

FAQs for H-2A Employers Regarding COVID-19

This is a brief collection of FAQs for H-2A employers involving COVID-19 and related issues in the workplace and the government response to the ongoing situation. The situation is extremely fluid, so this represents the best current information but is subject to change quickly and with little notice – please use this as a starting point, but be sure to seek specific, up-to-the-minute professional guidance tailored to your farm or business. The #1 priority at all times is the health and safety of yourselves, your employees, and your customers; this is intended to help address the other issues that may arise.

- ***If an H-2A employer loses customers or otherwise decides not to use the H-2A program any longer this season, what are their options?***

The H-2A regulations provide a few options for employers facing an uncertain market for their plants or crops in the upcoming season, here is a summary of those options:

1. **Contract impossibility.** Under 20 CFR § 655.122(o), if “the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract.” The employer can submit the request to the DOL Certifying Officer (“CO”) by email at TLC.Chicago@dol.gov, describing the loss of customers or other reason why fulfilling the contract has become impossible for reasons beyond the employer’s control. The request can occur at any point before the end of the season, including before any filing has taken place at USCIS, before the visa application at the consulate, or after the workers arrive in the U.S.

Once the CO approves the request, that ends the contract as of that date – the employer is responsible for paying the H-2A workers’ travel to their home or to their next employer, as well as 3/4 of the hours from their start date to the date of the CO’s termination notice. If the workers have not left their home country yet (no DOL labor cert, no USCIS visa approval, or no consulate appointment completed), then an impossibility declaration by the CO would avoid the travel costs, as well, and give the workers more of a chance to find other employers.

A CO-approved declaration of “contract impossibility” is different than having the CO agree that the employer can “withdraw” the application for labor cert. In a withdrawal, the terms-and-conditions of the job order remain in force for any U.S. worker hired as part of the H-2A recruitment. 20 CFR § 655.172.

2. **Transfer to another grower.** If you do not need the workers, but are contacted by or can identify another employer who does need workers (because of border or embassy delays in getting other workers into the US), the new employer can change their I-129 from “new hires” to “transfer” workers, naming your workers,

if your workers consent to the transfer. That would be reported to DOL and DHS as a voluntary termination by the workers, which would void the 3/4 guarantee or return-travel obligations.

3. **Continue the contract.** If the employer's customer contracts remain in place, they can continue to perform under the H-2A contract. As the contract goes along, if work slows down, the employer can decide whether the contract has become impossible and pursue Option 1 above; the only exposure is the 3/4 guarantee, which is measured over the life of the entire contract and not week-by-week. If, at the end of the contract (either the stated end-date, or the date the CO agrees to terminate it), the employer will need to compare the hours-offered vs. 3/4 of the hours stated on the contract and pay workers for the shortfall (if any).
 4. **Add more workers.** The OFLC guidance from last week expanded employers' ability to use the "emergency filing" provisions in 20 CFR § 655.134 and get certified more quickly than the usual 60-to-75-day and 45-day timeline. Once certified to hire more H-2A workers, the employer can either take steps to transfer them from another employer (see #2 above) or complete the consulate/border-crossing process for new hires.
- ***Does workers' compensation cover COVID-19?***
Probably not. Workers' compensation covers an injury that "arises out of and in the course of employment" – i.e., the employee's exposure is specifically "occupational" and tied to the specific conditions of their work. An EMT or emergency-room nurse who contracts COVID-19 may have a workers' compensation claim; most ag workers would not. But, it is a case-by-case analysis.
 - ***What happens if the H-2A employee's home country is closed to incoming travel?***
Several H-2A sending-countries (Peru and Guatemala, for example) have closed their borders and airports to incoming travel, including their own citizens returning from working in the United States. We are working with USCIS on issuing guidance (and hope to have it soon) on what that means for these employees. Most importantly, we want to ensure that they are not deemed to have fallen "out of status" by overstaying their visa or staying beyond the three-year accumulated stay limitation in 8 CFR § 214.2. Beyond that, while they must remain in the United States, we would like to see them able to continue working – either for their previous H-2A employer or a new one.
 - ***What about H-2A housing and quarantine?***
Employers of H-2A workers must provide free housing under the DOL regulations. If one or more employees develops COVID-19 symptoms, it is essential to remove them from that housing and undergo cleaning protocols immediately. The DOL H-2A regulations allow employers to substitute other housing ("rental or public accommodation housing") if the certified housing becomes "unavailable for reasons outside the employer's control." 20 CFR § 655.122(d)(6). Under that provision, the housing could be inspected by the SWA after the workers begin using it.

As for when quarantine is appropriate for individuals showing symptoms or those who have come into contact with symptomatic individuals, employers should follow local public health guidelines, CDC guidance for employers (<https://bit.ly/2Uv7NrT>), and OSHA workplace safety standards (<https://www.osha.gov/Publications/OSHA3990.pdf>).

- ***What does the Families First Coronavirus Response Act mean for H-2A employers?***

Congress passed and the President signed the “Families First Coronavirus Response Act” (“FFCRA”) on March 18, 2020. It takes effect 15 days later, on April 2, 2020. There are a number of provisions in the law that could potentially affect H-2A employers differently than how they will affect non-H-2A employers.

FFCRA includes a mandate for employers to provide paid family leave to employees under these circumstances:

- Subject to a quarantine order or experiencing symptoms and seeking treatment;
- Caring for an individual (not necessarily a family member) covered by a quarantine order – from the government or a medical provider;
- Caring for sons/daughters whose school or daycare is closed; or
- Experiencing a “other substantially similar condition” as set forth by HHS in consultation with DOL and the Treasury Department.

The paid family leave requirements apply to any employees employed for at least 30 days with that employer, with no distinction between H-2A and U.S. workers. By definition, few if any H-2A workers will have children or family members in the U.S. to care for, so the paid family leave rule will likely apply almost exclusively to U.S. workers.

FFCRA also includes a mandate for 80 hours of paid sick leave – this likewise does not distinguish between H-2A and U.S. workers. DOL will be publishing a model notice that employers will be required to post; best practice is to post it in a conspicuous location, next to the existing H-2A and MSPA posters. Failing to provide the sick leave or firing a worker who requests the leave, beginning April 2, 2020, will trigger civil money penalties from DOL under Section 5105 of the FFCRA.

The mandated paid-leave provisions in the FFCRA are reimbursed by the federal government via Social Security taxes, the 6.2% “FICA” tax. H-2A workers are exempt from this tax, however, so the limit in FFCRA of the federal reimbursement share could place a heavy unfunded mandate on employers with a significant H-2A workforce.