p>				
U.S. Worker Protections				
<input type="checkbox"/>	01 H-2A workers given preferential treatment		20 CFR 655.122(a)	
<input type="checkbox"/>	02 Unlawful rejection of U.S. workers		20 CFR 655.135(d)	
<input type="checkbox"/>	35 Failed to contact prior U.S. worker(s)		20 CFR 655.163	
<input type="checkbox"/>	36 Position vacant due to strike, layoff, etc.		20 CFR 655.135(g)	
<input type="checkbox"/>	38 Failed to accept SWA referrals		20 CFR 655.135(c)	
<input type="checkbox"/>	39 Failed to satisfy requirements of the job order by not stating actual terms and conditions		20 CFR 655.121(a)(3)	
Disclosure				
<input type="checkbox"/>	26 Failed to provide copy of work contract		20 CFR 655.122(q)	
<input type="checkbox"/>	51 Failed to post H-2A poster		20 CFR 655.135(f)	
Wage-Related Violations				
<input type="checkbox"/>	06 Failed to provide housing at no cost		20 CFR 655.122(d)(1)	
<input type="checkbox"/>	09 Unlawful charges for public housing		20 CFR 655.122(d)(4)	
<input type="checkbox"/>	10 Unlawful deposits - bedding/other items		20 CFR 655.122(d)(3)	
<input type="checkbox"/>	13 FTC - Employer provided items requirements		20 CFR 655.122(f)	
<input type="checkbox"/>	14 Failed to provide meals or kitchen facilities		20 CFR 655.122(g)	
<input type="checkbox"/>	15 FTC - Inbound transportation requirements		20 CFR 655.122(h)(1)	
<input type="checkbox"/>	18 FTC - Outbound transportation requirements		20 CFR 655.122(h)(2)	
<input type="checkbox"/>	19 FTC - 3/4 guarantee		20 CFR 655.122(i)	
<input type="checkbox"/>	27 Failed to pay required rate(s) of pay		20 CFR 655.122(l)	
<input type="checkbox"/>	28 Unlawful deductions		20 CFR 655.122(p)	
<input type="checkbox"/>	29 FTC - frequency of pay requirement(s)		20 CFR 655.122(m)	
<input type="checkbox"/>	41 Unlawful cost-shifting		20 CFR 655.135(j)	
Recordkeeping				
<input type="checkbox"/>	20 Failed to record why HW-hours offered		20 CFR 655.122(j)(3)	
<input type="checkbox"/>	22 FTC - earnings records requirements (up to 8 reqs.)		20 CFR 655.122(j)(1)	
<input type="checkbox"/>	23 Failed to make required records available		20 CFR 655.122(j)(2)	
Date:		Case ID:		(FTC- Failure to Comply)

Housing Costs

- Employers must provide housing/utilities at no cost to H-2A workers *and to U.S. workers in corresponding employment who are not able to reasonably return to their residence within the same day.*



Housing Costs

Best Practices:

- **Ask** your domestic workforce where they are commuting from. Document that answer and focus on whether commute is within a “reasonable commute distance.”
- Look at the Metropolitan Statistical Area (MSA) per the DOL to determine “reasonable commute distance.”

Types of H-2A Housing

- Employer-provided housing. Must meet the full set of DOL OSHA standards set forth at 29 CFR 1910.142, or the standards at §§654.404 through 654.417 (housing built before April 3, 1980).
- Rental and/or public accommodations. Must meet local or state standards.
- Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing.

Housing Costs-Meals

- Housing facilities must also include full kitchen capabilities for cooking or the employer must provide employees with three meals per day through the services of a food vendor.
- Employers may currently charge \$13.17 per day for the cost of meals or petition the DOL for a higher rate.
- Any deductions, especially deductions for meals, must be disclosed and written into the H-2A contract.

MSPA Federal Licensing-Housing

- H-2A employers must continuously ensure that all housing complies with the applicable local, state and federal laws.
- FLCs must ensure they have a license that authorizes housing from the Department of Labor.
- Housing must be inspected and permitted by the appropriate authorities.

MSPA Federal Licensing-Vehicles

- H-2A employers must continuously ensure that all transportation complies with the applicable local, state and federal laws.
- FLCs must ensure they have a license that authorizes transportation from the Department of Labor.
- Vehicles must be inspected and added to FLC license.
- FLCc must ensure they obtain sufficient drivers with FLCE licenses to transport the number of H-2A workers sponsored.

MSPA Federal Licensing

Best Practices:

- Where a timely application for FLC or FLCE renewal has been filed, the authority to operate pursuant to a valid certificate shall continue until the renewal application has been finally determined by the Secretary of Labor.
- Timely means more than 30 days, but it is recommended that H-2A companies files many months ahead of their license expirations.

Transportation—Inbound Expenses

- An employer must reimburse workers for all reasonable costs incurred for inbound transportation and subsistence costs once the worker completes 50% of the contract period. From the place of recruitment.

BUT...

- The FLSA prohibits an employer from requiring employees to incur costs for the benefit of the employer if such costs take the employee's wages below the FLSA minimum wage.

Inbound Expenses-Best Practices

- Although H-2A regulation cite to the reimbursement obligation occurring at the 50 % mark of the season, the 9th Circuit had held that the reimbursements should generally be made during the first workweek to avoid wage and hour violations concerning the minimum wage laws.
- See *Rivera v. Peri& sons Farms., Inc*, 735 F.3d 892, 2013 U.S. app. LEXIS 22891, 167Lab. Cas. (CCH) p36 179, 21Wage & Hour Cas.2d (BNA) 894, 2013 WL 5992255.

Inbound Expenses (Continued.)

Best Practices:

- **Document.** Where was the employee recruited from? Add to new hire paperwork or application.
- **Document again.** How did the employee travel? If the Company chartered a bus, does the Company have a receipt from the charter Company? Do we have a list of which employees were on the bus?
- **Document one more time.** Meals—Employees are entitled to subsistence when traveling. How many days did they travel/wait at the consulate? Were they reimbursed? Did the Company provide meals? Do we have receipts?
- **If Reimbursing:** reimburse during the first workweek.

Outbound Expenses

- Upon completion of the work contract, the employer must either **provide** or **pay** for the worker's return transportation and daily subsistence.



Outbound Expenses (Continued.)

Best Practices:

- **Document.** How is the Company providing transportation back to the place of recruitment?
- **Hypothetical.** My employee wants to fly but I chartered a bus and paid employees for subsistence during travel. Do I have to pay employee any return costs? [Just the subsistence. **Document** there was a seat on the bus for this employee and they declined it.]

Reimbursement

- Travel to the United States and BACK.
- Subsistence when traveling to and FROM the place of employment.
 - If the worker either completes the work contract period or is terminated without cause, and the worker has no immediate subsequent H-2A employment, the employer must provide (or pay at the time of departure) workers for subsistence expenses incurred traveling from the place of employment back to the place the worker came from to work for the employer.

Minimum: \$13.17 per day (1)

Maximum: \$55.00 per day (2) (with documentation of actual expenses)

Prepare for DOL to come knocking—**document...document...document!**

Timekeeping- Travel Time

- *Travel Time* – all “controlled” travel time other than commute to and from work is counted as hours worked
- Job sites
- Can establish different hourly rate



Timekeeping- Travel Time

Common practice, especially in Yuma/Imperial area, for employers to provide buses/vans/shuttles to employees to get to worksites.

Plaintiffs' bar—including CRLA doesn't care if this is a common practice—they say its ILLEGAL for employers not to pay employees for time spent riding on employer-provided transportation—especially for H-2A employees.

Timekeeping- Travel Time

California Law

Key case on the issue—Morillion v. Royal Packing, decided in 2000 by the California Supreme Court.

- In that case—farmworker employees were **required** to use company transportation.
- Court said—time “subject to ***control*** of employer” must be paid as “hours worked.”
- By requiring farmworker employees to ride the employer-transportation, the employer ***controlled*** workers by making them ride the buses—thus time traveling was “hours worked.”

Following the Morillion case, the Plaintiffs bar—lead by CRLA—has been working to EXPAND this ruling to include “voluntary” transportation programs.

Timekeeping- Travel Time

Plaintiff's narrative on this issue:

- ▶ After Morillion, the Ag industry's response was to slap a "voluntary" sticker on the buses, sometimes make employees sign a waiver that transportation was "voluntary" but not actually change day-to-day practices.
- ▶ Reality for H-2A workers is (1) they are not from the areas so they are unfamiliar with field locations; (2) they are without a support system—family/friends—that could pick them up/drive them to work and home; (3) They are coming from another Country so they don't have a car with them unless they buy one in the United States.

Timekeeping- Travel Time

Best Practices:

The employer should exert no “control” over employee activity on the bus/van (other than those required by safety protocols):

- No work should be done on the bus/van—including training, filling out forms, even simple things like passing out gloves or hairnets—wait until off the bus and on the clock!
- Have a policy and practice that employees may do whatever they want on the bus, for example, talk, listen to music, read, etcetera.
- Make sure the bus/van doesn't make stops—Plaintiffs argue they were trapped on the bus to run Company-errands e.g. get gas and pick up water and thus were under the “control” of the Company.
- **Keep track of people that drive themselves so that there is proof not all employees opted to take the bus.**

Timekeeping- Travel Time

Best Practices:

- Signed voluntary transportation policy;
- Directions to field locations;
- No work on the bus/van including filling out forms, passing out gloves/hairnets;
- Keep track of people who drive themselves;
- Communicate with workers about where they will be working and what time to report to work—not just what time to report to the bus.



Questions? Thank You!

Rebecca Hause-Schultz
916.210-0391
rhause-Schultz@fisherphillips.com