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H-2B March 2011 Proposed Rule v. Current Rule

Proposed Rule	Current Rule
Define temporary as less than 9 months, except in the case of a one-time occurrence that may last up to three years.	Peakload and seasonal needs cannot exceed 10 months.
Require registration process to substantiate need for temporary workers. Registration would be good for 3 years, provided employers do not increase required number of workers by more than 20% (50% if need less than 10 workers), if beginning and end dates of work do not vary by more than 14 days, or if job classification does not change. Registration applications can be filed between 120-150 days before date of need (DON).	No registration process. Employers must establish temporary need each year.
If application denied, CO must inform employer of reason for denial. Employer may request administrative review w/n 10 days of denial.	No change.
Employers must file Application for Temporary Employment Certification 75-90 days before DON.	Recruitment can begin 120 days before DON. Application is filed whenever recruitment is complete (no specific deadline).
Job orders must be listed with SWA until 3 days before H-2B workers are expected to start work. Jobs must also be posted on an electronic job registry. Jobs must be offered to qualified U.S. workers who apply for position up to 3 days before H-2B workers are scheduled to begin work. Available jobs must also be posted at the employer's place of employment for up to 10 days. The certifying officer can also require additional recruitment measures.	Job orders are listed for 10 to 30 days, depending on state's rules. No electronic registry. Employers are only required to accept referrals up to the date of preparation of the recruitment report, which can be finalized as early as 2 days after job order closes. No requirement for in-house posting. No current requirement of additional recruitment
During recruitment period, employers must contact former U.S. employees and labor unions for traditionally unionized industries and notify them of job listing.	No change.

Proposed Rule	Current Rule
Employers must advertise in a newspaper of general circulation in the area on two separate days, including a Sunday. The ad must include wages, information about the ¾ guarantee, transportation costs to be paid and state that tools/equip will be provided.	Same basic requirement, except for content of ad. Current rule does not require statements concerning payment of transportation costs, ¾ guarantee, or tools provided.
Ad must direct applicants to apply directly to SWA.	Ad directs applicants to apply directly with employer.
Employers must guarantee workers will be paid for ¾ of hours discussed in contract.	Not required.
Require employers to pay H-2B workers in-bound and outbound transportation costs, subsistence costs, visa and other costs. This also applies to U.S. workers who do not live near place of employment.	Only requires employers to pay return transportation when workers are dismissed before end of contract. (Note: Wage and Hour interprets FLSA to require employers to pay visa fees [100%] and transportation costs [to extent workers' wages would be reduced below fed min in first and last workweeks]. Currently WHD does not require reimbursement for subsistence costs.) No such rule for U.S. workers.
If lodging is provided to H-2B workers, same lodging must be provided to U.S. workers who do not live near workplace.	Not required.
H-2B workers must be guaranteed full time work, defined as more than 35 hours per week.	Full-time is defined as 30 hours/week, and employers are not required to guarantee a certain number of hours by regulation. Employers are currently required to attest that the job is a full-time job.
Workers must be paid every 2 weeks or in accordance with prevailing practice.	No specific compensation requirements.
Job order must be provided to H-2B workers (in a language they understand) at the time they apply for visa and to U.S. workers by first day of work. It must include wages, guaranteed hours and other information. Workers must also be provided with earnings statements prior to each paycheck.	Not required.
Employers must display a poster covering H-2B workers' rights.	Not required.
Require retention of all documents related to program requirements including recruitment materials for 3 years.	No change.

Proposed Rule	Current Rule
Employer must certify that they did not have any layoffs 120 days before DON until the end of the certification period. The certifying officer will deny any application if there is a strike or lockout.	No layoffs within 120 calendar days before DON through 120 calendar days after DON.
Job qualifications and requirements listed in job offer must be bona fide and consistent with those required by employers that do not use H-2B workers for the same or comparable occupations.	No change.
Prohibit an agent or recruiter from seeking any payments from prospective employees.	No change.
Employers and agents must submit any agreements with foreign labor contractor or recruiter.	Not required.
Provides DOL's Wage and Hour Division with independent debarment authority.	WHD can only recommend that ETA debar an employer.