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- **January 15, 2021. OFLC Announces Revised Interpretation and Issues New Guidance Clarifying Requirements under the H-1B Visa Program**

The Office of Foreign Labor Certification (OFLC) is making this public service announcement to all employers seeking to employ temporary nonimmigrant workers under the H-1B visa classification. The Office of Foreign Labor Certification (OFLC) has revised its interpretation of its regulations concerning which employers of H-1B workers must file a Labor Condition Application (LCA). Under the interpretation announced today, all common law employers of H-1B workers, including any secondary employers meeting the common-law test, will be required to file an LCA. This interpretation is more consistent with the H-1B statute and regulations, and is also independently warranted because of interpretative changes made by the Department of Homeland Security's U.S.

interpretative changes made by the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) concerning the requirement of secondary employers of H-1B workers to file nonimmigrant visa petitions.

OFLC's bulletin explains that H-1B employment frequently involves primary employers, such as staffing agencies, that petition to hire H-1B workers, as well as secondary employers, such as staffing agencies' clients, where the H-1B workers are assigned to work. Secondary employers must now comply with the statutory and regulatory requirements of the H-1B program if they are common law employers of the H-1B worker. For more information, please click [here](#).

- January 15, 2021. OFLC Announces Updates to Implementation of the H-2A Adverse Effect Wage Rate Methodology for Non-Range Occupations Final Rule; Compliance with District Court Order**

On December 23, 2020, the U.S. District Court for the Eastern District of California issued an order in *United Farm Workers, et al. v. DOL, et al.*, No. 20-cv-01690, enjoining the Department of Labor (Department) from implementing its Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 85 FR 70445 (Nov. 5, 2020), and ordering the Department to operate under the 2010 rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884 (Feb. 12, 2010).

On January 12, 2021, the court issued a supplemental order requiring the Department to publish the adverse effect wage rates (AEWR) for 2021 in the *Federal Register* on or before February 25, 2021, using the methodology set forth in the 2010 rule, and to make those AEWRs effective upon their publication. Additionally, the court ordered the Department to notify all state workforce agencies (SWAs), employers, and the general public that the AEWRs in effect on December 20, 2020, will remain in effect during the interim period until the Department publishes 2021 AEWRs in the *Federal Register*.

Accordingly, all H-2A job orders filed on or after December 21, 2020, with SWAs serving the area of intended employment, as set forth in [20 CFR 655.121](#), including job orders filed concurrently with an *Application for Temporary Employment Certification* with the OFLC National Processing Center for emergency situations under [20 CFR 655.134](#), must continue to use the AEWRs in effect on December 20, 2020, until the publication of new AEWRs in the *Federal Register*.

Additionally, the court reserved decision on whether an award of backpay is warranted based on the difference, if any, between the 2020 AEWRs and the final 2021 AEWRs. Accordingly, the court ordered the Department to provide notice to all employers who submit job orders and applications under the H-2A program between December 21, 2020, and the publication of 2021 AEWRs in the *Federal Register*, that affected H-2A workers may have a potential claim for backpay. Accordingly, and as part of their regulatory obligations to maintain accurate and adequate earnings records (see [20 CFR 655.122\(j\)](#)), the Department reminds employers to record the names and permanent home addresses of all H-2A workers who may later be entitled to backpay, and make reasonable efforts to ensure that such information for each worker remains current. The Department will provide here a further notice if and when the court issues a ruling regarding potential backpay.

- January 15, 2021. U.S. Department of Labor Announces a Final Rule Which Modernizes and Improves the H-2A Temporary Agricultural Program**

The U.S. Department of Labor today announced a final rule pending publication in the *Federal Register* that modernizes the H-2A visa program.

Furthering the agenda to help America's farmers, the Department of Labor's (the Department) Employment and Training Administration and Wage and Hour Division are putting forth this regulation in response to the extensive public comment received from farmers, farmworkers, farmworker advocates, and farmer associations from across the country. This final rule will modernize the Department's H-2A regulations in a way that is responsive to stakeholder concerns and enhances employer access to a legal source of agricultural labor, while maintaining the program's protections for the U.S. workforce and enhancing enforcement against fraud and abuse.

The final rule will streamline the H-2A application process by mandating electronic filing of job orders and applications. These elements are designed to bring the H-2A application process into the digital era, by harnessing the power of the FLAG electronic filing system to share information with other federal agencies like the Department of Homeland Security while also sharing information with the State Workforce systems and domestic farmworkers.

Additionally, the final rule will provide additional flexibilities to cut down on unnecessary burdens on the agricultural employers that use the program. These flexibilities include the ability to stagger the entry of workers into the country over a 120-day period and allowing agricultural employers the flexibility to file a single application for different dates of need instead of multiple applications.

The final rule also will strengthen protections for U.S. and foreign workers by enhancing standards applicable to rental housing and public accommodations, strengthening surety bond requirements, and expanding the Department's authority to use enforcement tools like program debarment for substantial violations of the program.

- [View the Final Rule submitted for publication in the *Federal Register*.](#)

The Department expects the Final Rule will be published in the *Federal Register* in the next few days, with a 30-day delayed effective date from the date of publication.

Although the OFR may make minor technical edits to the version of the Final Rule posted with today's announcement, the substance of the Final Rule published in the *Federal Register* will remain the same. The version to be published in the *Federal Register* will be the official version that amends the current regulations.

- **January 14, 2021. U.S. Department of Labor Published a Final Rule Updating Regulations for Wages Paid to Certain Immigrant and Nonimmigrant Foreign Workers and Better Protect the Wages and Job Opportunities of United States Workers**

The U.S. Department of Labor [published](#) a Final Rule in the *Federal Register* that will help America's workers remain competitive by reforming the prevailing wage methodology for several foreign worker programs. This Final Rule will be effective on March 15, 2021. However, filers will not be required to use the prevailing wage methodology under this Final Rule until July 1, 2021.

- **January 7, 2021. OFLC Publishes List of Randomized H-2B Applications Submitted January 1-3 for Employers Seeking H-2B Workers Starting April 1, 2021**

To keep the public informed regarding the submission and assignment of H-2B applications for review, the Office of Foreign Labor Certification (OFLC) published the assignment group(s) for 5,377 H-2B applications covering 96,641