

U.S. Department of Labor
Employment and Training Administration
OFFICE OF FOREIGN LABOR CERTIFICATION

2015 H-2B Interim Final Rule FAQs

Round 5: Job Offers and Employer Obligations

1. What is the difference between a job offer and a job order?

A job offer is the offer made by an employer or potential employer of H-2B workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits. A job order is a State-specific document containing material terms and conditions of employment relating to wages, hours, working conditions, worksite(s) and other benefits, including assurances, in accordance with 20 CFR 655.18 that is posted by a State Workforce Agency on its job clearance system.

2. What are the employer's obligations under the 2015 H-2B Interim Final Rule?

The 2015 H-2B Interim Final Rule (IFR) expands and clarifies employer assurances and obligations. In accordance with 20 CFR 655.20, the following summary generally describes the obligations that apply to all employers filing their H-2B applications under the 2015 H-2B IFR:

- a. Payment of the offered wage, which equals or exceeds the highest of the prevailing wage or Federal, State or local minimum wage, free and clear at least every two weeks during the entire certified period of employment. Alternative payment arrangements such as piece-rate, commissions, or bonuses are only permissible if the employer guarantees a weekly wage that equals or exceeds the offered wage. Any piece-rate must be no less than the normal rate paid by non-H-2B employers in the same occupation and area of intended employment.
- b. Deductions from wages must be made if they are required by law; all other deductions must be specifically disclosed in the job order and may only include the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts authorized to be paid to third persons for the worker's benefit through his/her voluntary assignment or deductions that are authorized through a collective bargaining agreement(s);
- c. Offer of full-time employment of at least 35 hours per week, with a single week being used for wage computation purposes;
- d. Disclosure of job qualifications and requirements which must be bona fide and consistent with the normal and accepted job qualifications and requirements of non-H-2B employers in the occupation and area of intended employment;

- e. Offer to each worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 12-week period (6-week period if the job order is less than 120 days), unless the certified period of employment is shortened by the contracting officer due to unforeseeable circumstances outside the employer's control;
- f. Payment or reimbursement of transportation and subsistence for workers to the place of employment after the worker completes 50 percent of the period of employment covered by the job order, if the employer has not previously reimbursed such costs;
- g. Payment of return transportation and subsistence if the worker completes the job order period or is dismissed early;
- h. Payment or reimbursement of visa, border crossing and related government-mandated fees in the first workweek;
- i. Provision of all tools, supplies and equipment;
- j. Provision of accurate earnings statements to employees each pay period with all deductions and reimbursements clearly itemized and hours worked and hours offered listed;
- k. Requirement that employers provide workers with copies of the job order no later than the time at which the worker applies for the visa, if the worker is departing directly from his or her home country, and display a poster describing employee rights and protections in English and, if necessary and made available by the Department, another language common to a significant portion of the workers at the work site;
- l. Prohibition of retaliation (such as by intimidation, threats, coercion, blacklisting, discharge or other discrimination) against employees who complained against violations, including through filing or participating in legal actions or seeking assistance from third parties;
- m. Prohibition against: passing on of fees associated with the H-2B applications or employment, such as application/petition costs, attorney fees, recruitment fees or other related fees (and employers must contractually prohibit agents and recruiters from seeking or receiving such fees from employees);
- n. Prohibition against: treating H-2B workers more favorably than U.S. workers; discriminating in hiring based on race, color, national origin, age, sex, religion, disability or citizenship; and laying off U.S. workers within the 120-day period before the start date of work through the end of the period of certification;
- o. Prohibition against: placing workers into uncertified employment or geographic area; and using the H-2B program if there is a strike or lockout in the area of intended employment at the time of application;
- p. Compliance with recruitment requirements under 20 CFR 655.40-.46;
- q. Continuing to consider and hire all qualified U.S. workers who apply for the job opportunity until 21 days before the start date of need;

- r. Notifying DOL when a worker abandons the job or is terminated for cause (and DHS if the person is an H-2B worker);
- s. Complying with all applicable Federal, State, and local employment-related laws; and
- t. Disclosing the identity of all foreign labor recruiters and their employees as well as pertinent agreements related to the recruitment of foreign workers.

3. Where can I get more information about the enforcement of employer assurances and obligations under the 2015 H-2B IFR?

The Department's Wage and Hour Division (WHD) is responsible for the enforcement of H-2B assurances and obligations under the 2015 H-2B IFR. WHD maintains a helpful Web site including a variety of Fact Sheets to assist employers with understanding and complying with the assurances and obligations under the 2015 H-2B IFR. To learn more, please visit: <http://www.dol.gov/whd/fact-sheets-index.htm>.

4. I prefer to hire workers with 6 months of experience, but have found that workers with 3 months of experience can generally perform the job in a satisfactory manner. May I list 6 months of experience as the required qualification on my *Application for Temporary Employment Certification* and job order?

The 2015 H-2B IFR requires an employer to identify its actual minimum education and experience requirements on the *Application for Temporary Employment Certification* (ETA Form 9142B) and job order. It further requires that each job qualification and requirement be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. In this scenario, the employer may only impose a 6-month experience requirement if 6 months of experience is minimally required for the workers to perform the job and if the 6 months of experience is consistent with the normal and accepted qualifications and requirements for the job imposed by non-H-2B employers in the same occupation and area of intended employment.

Important Note: Please remember that the Certifying Officer may require the employer to submit documentation substantiating the appropriateness of any job qualification and/or experience requirement that does not appear to meet this standard of review based on the information available to the Certifying Officer during the consideration of the application.

5. How will the Chicago National Processing Center (NPC) determine whether a minimum job requirement or qualification I listed on my *Application for Temporary Employment Certification* and job order is “bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment”?

When reviewing an *Application for Temporary Employment Certification* and related job order, the Chicago NPC evaluates each of the employer’s listed minimum job requirement(s) and qualification(s) on an individual basis. The Chicago NPC will use a variety of information sources to evaluate whether a job requirement or qualification is consistent with the normal and accepted regulatory standard and, therefore, is appropriate for testing the U.S. labor market. For example, the Chicago NPC uses the Occupational Information Network (O*NET), available at <http://www.onetonline.org/>, as a baseline for identifying normal and accepted qualifications (such as experience requirements) for specific occupations. For other qualifications and requirements not addressed by the O*NET (e.g., criminal background checks, licensing requirements, or drug tests), the Chicago NPC relies on its own historical experience with case-by-case application review as well as information received from outside sources (e.g., information on non-H-2B job requirements and qualifications available to the State Workforce Agency, other employers in the industry or occupation, or interest groups with knowledge of the industry or occupation) to identify job requirements and qualifications that do not appear consistent with the regulatory standard.

6. Why is the Department requiring that the daily subsistence rates under the H-2A program be used for the H-2B program?

The requirement that an H-2B employer pay or reimburse a worker for the reasonable cost of transportation and daily subsistence (which includes meals and, if required, lodging costs incurred on the employer’s behalf along the way) is a new requirement in the 2015 H-2B Interim Final Rule. However, this requirement has existed in the H-2A program for decades and the Department publishes annually the minimum and maximum daily meals amount for workers traveling to and from the place of employment. Because the Department has already determined the minimum amount of money required to provide reasonably adequate and nutritious meals per day under the H-2A program, the Department is extending this amount to the H-2B program. Accordingly, in the H-2B program, the amount of daily

subsistence required to be provided for meals must be at least the amount permitted to be charged when the employer provides meals under the H-2A program.

To obtain the most current minimum and maximum amounts that workers will receive for daily meals, please visit the OFLC website at http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm.

7. Am I required to provide workers with daily transportation to the worksite?

No. The employer is not required to provide or pay for daily transportation from the workers' living quarters to the worksite, or transportation from designated pick-up points to the worksite. However, where the employer chooses to offer or provide daily transportation to H-2B workers, the employer also must offer the benefit to U.S. workers and must disclose the benefit, and if applicable, any associated costs to the worker, including related deductions, in the job order and advertisements for the job opportunity.

8. Is the employer required to provide on-the-job training?

No. The employer is not required to provide on-the-job training. However, where the employer chooses to offer or intends to offer on-the-job training to H-2B workers, the employer must extend at least the same offer to U.S. workers and must disclose the offer in the job order and advertisements for the job opportunity. The employer may not offer any less in terms of benefits, wages and working conditions to U.S. workers than the employer is offering to H-2B workers.