July 2016

Practice Group(s):

Labor, Employment and Workplace Safety

Agribusiness

Getting It Right: Maximizing Yield While Minimizing the Risk in Hiring Farm Labor

North America Labor, Employment and Workplace Safety and Agribusiness Alert

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Agricultural producers and processors throughout the United States face significant pressure to ensure their operations comply with federal and state labor laws. Increasing demand for U.S.-grown goods and local labor shortages have intensified the pressure and the importance of strict compliance with such laws. The demand increase is largely made up of two parts: (1) heightened interest among U.S. consumers in healthy local produce and (2) heightened interest overseas in the broad array of American agricultural commodities. Alongside the increasing interest, between 2002 and 2014, the labor supply for U.S. agricultural production and processing operations fell by roughly 20%.[1] As a result of the demand surge and labor shortfall, one study by the Partnership for a New American Economy found that American fresh produce imports grew by more than 79% between 1998 and 2012.[2]

As growers and processors struggle to source labor, harvest fields, and process raw goods for end-user consumption, they have turned to three primary options: (1) the H-2A visa program for temporary agricultural workers, (2) the H-2B visa program for temporary non-agricultural (processing) workers, and (3) farm labor contractors (FLCs). At the same time, the Department of Labor (DOL) continues to emphasize its priority in vigorously auditing and investigating agricultural production and processing enterprises for labor law violations.[3] Given these economic and regulatory pressures, agricultural producers and processors need to understand the strict terms of the visa programs they have turned to and how the DOL might analyze producer relationships with FLCs. Deciphering the visa program terms can become more complicated—and more important—where a single enterprise qualifies separately for the H-2A and H-2B visa programs by both harvesting and processing commodities. For many employers, the lines between agricultural and non-agricultural work can be blurred, yet they must take great care to maintain compliance.

Cause for Confusion and the Impact of Getting it Wrong

Many producers maintain facilities where they add further value to the agricultural supply chain by processing commodities beyond their raw state. Enterprises that perform both harvesting and processing functions may qualify separately for the H-2A and H-2B visa programs, and may also utilize FLCs to satisfy their labor needs. Since the lines between

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[1] Stephen Bronars, Home Grown: *How Labor Shortages are Increasing America's Reliance on Imported Fresh Produce and Slowing U.S. Economic Growth*, PARTNERSHIP FOR A NEW AMERICAN ECONOMY, available at http://www.renewoureconomy.org/wp-content/uploads/2014/03/no-longer-home-grown.pdf.

[2] *Id*.

[3] *See* David Weil, *Protecting Farmworkers – a Healthy Start, Room to Grow,* U.S. Dept. Labor, available at http://blog.dol.gov/2015/05/01/protecting-farmworkers-a-healthy-start-room-to-grow/.

the processing plant and the production field often cross, these enterprises risk inadvertently violating the DOL's strict labor program requirements.

For example, employers utilizing the H-2B visa program may violate the terms of their certification by permitting performance of any task perceived as agricultural in nature. As an example, in a seed cleaning facility, where a truck pulls into a gravel lot surrounding the processing plant and unloads seed, it may not be clear whether an H-2B worker assisting with the unloading process is performing agricultural or non-agricultural work.

Additionally, employers who believe they have limited their liability by utilizing H-2A or H-2B workers provided by general FLCs may instead find that they share the contractors' liability as a joint employer of the relevant workers. Under the H-2B visa program, employers must declare joint employment with the H-2B labor contractors (H-2BLCs). This means that if the H-2BLC violates any of the notification, recruitment, expense reimbursement, or other standards, the DOL Wage and Hour Division may find the agricultural enterprise jointly liable. Under a 2015 H-2B rule, the DOL could fine the employer and contractor $10,000 per violation, revoke the labor certification, debar the employer for between one and five years, and pursue other appropriate actions.[4]

Furthermore, under the rules discussed below, an agricultural enterprise may find itself liable for a FLC's violations relating to worker pay, information flow, records maintenance, or the contractor's compliance with the terms of its own worker agreements.

In order to better inform you about these three labor-supply options, the remainder of this alert will set out some of the relevant employment standards surrounding the H-2A visa program, the H-2B visa program, and FLCs.

H-2A Visa Program Overview[5]

Under the H-2A visa program, employers experiencing labor shortages can recruit foreign workers to perform agricultural work of a temporary or seasonal nature. To qualify, these employers must make specific showings to the DOL and provide certain guarantees and benefits to the recruited workers. For example, employers must demonstrate their need for a set number of H-2A workers. The DOL also requires employers to engage in positive efforts to recruit U.S. workers, coordinating their recruiting activities through the appropriate State Workforce Agency (SWA) and reaching out to any former U.S. employees. The DOL also prohibits employers from hiring H-2A workers if the employer laid off U.S. workers within 60 days preceding the need, unless those workers were offered but refused the agricultural jobs. After making the appropriate showings and completing the certification process, eligible employers may recruit temporary foreign workers to satisfy their labor need. In doing so, however, they must adhere to strict employment standards under the H-2A program.

To start, H-2A employers must provider workers—in a language understood by them—with a written work contract or a copy of the job order that was approved by the DOL containing the particular conditions of their employment. Employers must also provide, at no cost to the workers, housing, transportation between the living quarters and worksite, and inbound and outbound international travel expenses. Employers cannot seek any reimbursement for

[4] *See* http://www.dol.gov/whd/immigration/H2BFinalRule/H2BSideBySide.htm.

[5] The information from this section was sourced from the following Department of Labor website: http://www.dol.gov/whd/regs/compliance/whdfs26.htm.

program-related costs and must keep accurate records of the hours offered to and worked by H-2A workers for three years following certification.

H-2A labor contractors (H-2ALCs), in addition to the above requirements, must submit documentation identifying the fixed-site agricultural businesses where they expect to provide H-2A workers and each expected work contract agreement. H-2ALCs must also provide their respective Migrant and Seasonal Agricultural Worker Protection Act (MSPA)[6] FLC Certificate of Registration number if they are required to hold one as a FLC, and to identify the activities that they perform (as authorized by the Wage & Hour Division of the DOL).

H-2B Visa Program Overview[7]

The H-2B visa program recently was modified by the 2015 Interim Final Rule jointly issued by the DOL and the Department of Homeland Security (DHS). Under the H-2B visa program, employers experiencing labor shortages can recruit foreign workers to perform temporary non-agricultural work. Employers will qualify for this program only if they can offer H-2B workers terms and working conditions on a full-time (35+ hours per week) temporary basis that are comparable to similarly employed U.S. workers. And employers cannot impose restrictions or obligations on U.S. workers not imposed on H-2B workers. Employers must also accurately state the dates, reason for, and number of positions requested in their labor certification application. To satisfy H-2B recruiting requirements, employer-applicants must obtain a wage determination from the National Processing Center, submit a job order to the appropriate SWA, and satisfy stringent recruiting requirements.

The H-2B program also imposes other restrictions, requiring employers to:

- Offer H-2B workers no less than the highest of the prevailing wage or the federal, state, or local minimum wage;
- Provide all tools, supplies, and equipment needed to perform the job without charge;
- Guarantee an offer of employment for a total number of work hours equal to three-fourths of the workdays in every 12-week period (or every 6-week period for jobs orders lasting less than 120 days);
- Contractually prohibit agents or recruiters (and any agent or employee of those agents and recruiters) who are engaged directly or indirectly in recruitment of H-2B workers from receiving any payments from the employees (except as direct reimbursement for fees that are by statute solely the responsibility of the worker); and
- Collect no payment from the workers in order to administer the program.

The DOL also prohibits participating employers from laying off any U.S. worker in a position covered by the labor certification between 120 days before the date of need through the end of the period of employment.

In some respects, the H-2B visa program differs substantially from its H-2A counterpart. Nothing requires H-2B employers to cover the workers' cost for housing or transportation to and from the worksite. The 2015 Interim Final Rule did, however, change the expense

[6] 29 U.S.C. 1801, *et seq*.

[7] The information from this section was sourced from the following Department of Labor website: http://www.dol.gov/whd/immigration/H2BFinalRule/.

reimbursement standards. Employers must now reimburse H-2B workers within the first workweek for the full cost of visa and visa-related expenses. Additionally, among other federal minimum wage related travel reimbursements, employers are liable under H-2B for the reasonable expenses of:

- Inbound travel, including related daily subsistence expenses, for workers who complete 50% of the job order; and
- Outbound travel, including related daily subsistence expense, for workers who work until the end of the job order or are dismissed early.

Employers under H-2B also need to notify the DOL and DHS in writing within two workdays if any H-2B or corresponding worker leaves prior to the end of the certified employment period. Employers must also notify H-2B workers that they have to leave the United States at the end of their authorized stay or separation. And the H-2B program prohibits employers from placing a qualified worker outside the area of intended employment listed on the H-2B certification unless the employer has obtained a new temporary labor certification. Indeed, under the Final Interim Rule, employers may not place H-2B workers in any job opportunity not certified on the Application. The DOL may pursue any inaccurate statements as willful misrepresentations of the application.

Finally, H-2B labor contractors—which qualify under the Final Interim Rule only if they can show their own genuine need for workers—can no longer move H-2B workers between different employers or different worksites.[8] Their ability to qualify and the duration of their need can last only as long as need of the employer on whose behalf they filed the application for H-2B certification.[9]

Farm Labor Contractor Basics[10]

The MSPA requires FLCs to register with the DOL. Under the MSPA, agricultural workers can have more than one employer at the same time, and each joint employer is responsible for all MSPA employer obligations. While only one of the joint employers needs to carry out the employer obligation in question, a failure to provide the required protection will lead to joint liability for all joint employers.

The MSPA states that FLCs and the agricultural employers that use them are jointly liable to and must:

- Provide written disclosure of the terms and conditions of employment;
- Post information about work protections at the worksite;
- Pay workers the wages owed when due and provide an itemized statement of earnings and deductions;
- Comply with the terms of any working arrangement made with the workers; and

[8] The information from this section was sourced from the following Department of Labor website: http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=28228&Month=4&Year=2015.

[9] *Id*.

[10] The information from this section was sourced from the following Department of Labor website: http://www.dol.gov/whd/immigration/H2BFinalRule/H2BSideBySide.htm.

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- Make and keep for three years payroll records for each employee.

Joint employment and the associated liability exposures arise as long as the FLC is not a true "independent contractor." The DOL will not find an individual (whether an FLC or a worker) to be an independent contractor if the individual is economically dependent upon the agricultural employer. Where an FLC is considered an employee of the enterprise utilizing his/her services, then the workers in the crew are also employees of that person. To make the independent contractor determination, the DOL will look to the employer's level of control over the work, the employee's chance for profit/loss based on managerial skill, who supplies the equipment and materials, whether the alleged employee hires additional workers, whether the services require special skill, the length of the working relationship, and the import of the relevant services. Additionally, even where the FLC is considered an independent contactor, the enterprise also will be a joint employer of any workers the FLC hires if it is determined that the agricultural worker is economically dependent on both the FLC and the enterprise.

Additional Assistance

Ultimately, the issues discussed above call for nuanced, fact-specific inquiries. Our attorneys have a deep bench of knowledge surrounding these employment and other agricultural legal issues. For additional information, or to resolve any questions you might have about this alert, please contact one of the attorneys listed above.

The authors wish to thank 2015 summer associate Timothy P. Nicholson for his extensive work in preparing this Legal Insight.

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