



2016 H-2A Visa Planning

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For growers using any of the temporary visa programs for your workers, you know that even if your season is not yet complete, it is time to start planning for next year's workers already. For those of you who plan to enter one of the temporary visa programs for the first time in 2016, or still trying to decide, you must start planning now to avoid being too late to get the workers you need for 2016.

I hope you all know that NCAE is planning an Ag Employer Labor Forum in Las Vegas on December 2 through 4, 2015. The forum sessions will focus on the legal and technical issues of getting fully into compliance, staying in compliance every day during the season, and both what to expect from and how to interact with the US DOL and other regulatory agencies when they visit with you. Note that we say "when" because there are only two categories of Harvesters out there using temporary visa programs; those of you who have been audited by Wage and Hour and those who will be audited by Wage and Hour. As intimidating as those audits can be, it does not have to be a negative experience, in fact if you are on top of your records and handle the visits professionally an audit can end up being a positive learning

opportunity for both regulator and employer. See [NCAE's website](#) at to learn more, and register for December.

Today we will focus on a list of the 10 most common H-2A compliance issues as described by an excellent and experienced H-2A employer attorney at the recent Florida Agricultural Employer Forum. This was an excellent forum held September 10 and 11 in Orlando. Some of the same speakers will be featured at NCAE's Las Vegas forum in December.

The 10 most common compliance issues for H-2A employers discussed were:

1. Getting into the program without reading and understanding the employer obligations. This means understanding all the requirements, training everyone involved in management and record-keeping to know what records are required and keep them all up to date and accessible, no matter how busy you get. I recently spoke with new; small H-2A user growing vegetables in the South who told me that there wasn't time for a farmer to do all the compliance and records Wage and Hour expected him to have when they audited him. I did what I could to help this grower prepare to answer Wage and Hour's requests, but the bottom line is that you should not enter the program if you do not understand, or cannot/will not comply with the paperwork and documentation required.
2. Not operating with the assistance of an H-2A agent or attorney who understands and complies with all the rules and requirements. We will not go into detail here, but it is important to understand that if the agent/attorney does not follow the rules and procedures, all of them, your workers will be delayed, you may pay extra fees, and you as employer will be responsible for the fees, penalties, and even debarment issues that come up with your workers.
3. Not understanding the timing for filing applications and the correct procedures for job descriptions and notifications. Although for most of you this will relate back to understanding of the program and thoroughness of your agent/attorney, it is all ultimately your responsibility as employer. Your agent/attorney's final application is only as accurate as the information you give them.

4. Not understanding that all H-2A workers are employed under a written, binding, contract that includes enforceable rights and obligations on the employer and the employee. H-2A employees are not "at will employees." Understand that all terms of employment, including termination, must be included up-front and given to both the H-2A and domestic employees at the proper times.
5. Not appreciating that some farm worker advocates and others are very opposed to the guest worker visa programs and may attempt to target your employment practices. Compliance is your only defense.
6. Misunderstanding the importance of accurate record-keeping, in real time. If you are not willing or able to keep the required records, and have them available for audits in the field, you should not participate in the H-2A program. You will be audited, you cannot "catch-up" the paperwork later--- "when things slow down" and your records are your only defense.
7. Misunderstanding your obligations to domestic referrals and applicants. Your domestic referrals are due the same required H-2A wage rates, housing, benefits, and work opportunities in the H-2A contract starting on the contract date of need, even if the H-2A workers arrive late.
8. Misunderstanding the obligation to reimburse H-2A workers for certain pre-employment expenses so that they do not fall below the federal minimum wage at the end of the first work-week. You must get receipts and calculate they make at least minimum wage.
9. Misunderstanding productivity standards for purposes of job retention. If there is a productivity standard it must be clear in the contract and it must be worded such that DOL Chicago will accept it.
10. Inaccurate responses to Wage and Hour or other regulatory audit questions. It should go without saying that you cannot ignore responding either. Inadequate, inaccurate, or non-existent responses

will result in supplemental requests for data, repeated audits, and likely more costly and onerous penalties. You should assume you will be audited, assume it will happen at your busiest time in the field, and prepare for being audited in advance.

We will discuss these ten points and more in Las Vegas in December 2015. We look forward to having our HFGN/VGN reader friends join us at both sessions. What you learn will more than pay for your trip.

The author is Executive Vice President of the National Council of Agricultural Employers (NCAE.) NCAE is the national trade association representing Agricultural Employers in Washington, DC. NCAE advocates and addresses employer issues for all employers of both domestic and H-2 agriculture workers. NCAE is proud to count many individual growers and grower associations among our Membership. The invitation to become an individual Member of NCAE and receive our communication and information direct is extended to all agricultural employers. Visit NCAE's [website](#) at for more information and continuing updates.