



## Legal Responsibilities When Hiring Migrant, Seasonal, and H-2A Visa Workers

**W**hen farmers need to harvest a large amount of crops in a short period of time, migrant, seasonal, and H-2A Visa workers can often be the best solution to complete the job quickly and affordably. However, there are specific Federal and state legal duties and responsibilities for farmers who employ these types of workers and substantial criminal and civil penalties for failing to adhere to the law.

### Migrant and Seasonal Workers

The Federal law governing the employment of migrant and seasonal workers is the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).<sup>1</sup> The MSPA is meant to “assure necessary protections for migrant and seasonal agricultural workers, agricultural associations,

and agricultural employers.”<sup>2</sup> Generally, the MSPA creates protections for migrant and seasonal workers through employment standards related to wages, housing, transportation, disclosures, and recordkeeping.<sup>3</sup> Many of the provisions of the MSPA are also found in Maryland law and may be enforced by the Maryland Department of Labor, Licensing and Regulation (DLLR).

The MSPA separates migrant and seasonal workers into two independent categories of employees protected under the MSPA. The difference between the two classifications is that a migrant worker is one who is not able to return to a permanent place of residence because of the distance between the place of work and the place of residence.<sup>4</sup> A seasonal worker is a



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worker, other than a migrant worker, employed on a seasonal or temporary basis.<sup>5</sup> Persons excluded from the definition of migrant or seasonal workers include immediate family members of the farm employer or any temporary nonimmigrant alien authorized to work in U.S. agricultural employment.<sup>6</sup> H-2A Visa agricultural workers are not considered migrant or seasonal workers under the MSPA and are discussed in more detail below.

*Non-exempt farm labor contractors, agricultural employers, and agricultural associations which recruit migrant and seasonal agricultural workers are required to provide migrant workers with a written contract in English or the worker's primary language at time of recruitment, meaning before the worker has accepted a position.*

The MSPA creates legal duties for agricultural employers and agricultural associations who directly recruit and hire migrant and seasonal workers and farm labor contractors. A farm labor contractor is defined as a person "other than an agricultural employer, and agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs farm labor contracting activity."<sup>7</sup> According to the MSPA, a farm labor contracting activity



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includes the "recruiting, soliciting, hiring, employing, furnishing, or transporting [of] any migrant or seasonal workers."<sup>8</sup>

A farm labor contractor must register to do business with U.S. Department of Labor (DOL) and the Maryland DLLR before undertaking any contracting activities. Further, before hiring a farm labor contractor, a farm operator must make sure that the farm labor contractor is registered to do business with DOL and DLLR; failure to do so is a violation of the MSPA.<sup>9</sup>

There are two major classes of farmers exempt from the MSPA: family businesses and small businesses. Under the family business exemption, a person who engages in farm labor contracting activity on behalf of a farm owned or operated exclusively by that person or by an immediate family member is exempt from MSPA.<sup>10</sup> A small farm business is exempt from the MSPA if the agricultural employer did not use more than 500 man-days

of labor in any calendar quarter of the previous year.<sup>11</sup> A man-day is any day in which one nonfamily worker works at least one hour. All labor performed on the farm, whether seasonal or full-time, counts towards the calculation.

Non-exempt farm labor contractors, agricultural employers, and agricultural associations which recruit migrant and seasonal agricultural workers are required to provide migrant workers with a written contract in English or the worker's primary language at time of recruitment or offer of employment, meaning before the worker has accepted a position. The contract must include: the place of employment; the wage rates to be paid; the crops and kinds of activities on which the worker may be employed; the period of employment; the transportation, available housing, and any other employee benefit to be provided, as well as any cost to be charged for each.<sup>12</sup> Additional required items include the existence

of any strike or other concerted work slowdown and whether state workers' compensation insurance is provided.<sup>13</sup> A seasonal worker must be given a verbal description of the job and provided a written contract only upon request.

The requirements of the MSPA must also be posted (DOL can provide a poster) in a conspicuous place so the workers can refer to it once employed.<sup>14</sup> The purpose of these requirements is to prevent a "bait-and-switch" situation, whereby the workers agree to the employment only to find, once they arrive at the farm, that the terms and conditions of employment are different than what was explained to them at the time of the job offer.

Aside from the initial disclosure requirements, farm labor contractors, agricultural employers, and agricultural associations must also ensure that migrant and seasonal workers are consistently paid all wages when due and provide pay stubs to the workers detailing the earnings and deductions each pay period.<sup>15</sup> Employers must complete and retain payroll records for all workers for a period of 3 years.<sup>16</sup> The MSPA does not legally require any specific wage rate and minimum wage rates are dictated by the Fair Labor Standards Act (FLSA) and any applicable state law such as the Maryland Wage and Hour law. If an agricultural employer provides housing for migrant workers, he or she must ensure that the housing is in good condition and meets all Federal and state safety and health regulations.<sup>17</sup> Similarly, all non-agricultural vehicles used by a farm labor contractor or agricultural employer to transport workers must meet Federal and state safety

standards, be fully insured, and driven by licensed drivers.<sup>18</sup>

*A violation of the MSPA, such as knowingly providing a worker with false or misleading information, can lead to fines, a prison sentence of not more than 1 year, or both, for first time violations.*

One important legal concept for both agricultural employers and farm labor contractors to understand in relation to the MSPA and FLSA is "joint employment." Joint employment occurs when a worker is jointly employed by a farm labor contractor and agricultural employer because of the level of control the agricultural employer has over the contractor. There are a number of legal considerations a court will analyze to determine if a joint employment situation exists but generally, if an agricultural employer has the power to direct, control, or supervise the workers, or to determine their pay rates or method of payment, the agricultural employer and the farm labor contractor are the joint employers of the workers.<sup>19</sup> The courts don't look at any one particular element but rather consider all of the elements together to decide whether the worker was economically dependent on both the labor contractor and the agricultural employer.<sup>20</sup> This is of import because in a joint employment situation, the agricultural employer is equally responsible along with the farm labor contractor for any non-compliance with both MSPA and FLSA obligations. This joint liability is significant and can be an unwelcome surprise for

agricultural employers who turn a "blind eye" towards the actions of a farm labor contractor.

The agency responsible for enforcing MSPA is the Wage and Hour Division of DOL. A violation of the MSPA, such as knowingly providing a worker with false or misleading information, can lead to very serious consequences. Anyone found violating the MSPA may be fined or sentenced to prison for not more than 1 year, or both, for first time violations.<sup>21</sup> Subsequent violations carry a fine of not more than \$10,000 or a prison sentence of not more than 3 years, or both.<sup>22</sup> A unique feature of MSPA is that it allows anyone aggrieved by a violation to bring a lawsuit in Federal court regardless of the amount in controversy, the citizenship of the parties, or whether all administrative remedies the act provides have been exhausted.<sup>23</sup> The MSPA also contains a "whistleblower" provision prohibiting any form of retaliation against a worker who has filed a complaint or instituted proceedings under the MSPA.<sup>24</sup> Non-exempt farm labor contractors, agricultural employers, and agricultural associations should also note that there are significant penalties under the FLSA for improper payment of wages.

### **H-2A Visa Workers**

The H-2A visa program is the non-immigrant seasonal foreign worker visa program for agricultural employers. In Maryland, H-2A visa workers are common in nurseries, fruit and vegetable operations, Christmas tree farms, and other similar operations. Generally, the program requires that a farmer prove to the Federal

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**Agricultural employers are advised that the application and approvals for H-2-A visa workers can take up to 80 days to complete.**

government that foreign workers are needed because U.S. workers are unavailable for the work in question and once hired, the farmer must provide the foreign workers with transportation, safe housing, and fair wages for the duration of their seasonal employment.

In order for a foreign worker to apply for an H-2A visa, a worker must have a job offer from a U.S. agricultural employer. Agricultural employers typically work with recruiters who identify foreign workers with the necessary skills for the job. An agricultural employer who wants to hire an H-2A visa worker must first submit a job order to DLLR at least sixty (60) days before the day the worker is first needed. Further, at least forty-five (45) days before an H-2A is worker is first needed, the employer must apply with DOL for a “temporary labor certification.” To be approved for a “temporary labor certification” agricultural employers must demonstrate that the job is of a temporary or seasonal nature, that

there are not enough U.S. workers who are “able, willing, qualified and available to perform work at the place and time needed,” and that the wages and working conditions of workers in the United States will not be “adversely affected” by the importation of guest workers.<sup>25</sup> If approved, the employer then files a Petition for Nonimmigrant Worker with U.S. Citizens and Immigration Services. Once the petition is approved, a prospective foreign worker can then apply for an H-2A nonimmigrant visa at the U.S. embassy or consulate in their home country. Agricultural employers are advised that the application and approvals for H-2A visa workers can take up to 80 days to complete. Maryland provides assistance to farmers with the H-2A program by and through the Maryland Job Service Rural Service Coordinator at DLLR.

An agricultural employer must pay a wage to a H-2A worker that is at least the higher of: (a) the local “prevailing wage” as determined

by DLLR and the DOL; (b) the state or Federal minimum wage, or (c) the “adverse effect wage rate” (AEWR) which is the average wage of nonsupervisory field and livestock workers as determined by a USDA survey.<sup>26</sup> Employers must also provide H-2A workers with paystubs throughout the course of the employment which itemize all earnings and deductions.<sup>27</sup> Further, employers must retain payroll records for all H-2A workers for a period of 3 years.<sup>28</sup> Employers soliciting H-2A workers must also provide workers’ compensation insurance for occupational injuries.<sup>29</sup> DOL performs regular audits of agricultural employers to ensure that H-2A workers are being properly paid.

In addition to wages, employers must provide all H-2A workers who cannot return to their principal place of residence within the same day housing at no cost and either three meals a day or adequate kitchen facilities so the workers can cook their own meals.<sup>30</sup> The housing provided to H-2A workers must meet all applicable Federal and state health and safety standards. Pursuant to Federal regulation, employers must offer U.S. workers the same benefits, wages and working conditions that are offered to similarly situated H-2A workers.<sup>31</sup>

The transportation costs to get an H-2A worker from their home country to the farm in America are required to be paid by the agricultural employer if the worker has completed at least 50% of the work contract period.<sup>32</sup> Employers must also provide transportation to and from the farm to H-2A workers at no cost, if needed.<sup>33</sup> Upon expiration of the contract, the

agricultural employer shall pay for the worker's transportation costs, to return home.<sup>34</sup>

*H-2A workers are guaranteed employment for at least three-fourths of the workdays in their employment contract. If the employer fails to provide at least three-fourths of the workdays originally promised, the worker must still be paid for three-fourths of those days.*

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Once hired, H-2A workers are guaranteed employment for “at least three-fourths of the workdays” described in their employment contract which is broken down into the total number of work hours.<sup>35</sup> For example, if a 40-hour work week is promised, the agricultural employer has met this burden by providing at least 30 hours a week of work. If the employer fails to provide at least three-fourths of the workdays originally promised, the worker must still be paid for three-fourths of the promised days of work. This provision of the law is important because H-2A workers are

not legally allowed to work for any other employers in the United States and are unable to supplement their income if an agricultural employer substantially changes the terms of their employment. Employers must provide H-2A workers, no later than the time at which the workers apply for the visa, a written employment contract with all of the provisions outlined herein.<sup>36</sup>

Although H-2A workers get benefits not provided to migrant and seasonal workers under the MSPA such as transportation costs, free housing, and guaranteed wage rates, the enforcement provisions

of the H-2A visa program are weaker than those of the MSPA. There is a procedure for H-2A workers to file complaints with the DOL, but no specific enforcement provisions similar to those in the MSPA.<sup>37</sup> Upon receipt of a complaint, the DOL may take whatever investigative or enforcement action it deems appropriate. Unlike migrant and seasonal workers, H-2A workers are not granted jurisdiction in Federal court so finding a court with jurisdiction to decide an H-2A visa complaint case can be very difficult.<sup>38</sup> ■



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<sup>1</sup> The Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1801, et seq.

<sup>2</sup> 29 U.S.C. §1801.

<sup>3</sup> U.S. Department of Labor, Wages and Hour Division, *Fact Sheet #49: The Migrant and Seasonal Agricultural Worker Protection Act*, page 1 (revised 2008).

<sup>4</sup> 29 U.S.C. § 1802 (8)(A).

<sup>5</sup> 29 U.S.C. § 1802 (10)(A)(i)-(ii).

<sup>6</sup> 29 U.S.C. § 1802 (8)(B)(i)-(ii).

<sup>7</sup> 29 U.S.C. § 1802 (7)

<sup>8</sup> 29 U.S.C. §1802 (6)

<sup>9</sup> 29 U.S.C. §1842

<sup>10</sup> 29 U.S.C. §1803(a)(1)

<sup>11</sup> 29 U.S.C. §1803(a)(2)

<sup>12</sup> 29 U.S.C. §1821 (a)(1), 29 U.S.C. §1831(a)(1)

<sup>13</sup> 29 U.S.C. §1821 (a)(1), 29 U.S.C. §1831(a)(1)

<sup>14</sup> 29 U.S.C. §1821 (b), 29 U.S.C. §1831(b)

<sup>15</sup> 29 U.S.C. §1821 (d), 29 U.S.C. §1831(c)

<sup>16</sup> *Id.*

<sup>17</sup> 29 U.S.C. §1823(a)

<sup>18</sup> 29 U.S.C. §1841

<sup>19</sup> *Antenor v. D&S Farms*, 88 F.3d 925, 933 (11<sup>th</sup> Cir. 1996)

<sup>20</sup> *Id.*

<sup>21</sup> *Maryland Code*, Labor and Employment Article, § 7-507, 29 U.S.C. §1851(a)

<sup>22</sup> 29 U.S.C. §1851(a)

<sup>23</sup> 29 U.S.C. §1854

<sup>24</sup> 29 U.S.C. §1855

<sup>25</sup> 20 C.F.R. §655.103(a)

<sup>26</sup> 20 C.F.R. §655.120(a)

<sup>27</sup> 20 C.F.R. §655.122(k)

<sup>28</sup> 20 C.F.R. §655.122(j)

<sup>29</sup> 20 C.F.R. §655.122(e)

<sup>30</sup> 20 C.F.R. §655.122(d), 20 C.F.R. § 655-122(g)

<sup>31</sup> 20 C.F.R. §655.122(a)

<sup>32</sup> 20 C.F.R. §655.122(h)(1)

<sup>33</sup> 20 C.F.R. §655.122(h)(3)

<sup>34</sup> 20 C.F.R. §655.122(h)(2)

<sup>35</sup> 20 C.F.R. §655.122(i)

<sup>36</sup> 20 C.F.R. §655.122(q)

<sup>37</sup> 20 C.F.R. §655.185

<sup>38</sup> Christopher Ryon, *H-2A Visa Workers Should Not Be Excluded From Migrant and Seasonal Agricultural Worker Protection Act*, 2 U. Md. L.J. Race Relig. Gender & Class 137 (2002)

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The Agriculture Law Education Initiative is a collaboration between the University of Maryland Francis King Carey School of Law and College of Agriculture & Natural Resources, University of Maryland, College Park. Through the University of Maryland Extension - the statewide, non-formal agriculture education system - the collaboration partners with the School of Agricultural and Natural Sciences, University of Maryland Eastern Shore.

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