



UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210



December 7, 2021

FIELD ASSISTANCE BULLETIN No. 2021-3

MEMORANDUM FOR: Regional Administrators
District Directors
Investigators

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SUBJECT: Overtime Obligations Pursuant to the H-2B Visa Program

This Field Assistance Bulletin (FAB) provides enforcement guidance on overtime obligations pursuant to the H-2B provisions of the Immigration and Nationality Act (INA) (H-2B visa program).

Background

The U.S. Department of Labor (Department), Wage and Hour Division (WHD) enforces certain labor protection provisions relating to the H-2B visa program. Specifically, WHD investigates employers to determine compliance with obligations under 8 U.S.C. 1184(c), INA Section 214(c), 20 CFR part 655 Subpart A, and 29 CFR part 503. 29 CFR 503.7. Upon finding a violation, WHD may institute administrative proceedings, including the recovery of unpaid wages, the enforcement of the provisions of the job order, and debarment from future participation in the H-2B visa program. 29 CFR 503.20.

WHD is also responsible for administering and enforcing the statutory and regulatory requirements of the Fair Labor Standards Act (FLSA), which governs employees' wages and hours of work. Generally, workers employed under the H-2B visa program are covered by the FLSA. The FLSA requires employers to pay nonexempt employees at least the federal minimum wage for every hour worked in a non-overtime workweek and overtime premium pay of at least one and one-half times the regular rate of pay for every hour worked over 40 in an overtime workweek. 29 U.S.C. 206(a), 207(a). Administrative procedures are outlined in 29 U.S.C. 216(c) and authorize the Department to institute legal action to obtain the back wages due an employee, an equal amount as liquidated damages, and civil money penalties (CMPs), if

applicable. In lieu of litigation, WHD may seek back wages, liquidated damages and CMPs if applicable in an agreed-to settlement.

The Department's Employment and Training Administration, Office of Foreign Labor Certification (OFLC) is responsible for administering the certification process for employers who seek to participate in the H-2B visa program. This includes examining the employer's representations and assurances (*e.g.*, the terms and conditions of the job and the employer's need for foreign workers) and the employer's recruitment of U.S. workers. Where the OFLC Certifying Officer (CO) determines that an *Application for Temporary Employment Certification* (TEC Application) and/or job order contains errors or inaccuracies, or fails to comply with applicable regulatory and program requirements, the CO issues a formal Notice of Deficiency that provides an opportunity for the employer to address the deficiency that prevents certification. If the employer fails to sufficiently address the deficiency, the CO will deny the TEC Application. In addition to administering the labor certification process, OFLC conducts program integrity measures, such as post-certification audits of employer applications and supporting documentation.

Overtime Obligations in the H-2B Visa Program

If an employer participating in the H-2B visa program will make overtime hours available to workers, the H-2B visa program requires the employer's job order to "specify that overtime will be available to the worker and the wage offer(s) for working any overtime hours." 20 CFR 655.18(b)(6).

The H-2B visa program does not mandate the payment of an overtime premium for hours worked exceeding a certain number in the day, week, or pay period. However, employers participating in the H-2B visa program are required by the FLSA to pay an overtime premium of not less than one and one-half times the workers' regular rate of pay for hours worked exceeding 40 hours in a workweek.¹ There are exemptions from the overtime requirements, but these exemptions are not commonly applicable to industries represented in the H-2B visa program.² An employer who is employing workers who are exempt from the FLSA overtime requirements must still comply with any State or local laws requiring overtime pay.

All employers participating in the H-2B visa program must comply with all applicable Federal, State, and local employment-related laws during the period of employment specified on the TEC Application. 20 CFR 655.20(z); 29 CFR 503.16(z). The H-2B visa program therefore requires compliance with applicable laws requiring premium pay for overtime hours worked, including any applicable State or local overtime laws, as well as the FLSA. Federal, State, and local laws may vary by the hours threshold at which overtime will be paid, the rate at which overtime will be paid, employer coverage, and employee eligibility for overtime. Where multiple overtime laws apply, the employer must comply with the law that provides the greatest benefit to the

¹ For further information on FLSA overtime requirements, please see WHD's website at <https://www.dol.gov/agencies/whd/overtime>.

² Workers employed in the entertainment industry may be exempt from federal overtime requirements pursuant to FLSA Section 13(a)(3). See <https://www.dol.gov/agencies/whd/fact-sheets/18-flsa-seasonal-amusement>. This exemption is discussed in greater detail below.

employee. For example, if an employer is required by Federal law to pay time and a half after 40 hours in a week, but is required by State law to pay overtime at time and a half after 46 hours in a week, the employer must comply with the Federal law as it is more beneficial to the employee. If, in an investigation, WHD determines that the employer has failed to comply with all applicable labor standards laws, including those related to overtime, WHD may cite a violation of the H-2B visa program requirements and assess penalties, and back wages when appropriate, for failure to comply with applicable laws.

In addition to complying with applicable laws (including those related to overtime), under the H-2B visa program, an employer must ensure that job applicants from the U.S. are fully informed of all benefits associated with the job opportunity, including the potential for overtime wages. The H-2B visa program requires an employer's job order to offer U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to workers with H-2B visas. 20 CFR 655.18(a)(1) and 29 CFR 503.16(q). In part, the purpose of this provision is to ensure that employers do not understate wages and/or benefits in the job order in an attempt to discourage U.S. workers from applying for the job. *See* 80 Fed. Reg. 24062 (Apr. 29, 2015). An employer engages in impermissible preferential treatment of workers with H-2B visas when it offers and/or pays more favorable wages or benefits to those workers than those offered to U.S. workers in the job order. In an investigation, WHD may cite a violation of the H-2B visa program preferential treatment provisions if it determines that an employer paid overtime wages to workers with H-2B visas without first advertising the potential applicable overtime wages to U.S. workers.

Finally, the employer must pay the wage offered in the job order, free and clear, during the entire period covered by the TEC Application. The offered wage must equal or exceed the highest of the prevailing wage or Federal, State, or local minimum wage. 20 CFR 655.20(a)(1); 29 CFR 503.16(a)(1). Any overtime premium listed on the job order becomes part of the H-2B offered wage rate and must be paid as appropriate.

Therefore, where overtime pay requirements (*i.e.*, Federal, State, or local laws) apply, an employer in compliance with all H-2B visa program requirements will include the wage offer(s) for working any overtime hours in the job order, which renders such wage offer(s) enforceable as part of the H-2B visa program.

DOL's Role with Respect to Overtime Obligations

OFLC reviews and certifies employers' TEC applications. If an employer's application indicates that the anticipated hours of work exceed 40 hours per week, then the employer is expected to include an overtime rate of pay in its application. If no overtime rate is included, OFLC may issue a Notice of Deficiency to the employer. If an employer is not required by Federal, State, or local law to pay an overtime premium, the employer must specifically state this in its application in order to preempt the issuance of a Notice of Deficiency on this issue. An employer's provision of an overtime rate(s) of pay in its TEC application, the failure to include the required overtime rate(s), or an assertion to OFLC that it is not required to pay overtime pursuant to Federal, State, or local law, and OFLC's acceptance of such for the purposes of certifying the TEC application, is not determinative in any WHD investigation as to whether overtime is owed

pursuant to the laws that it enforces and/or whether the employer's advertised wages and benefits resulted in impermissible preferential treatment of workers with H-2B visas.

In an investigation, WHD reviews the employer's compliance with H-2B visa program obligations, including the requirements to comply with Federal, State, and local employment-related laws, to include in the job order the same wages, benefits, and working conditions that the employer is offering and will provide to workers with H-2B visas, and to pay the offered wage rate. Failure to comply with any of these provisions may result in the assessment of H-2B visa program CMPs and/or the computation of back wages owed to employees.

WHD enforces the FLSA in addition to the H-2B visa program provisions, and most investigations will explore the employer's compliance with both laws (and other laws, when applicable). Violations of the FLSA may result in the computation of back wages owed to employees plus an equal amount in liquidated damages, and/or the assessment of FLSA CMPs.

Accurate Disclosure of Overtime

Where applicable overtime laws require the employer to pay an overtime premium rate, in order to maintain compliance both with applicable overtime pay laws and the prohibition against preferential treatment of workers with H-2B visas, overtime hour and payment information must be included in the job order and in any other materials used to recruit U.S. workers. Overtime rates, their applicability, and the hours threshold at which overtime will be paid (if different from the FLSA standard of 40 hours per week), must be accurately disclosed. If the employer does not disclose a separate hours threshold after which overtime will be paid, the employer is stating that it will pay the disclosed overtime rate after 40 hours in a workweek (which is the FLSA standard applicable to most employers).

For most employers participating in the H-2B visa program, overtime obligations are consistent throughout the period of employment based on the location in which they operate. Most employees with H-2B visas work within one area of intended employment, and therefore are unlikely to be subject to multiple different State and/or local laws related to overtime compensation.³ Such employers must comply with applicable overtime laws and disclose the overtime rate(s) offered—and the hours threshold after which overtime will be paid, if different from the FLSA standard—on the job order to maintain compliance with all H-2B visa program requirements, as discussed above.

Some employers, for example, those engaged in tree planting and related reforestation activities, or in the entertainment industry, may work in multiple areas of intended employment. *See* Foreign Labor Certification Training and Employment Guidance Letters 31-05 and 27-06. As such, these employers may be subject to different State and local overtime laws depending on the locations where work is performed. The employer is responsible for researching and knowing the applicable employment-related laws in each State and/or municipality where they perform work. Detailed disclosure of wage(s) offered for overtime hours is particularly important for

³ However, given that one area of intended employment may encompass multiple States and/or municipalities, it is possible that a non-itinerant employer may be subject to different State or local employment-related laws depending on where the work is performed. 20 CFR 655.5 and 29 CFR 503.4.

itinerant job opportunities that may be subject to different overtime laws for work at different worksites (*e.g.*, exempt from any overtime law in some locations; subject to State overtime laws in other locations).

Sample language for such disclosure is provided below. If there are no overtime obligations, the employer should so state.

Language for optional use:

Example 1:

Scenario. Worksite in California. The employer is required to pay overtime by both the FLSA and California State law.

Disclosure language. “An overtime premium will be paid when required by Federal, State, or local law, including at time-and-a-half after eight hours in a day and for the first eight hours on the seventh consecutive day of work in a workweek; at double-time after 12 hours in a day and for all hours worked in excess of eight on the seventh consecutive day of work in a workweek; and at time-and-a-half after 40 hours in a workweek.”

Example 2:

Scenario. Worksites in Minnesota, Wisconsin, and Illinois, with a different State overtime law applicable in each State. The employer is exempt from Federal overtime provisions in all States under FLSA section 13(a)(3) because it is an amusement or recreational establishment and does not operate for more than seven months in any calendar year; however, Minnesota and Illinois overtime requirements contain no such exemption.

Disclosure language. “An overtime premium will be paid when required by Federal, State, or local law, including at time-and-a-half after 48 hours per week in Minnesota and time-and-a-half after 40 hours per week in Illinois. No overtime premium rate will be paid in Wisconsin.”

Example 3:

Scenario. Worksite in Alabama, with no applicable State or local overtime law. The employer is exempt from Federal overtime provisions in all States under FLSA section 13(a)(3) because it is an amusement or recreational establishment and does not operate for more than seven months in any calendar year, and there are no applicable State or local overtime laws. Therefore, the work is not covered by Federal, State, or local overtime laws.

Disclosure language. “No overtime premium will be paid as it is not required under Federal, State, or local law.”

When overtime obligations differ between worksites, WHD will determine the specific wage obligation, and possible preferential treatment of H-2B workers, by examining the disclosures made on the relevant documents listed above and the overtime obligations required by the applicable law(s).