



H-2A Summit 2023

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Don't Be a Headline

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H-2A Summit '23 - Confidence in Labor/Confianza Laboral



Scenario 1: Joint Employment? What's the Exposure?

- Related entities with common ownership hire FLCs, and some related entities decided to use the H-2A program the following harvest season.
- Following harvest season FLC is retained by one of the related entities (no H-2A contract at this farm).
- Two other related entities file an H-2A contract.
- Employees of the FLC apply to the H-2A job

Scenario 2: What can get you debarred?

Worker complaints can trigger investigations. In this scenario Northwest Justice Project received the complaint.

WHD Findings:

- Did not meet safety and health requirements for housing, including having mattresses on the floor and failing to have working smoke detectors.
- Failing to pay workers for inbound and outbound transportation from their home countries.
- Not offering the work hours detailed in workers' contracts, which left them unable to provide for themselves for months at a time.
- Failed to contact U.S. workers in its recruiting efforts.
- Not paying visa-related fees to several workers.

Scenario 2 cont.

WHD News Release stated:

“The employer intimidated and threatened workers and put their livelihoods at risk as they violated many provisions of a federal program designed to assist the nation’s agricultural employers.”

Employer was debarred from using the h-2A program for 3 years. In addition to debarring the employer from the H-2A program, the department assessed \$64,120 in fines and \$7,485 in unpaid wages.



Scenario 3: Sometimes we don't know what we don't know.

Ostrom Mushrooms somehow got an H-2A contract approved

WHD Findings:

- Employer did not pay required H-2A wages
- Employer did not provide cooking facilities or 3 meals a day
- Did not have a pre-occupation inspection of housing
- Recruiter charge workers fees

Scenario 3 cont.

In addition to WHD fines, WA State AG's office also investigated Ostrom Mushroom and issued penalties for:

- Discriminating on the basis of immigration status by firing and refusing to hire U.S. based workers
- Discriminating against its workers on the basis of sex by firing and refusing to hire female workers
- Retaliating against workers who tried to assert their rights, including through warnings, discipline, and one case of physical assault

Penalties total \$3.4 million



Scenario 4 – Housekeeping

Employer provides approved housing to H-2A workers. Eight workers share a house. Workers agree to share cleaning duties. But 2 workers never do their share of cleaning. Workers decide to hire cleaning service and pay for cleaning 6 days a week. Housekeepers clean common areas of housing daily and charge \$96/week (= \$12 per employee or \$2/day).

- Is this Permissible?
- Variation 1
- Variation 2

Scenario 5 – Hours Worked

H-2A Job Order says work begins at 7:30 a.m. But employees are advised that work begins at 7 a.m. when everyone meets at farm office/shed and foreman provides daily instructions. Some workers clock in at 6:45 a.m. and then get coffee and wait for foreman. Some workers clock in at 6:55 a.m. Some workers clock in at 7:00 a.m.

- When calculating work hours, employer pays workers beginning at 7 a.m. Is this permissible?

Scenario 6 – Wage Rate for Non-H-2A Work

H-2A workers are hired for tobacco work at AEW of \$12/hour. During part of season, farmer offers additional work building a house he is going to sell. Workers spend 30 hours in tobacco and 15 hours on house. In the H-2B program, construction work pays \$14/hour. How much are the workers owed for the week?

- 30 hrs x \$12 (\$360) + 15 hrs x \$14 (\$210) = \$570
- 45 hrs x \$12 = \$540
- 45 hrs x \$14 = \$630
- 40 hrs x \$12 (\$480) + 5 hrs OT x \$18 (\$90) = \$570
- 30 hrs x \$12 (\$360) + 10 hrs x \$14 (\$140) + 5 hrs OT x 19 (\$95) = \$595

Scenario 7 – US Applicants

Employer places H-2A Job Order and gets no U.S. applicants. Two years later during DOL investigation, US worker claims he applied in person at farm office during the time the job order was active. Worker tells DOL he was rejected after being told he spoke too much English. Worker is not on SWA list of referrals. Worker cannot specify date he supposedly applied but says his girlfriend was in the truck and knows he was rejected. Worker would be owed \$13,000 in lost wages.

- Does DOL think farm should pay US worker \$13k?