A GINNER'S PRACTICAL GUIDE TO COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT (FLSA) AND THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA)

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INTRODUCTION

Note that this Guide does not contain a complete listing and discussion of all legal requirements and issues Ginners face even under federal law, but we hope it will give you a head start on what is required so you are on notice to read, understand and comply with all applicable requirements. Failures to understand what's required and how to comply with Fair Labor Standards Act (FLSA), the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the H-2A Program, and OSHA requirements as well as with state laws where you operate and where your employees are recruited can be devastating in terms of liability for back pay and other damages, debarment from using the H-2A Program and customer-relations. Gin operators may be held liable for the acts and omissions of farm labor contractors they have hired to manage their seasonal workforce needs and these requirements, but even gin operators that hire farm labor contractors have specific duties under these laws. Expect more US DOL and employee-brought claims that Ginners are liable as joint employers with farm labor contractors they hire to employ workers to provide labor services to gins.

THE FAIR LABOR STANDARDS ACT (FLSA)

This Guide is intended to be a practical guide rather than an exhaustive discussion of the provisions of the FLSA with comments also on required compliance with the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) that is applicable to cotton gins because the definition of "agricultural employment" under MSPA includes "agricultural labor or services" under the Internal Revenue Code (IRC), 26 U.S.C. 3121(g). The statutory definition of "agricultural labor" under the IRC "includes all service performed- ... in connection with the ginning of cotton." Because of this IRC definition, work at cotton gins is also eligible for H-2A certification to allow temporary foreign workers to perform work at cotton gins.

If you have a specific question about the FLSA, the MSPA or the H-2A Program, you should contact your gin association or seek the advice of an attorney. This short Guide does not cover every aspect of compliance under these laws. Additionally, employers should note that this document only covers the federal statutes and does not cover local and state labor laws and regulations. Since this Guide was last updated, many states have passed laws that govern minimum pay and overtime requirements, the time period within which pay must be provided to a current or former employee, restrictions on deductions from pay, such as advance notice, specific content of written deduction authorizations signed by individual employees, opportunities for employees to rescind previously authorized deductions, and many other restrictions. States may institute laws that exceed the federal statutes. It is incumbent on you as an employer to ensure that you are following labor law applicable in the state where you operate and potentially mandatory disclosure and other labor law requirements applicable in the state in which your employees were located when they were recruited to work in your state at your gin.

Cotton gins are required by the FLSA to pay all employees not less than the FLSA minimum wage and overtime after forty (40) hours in the workweek unless the employee is exempt from either the minimum wage or the overtime standards.

The FLSA does provides several limited exemptions for cotton gins. This guide will explain the exemptions commonly available for gins.

Gin Manager

Typically, the gin manager is exempt from both the minimum wage and overtime provisions of the FLSA under Section 13(a)(1). The manager must have active managerial control of the gin, including the right to hire, fire or make recommendations for such action to be taken; the manager must customarily direct two or more employees of the gin; and the manager must exercise discretionary powers in management of the gin. This exemption is available in both the active ginning season and the dormant season. Be careful, to be exempt the gin manager must be on salary that is not subject to reduction based on quantity or quality of work and must always direct the work of two or more full time employees or the equivalent part-time employees. The current minimum salary requirement is at $684 per week. (29 CFR 541) Assistant managers may not qualify for exemption under this section unless they can meet all the tests above. Many assistant managers have successfully sued on claims that they do not meet all of these required criteria. (See USDOL Wage-Hour Division Fact Sheets #17(A-H) (https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime) for more information regarding the most common exemptions from overtime and minimum wages.

During the active ginning season, the FLSA provides a partial overtime exemption for any employee employed by an employer exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton under FLSA Section 13(h).

During the active ginning season, the FLSA provides a partial overtime exemption for employees actively and exclusively engaged in the ginning of cotton for market under FLSA Section 13(i).

These two exemptions, Section 13(h) and Section 13(i), apply to different employees, giving a partial overtime exemption for 14 weeks during the active season. Be careful; the method by which the number of exempt weeks is counted is different for 1) the employees employed by such employer exclusively to provide services necessary and incidental to the ginning of cotton and 2) the employees actively and exclusively engaged in the ginning of cotton.

FLSA Section 13(h) – Employees Necessary and Incidental to Ginning of Cotton

The FLSA Section 13(h) group of employees are employees employed by such employer exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton. This group includes the following employees:

Truck Drivers

A truck driver must be 18 years of age or older. The truck driver's duty is to operate a truck or whose sole duty is to assist in the trucking operation where seed cotton is hauled from the place of harvest to the gin or where cotton, cottonseed, or gin trash is hauled away from the gin's premises.

Office Person, Combination Bookkeeper and Scale Clerk

The office person, combination bookkeeper and scale clerk's duties are to keep records of cotton ginned and weights, maintain customers' accounts, record sales, purchases and other bookkeeping transactions normally required for the operation of a gin.

Maintenance or Repair Person

The maintenance or repair person is employed in general maintenance and repair of the gin, as opposed to those making operating repairs during the active gin season, which are covered by FLSA Section 13(i). Be careful, repair of the gin before and after the active season is general maintenance and is subject to overtime after 40 hours in a workweek.

Watchman or Security Guard

The watchman or security guard remains on duty at the gin plant to prevent fire, theft, and vandalism. As long as this person is required or permitted to be present, this person must be paid regardless of whether he or she is allowed to sleep or leave the premises during the period of duty.

Wage Information

All individuals listed above are to be paid the FLSA minimum wage rate ($7.25 per hour as of March 2022), and as indicated above, applicable state law where the gin is located may require a higher minimum hourly pay and overtime payments. When claiming one of the FLSA exempt weeks, these employees must be paid time and one-half their "regular rate" for hours worked in excess of 10 hours in any workday or in excess of 48 hours in any workweek. Daily overtime or weekly overtime is to be paid, whichever is greater, if the worker exceeds 40 hours in the workweek. The exempt workweeks apply to all employees and the exemption cannot apply to individual employees, i.e., a gin cannot claim exemption for only part of the employee group to avoid the daily overtime requirements.

The exemption for the employees listed above may be claimed by the employer for 14 weeks during any calendar year. The 14 exempt weeks do not have to be claimed consecutively. The

employer may declare the workweek as an exempt week at any time preceding the writing and dispensing of the paychecks. The employer must designate exempt weeks in its payroll records.

After 14 weeks of the exemption are used in any calendar year and in the dormant season, under the FLSA, these employees must be paid time and one-half of their regular rate for all hours worked in excess of 40 hours in any workweek.

FLSA Section 13(i) – Employees Actively and Exclusively Engaged in Ginning

The Section 13(i) employees are employees actively and exclusively engaged in the ginning of cotton for market. This group includes the following employees:

Ginner, Ginner Helper, Suction Hands, Press Hands, Yard Hands, Module Feeder Hands, Clean Up Hands, and any Others Directly Engaged in the Ginning of Cotton

These are employees who are engaged exclusively in the ginning operations, who work solely in and around the gin plant, and are necessary to operation of the gin plant. This group includes employees who remove bales from the press to place them in holding areas on or near the gin's premises. It also includes employees who make operational gin repairs as part of their regular duties during the active season. This exemption cannot be used for gin repairs made prior to the ginning season; except during the ginning season, overtime must be paid after 40 hours in the workweek.

Weigher or Scale Clerk

The weigher or scale clerk operates the scales, records the weight of seed cotton, and writes in any information on the gin ticket that properly identifies the cotton being ginned. Be careful, if this employee performs any other bookkeeping or recordkeeping duties, this employee is not exclusively engaged in the ginning of cotton.

Wage Information

All individuals listed above are to be paid the FLSA minimum wage rate ($7.25 per hour in March 2022), and as indicated above, applicable state law where the gin is located may require a higher minimum hourly pay and overtime payments. When claiming one of the exempt weeks that is available under the FLSA, these employees must be paid time and one-half their regular rate for hours worked in excess of 10 hours in any workday or in excess of 48 hours in any workweek. Daily overtime or weekly overtime is to be paid, whichever is greater, if the worker exceeds 40 hours in the workweek. The exempt workweeks apply to all employees, and the exemption cannot apply to individual employees, i.e., a gin cannot claim exemption for only part of the employee group to avoid the daily overtime requirements.

The exemption for the employees listed above may be claimed by the employer for 14 weeks during any consecutive 52-week period. The 14 exempt weeks do not have to be claimed consecutively. The employer may declare the workweek as an exempt week at any time preceding the writing and dispensing of paychecks. The employer must designate exempt weeks in their payroll records.

After 14 weeks of the exemption are used in any consecutive 52-week period and in the dormant season, under the FLSA, these employees must be paid time and one-half of their regular rate for all hours worked in excess of 40 hours in any workweek.

Example Payroll Exemption Calculations

Daily overtime or weekly overtime is to be paid, whichever is greater, if the worker exceeds 40 hours in the workweek, i.e., an employee must work more than 40 hours in the workweek to qualify for overtime, regardless of hours worked in any single day, and works more than 10 hours in any workday or more than 48 hours in any workweek.

Active Season (one of the claimed partial overtime weeks):

#1 Employee works 12 + 12 + 12 = 36 total hours; no overtime is due.
#2 Employee works 12 + 12 + 12 + 5 = 41 total hours; 6 hours of daily overtime are due.
#3 Employee works 10 + 10 + 10 + 10 + 5 = 45 total hours; no overtime is due.
#4 Employee works 12 + 12 + 12 + 12 = 48 total hours; 8 hours of daily overtime are due.
#5 Employee works 10 + 10 + 10 + 10 + 8 = 48 total hours; no overtime is due.
#6 Employee works 12 + 12 + 12 + 12 + 12 + 12 + 12 = 84 total hours; 36 hours of weekly overtime are due.

Dormant Season or a non-claimed partial exemption workweek:

#1 Employee works 12 + 12 + 12 = 36 total hours; no overtime is due.
#2 Employee works 12 + 12 + 12 + 5 = 41 total hours; 1 hour of overtime is due.
#3 Employee works 10 + 10 + 10 + 10 + 5 = 45 total hours; 5 hours of overtime are due.
#4 Employee works 12 + 12 + 12 + 12 = 48 total hours; 8 hours of overtime are due.
#5 Employee works 10 + 10 + 10 + 10 + 8 = 48 total hours; 8 hours of overtime are due.
#6 Employee works 12 + 12 + 12 + 12 + 12 + 12 + 12 = 84 total hours; 44 hours of overtime are due.

Bonuses

Promised or non-discretionary bonuses, i.e., a bonus to be paid if the employee stays for the entire season or bonuses based on production or safety, are wages and must be included in the regular rate (the rate on which the overtime rate must be calculated) and the extra half time must be paid based on that higher “regular rate” that includes the bonus amount regardless of

when the bonus is paid. The U.S. Department of Labor, Wage-Hour Division says that for a bonus to be considered discretionary so that the bonus amount is not required to be added to the regularly paid hourly rate, "both the fact that payment is made and the amount of the payment" must be "determined at the sole discretion of the employer at or near the end of the period" when the payment is to be made. 29 C.F.R. 778.211(a). Moreover, to be considered "discretionary," the payment must not be made "pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly." See § 778.211(a) See also the U.S. Department of Labor, Wage-Hour Division, Field Operations Handbook (FOH), Chapter 32c01 (as published 11/17/2016 with revisions published on the website as of 3/14/2022, available https://www.dol.gov/agencies/whd/field-operations-handbook.)

For example, a 50 cent per hour bonus becomes 75 cents for the overtime hours.

Effective January 15, 2020, the U.S. Department of Labor, Wage-Hour Division updated its regulations concerning discretionary bonuses in 29 C.F.R. 778.211, expressly saying that whether the employer calls a bonus "discretionary" is not determinative of whether it will consider the bonus as being discretionary. If an employer announces at the beginning of the season that it intends to pay a bonus to employees who remain employed for the full season, the employer has thereby abandoned its discretion regarding the fact of payment. Such a bonus would not be excluded from the regular rate of the employees receiving the end-of-season bonus. Ginners should expect Department of Labor, Wage-Hour Division, investigators to examine all of the facts and circumstances, including employee expectations based on words said and past history of bonuses at the gin, to determine if a bonus will be deemed "discretionary."

As shown in the FOH, if the bonus is paid at the end of the season, "the employer may disregard the bonus in computing the regular hourly rate until the amount of the bonus can be ascertained." (Emphasis supplied.) Once the amount is ascertained "it must be apportioned back over the workweeks of the period during which" it was earned—for example, the full season. The bonus calculation will result in an additional amount of pay for each workweek during the "bonus-earning" period. "The additional amount will be based on one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of overtime hours worked that workweek." See FOH Chapter 32c03(b).

To avoid the workweek-by-workweek calculation of how the bonus will affect pay for each week, including any overtime payments due, an employer may distribute a bonus as a percentage of the total earnings of each respective employee over the "bonus-earning" period. FOH Chapter32c04(a).

Transportation

'*Advanced money for transportation*': In non-overtime weeks, money that is advanced for transportation cannot be deducted from an employee's wages if the deduction reduces the

employee's hourly rate below the legal minimum wage for the hours worked. *Be careful*; care must be taken that a MSPA violation does not occur because a migrant agricultural worker was not notified at the time of recruitment of the deduction for transportation. (See MSPA portion of this Guide.)

In overtime weeks, no deductions are permitted unless an agreement regarding the deduction is in place. Where there is an agreement as to the deductions for the transportation advance, deductions are permitted in the same manner as in non-overtime weeks, not to exceed 40 hours; however, no deduction can be taken from the required overtime compensation. The WH-516 notice required by the MSPA can be used for this purpose.

'*Out of pocket*' transportation costs: The US Department of Labor now strictly enforces a rule that to date we have seen applied only in the context of the H-2A Program but said to be based on the Fair Labor Standards Act. In the H-2A context this reimbursement of certain out-of-pocket expenses on or before the date the worker is paid his first paycheck is now mandatory. U.S. workers in corresponding employment to any work performed by or eligible to be performed by H-2A visa-holders and H-2A visa-holders who travel from a foreign country must be reimbursed on or before the employee's first payday the part of his or her transportation costs that cut into his or her FLSA minimum wages or higher state minimum wages for his or her first payday. The employer must pay enough so that the employee is sufficiently reimbursed at that first payday that the worker will still be paid, free and clear, enough cash wages that his earnings cover the FLSA minimum or state law minimum for all hours worked that week. While the example given by the Court that first ruled that such pre-employment expenses may not be allowed to cut into the FLSA minimum wages for the first workweek involved the FLSA minimum wage then set at $5.15 per hour, which is no longer in effect, the Court's explanation of how to calculate this reimbursement obligation is worth studying. The Court said that requiring an employee to absorb the cost of transportation from the worker's home village to the job at a Florida farm was like requiring the employee to purchase a tool that would be necessary to perform the job. The cost of such a tool, the Court said, could not be allowed to cut into the employee's required FLSA minimum wages for the first workweek on the job. The Court gave the following example of how to calculate and pay extra money by the first payday to cover the transportation cost insofar as that cost cut into the minimum wage, then $5.15 per hour, for all hours worked in the first workweek:

> Suppose a worker is required to bring to work tools which cost $100. In his first workweek, he works 40 hours at a rate of $7 per hour. If only given pay for the hours worked, which would be $280, the FLSA would be violated. This is so because the cost of the tools, which has been imposed on the worker prior to employment, reduces the wages to $180; when $180 is divided by 40 hours, the hourly rate drops below the minimum wage of $5.15. However, the FLSA does not require the employer to add the cost of the tools onto the regular wages, but only to reimburse the worker up to the point

> that the minimum wage is met. To satisfy the FLSA, the employer would need to pay this worker $306 he first workweek: $100 for the tools plus $206 (40 hours multiplied by $5.15). **[Note: the number of hours would be multiplied by the current FLSA or higher state minimum wage in effect at the time.]**

Arriaga v. Florida Pacific Farms, LLC, 305 F.2d. 1228, 1237 n. 11 (11th Cir. 2002). Thus, when the cost of the mandatory tool required for the job was taken into account, the employer was required to pay enough additional money on the first payday so that the employee still received the minimum wage, then $5.15 per hour, after the cost of the tool was taken into account**. As of March 2022, under the *Arriaga* requirement, once the cost of a tool is taken into account, the employee would still be required to receive at least $7.25 per hour for all hours worked in first workweek period covered by the first payday under the FLSA. If the state law required, for example, $11.50 per hour, then after taking into account the cost of the "tool" or incoming transportation expense, the employee would have to be paid, free and clear, $11.50 per hour for all hours worked.** While we have not seen the "Arriaga rule" applied outside the context of an employer that is using the H-2A Program, even in employment that is not regulated under the H-2A Program, employees who relocate in order to perform a job at a gin likely should not be charged for the cost of their relocation travel expenses, to the extent such costs cut into the FLSA minimum wage or higher state minimum wage, if an employer has provided the transportation.

Deductions

Be careful, under the Migrant and Seasonal Agricultural Worker Protection Act, (MSPA), as discussed below, no deductions, other than those required by law, i.e., FICA, withholding, are allowed unless the migrant agricultural worker or day haul worker is notified in writing, at the time of recruitment of the deduction. Form WH-516 can be used for this purpose. Note that if your gin employs H-2A visa-holding workers and U.S. workers in "corresponding employment," meaning U.S. citizens, green card holders, and others authorized to work in the United States, who perform any of the duties the H-2A visa-holders may perform or do perform, then additional restrictions on deductions and descriptions of the terms of the job apply.

Note many states have enacted laws and regulations that further restrict deductions that may be made from employees' pay. Such restrictions include special authorizations that must follow a prescribed written form, must be signed in a particular way, may be revoked by the employee, etc. Make sure you check on state law that may be applicable to deductions from employee pay even if the employee says he or she will sign a form authorizing the deduction. There may be special state law and regulatory requirements even for voluntary deductions from pay to repay a cash advance and for other voluntary deductions.

Example Payroll Deduction Calculations That Are Permissible under the FLSA and under MSPA if Properly Disclosed

In the following examples, assume that the employee is a migrant agricultural worker (and the H-2A rules are not applicable) and that a notice of deduction (Form WH-516 can be used for this notice) was given at the time of recruitment. The employee's rate of pay is $8.25/hour and the minimum wage is $7.25/hour.

$8.25/hour - $7.25/hour = $1.00/hour paid above the minimum wage.

Active Season (one of the claimed partial overtime weeks):
#1 Employee works 12 + 12 + 12 = 36 total hours; no overtime is due (36 x $1.00/hour = $36.00 total deduction is allowed).

#2 Employee works 12 + 12 + 12 + 5 = 41 total hours; 6 hours of daily overtime are due (35 x $1.00/hour = $35.00 total deduction is allowed).

#3 Employee works 10 + 10 + 10 + 10 + 5 = 45 total hours; no overtime is due (45 x $1.00/hour = $45.00 total deduction is allowed).

#4 Employee works 12 + 12 + 12 + 12 = 48 total hours; 8 hours of daily overtime are due (40 x $1.00/hour = $40.00 total deduction is allowed).

#5 Employee works 10 + 10 + 10 + 10 + 8 = 48 total hours; no overtime is due (48 x $1.00/hour = $48.00 total deduction is allowed).

#6 Employee works 12 + 12 + 12 + 12 + 12 + 12 + 12 = 84 total hours; 36 hours of weekly overtime are due (48 x $1.00/hour = $48.00 total deduction is allowed).

Dormant Season or a non-claimed partial exemption workweek:
#7 Employee works 12 + 12 + 12 = 36 total hours; no overtime is due (36 x $1.00/hour = $36.00 total deduction is allowed).

#8 Employee works 12 + 12 + 12 + 5 = 41 total hours; 1 hour of overtime is due (40 x $1.00 = $40.00/hour total deduction is allowed).

#9 Employee works 10 + 10 + 10 + 10 + 5 = 45 total hours; 5 hours of overtime are due (40 x $1.00/hour = $40.00 total deduction is allowed).

Remember, deductions are never allowed unless a notice of deduction was given at the time of recruitment for migrant workers and day haul workers on the WH-516 or an equivalent notice, and as noted above, there may be state law and regulatory restrictions and requirements.

THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA)

This Guide is intended to be a practical guide rather than an exhaustive discussion of the provisions of the MSPA. For a more complete discussion of the MSPA, refer to 29 CFR 500. These MSPA regulations are available here: https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-A/part-500. If you have a specific question about the MSPA, you should contact your gin association or seek the advice of an attorney because this Guide can provide only an overview.

When a cotton gin employs a migrant agricultural worker or a day haul worker, the gin is required to comply with the requirements of the MSPA. Only those employees that come within the meaning of a migrant agricultural worker or day haul worker are covered by the MSPA in cotton gins. Note that the U.S. Department of Labor, Wage-Hour Division, and an Administrative Law Judge of the United States Department of Labor have agreed that a trucking company that employs H-2A truck drivers and migrant agricultural workers to haul cotton from farmers' fields to the gin is engaged in a "farm labor contracting activity," and the trucking firm must be fully licensed under MSPA as a farm labor contractor for furnishing the workers. Thus, such an operation must comply with all MSPA and H-2A requirements. The trucking firm was required to be licensed under MSPA for all of the activities in which it would be engaged—providing housing, transportation and driving the workers, and it was required to have MSPA-licensed farm labor contractor employees to handle driving and other MSPA-covered duties on behalf of the business.

MIGRANT AGRICULTURAL WORKER means an individual who is employed in agricultural employment of a seasonal or other temporary nature and who is required to be absent overnight from his permanent place of residence. (MSPA Sec. 3(8)); 29 C.F.R. 500.20(p).

DAY HAUL WORKER means an individual employed in a day haul operation. A day haul operation means the assembly of workers at a pick-up point waiting to be hired and employed, transportation of such workers to agricultural employment, and the return of such workers to a drop-off point on the same day. (MSPA Sec. 3(4)); 29 C.F.R. 500.20((g).

Recruitment of Migrant Agricultural Workers under MSPA

The MSPA provides an exemption from registration as a farm labor contractor (FLC) for cotton gins themselves and the gins' employees when performing farm labor contracting activities exclusively for the gin. (MSPA Sec. 4(b); 29 CFR 500.30(k)) However, the gin is required to provide all other protections required by the MSPA to its MSPA-covered employees.

If a cotton gin utilizes any business or person to perform farm labor contracting activities who is not an employee of the gin, that business or person must register with the U.S. Department of Labor as a farm labor contractor. (29 CFR 500.40). Farm labor contractors must also employ

only MSPA-registered "farm labor contractor employees" to perform any "farm labor contracting activity," which means "recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker." 29 C.F.R. 500.20(i). Note that the U.S. Department of Labor, Office of Foreign Labor Certification, and an Administrative Law Judge of the United States Department of Labor have agreed that a trucking company that employs H-2A truck drivers and migrant agricultural workers to haul cotton from farmers' fields to the gin is engaged in a "farm labor contracting activity" and must be fully licensed under MSPA as a farm labor contractor for furnishing the workers. Registration as a "farm labor contractor" would be required even though the trucking firm expected it would be able only to hire temporary H-2A visa-holders because the trucking firm must recruit and seek to hire U.S. workers as part of the H-2A process. Thus, such an operation must comply with all MSPA and H-2A requirements. The trucking firm was required to be licensed under MSPA for all of the activities in which it would be engaged—employing truck drivers who would be hauling cotton from farmers' fields to the gin, providing housing, transportation and driving the workers.

As noted above, a gin is required to utilize only registered farm labor contractors who are currently registered to perform each of the services provided. (29 CFR 500.71). *Be careful*, a farm labor contractor may be registered but not authorized to transport or house workers. Check the farm labor contractor's registration closely. Farm labor contractors must be licensed to house workers in specific housing facilities that have been inspected and are listed on the contractor's license card, and they must be licensed to transport workers in specific vehicles that have been inspected and are listed on the contractor's farm labor contractor license. Contractors may only employ individuals who are authorized to work for that contractor and drive vehicles of the contractor that are listed on the contractor's FLC license to transport employees of the contractor.

FARM LABOR CONTRACTING ACTIVITY means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant agricultural worker.

In situations of joint employment or joint responsibility by more than one employer, each employer is responsible for the protections provided by the MSPA; however, unnecessary duplication of efforts, such as distribution of the terms and conditions of employment on multiple WH-516 forms is not required. *Be careful*, any time you use a farm labor contractor, there is significant risk of the gin being classified as joint employer with the contractor, particularly if the gin sets the hours, days, and times the contractor's employees may work or oversees the contractor's employees use and operation of the equipment even if the gin management conveys information and direction to and through the contractor. A finding that the gin and contractor are "joint employers" of workers paid, housed, and transported by the contractor can make the gin potentially liable for all errors made by the FLC and the FCL's employees. As of January 2022, fines for violation of MSPA requirements increased to $1898 per violation, with higher fines possible for certain types of violations and violations that are

deemed to be "willful." Damages for MSPA violations and statutory penalties may be pursued by employees who contend that the gin and a contractor are jointly liable for MSPA violations. At the time of recruitment, i.e., before the worker relocates to take the job (for migrant workers) and at the time of recruitment of a seasonal agricultural worker for employment through use of a day haul operation, each such prospective worker must be notified, in writing, in a language in which he or she is fluent, of specific terms and conditions of employment. Copies of the permissible form WH-516 in English and Spanish are attached at pages 17 and 18 of this Guide. A form in Haitian Creole is available through the U.S. Department of Labor, Wage-Hour Division. Copies of all of these WH-516 forms are available here: https://www.dol.gov/agencies/whd/forms. An employer may attach additional pages to these disclosure documents that contain, for example, work rules, standards of conduct for using employer-provide housing, etc. An employer is not required to use the WH-516 form so long as the required information is provided. Note that if the gin employs or files an application to employ temporary foreign H-2A employees, the job requirements must also comply with the H-2A rules and requirements. U.S. workers in corresponding employment to the work to be performed by temporary foreign H-2A visa-holders may not be treated differently in terms of restrictions or obligations than the H-2A visa holder temporary foreign workers. All workers must be provided special U.S. Department of Labor, Office of Foreign Labor-approved terms of employment, and U.S. workers must also be provided all MSPA-required disclosures, some of which are not included on the Department's H-2A forms.

Be careful, no deductions, other than those required by law, i.e., FICA and tax withholdings, are allowed unless the migrant agricultural worker or day haul worker is notified in writing, at the time of recruitment, of the deduction. The terms and conditions of employment cannot be changed or violated without justification, and the content of the required WH-516 forms are often viewed as contracts by courts when employees bring suit to enforce rights or the Wage-Hour Division makes claims that MSPA requirements have been violated. Again, please note that some states have additional requirements concerning the terms of the job that must be disclosed in writing during recruitment or on the first day on the job.

A poster, which sets out the rights and protections of the migrant agricultural worker must be posted at the place of employment. This poster, which is yellow, is provided by the U.S. Department of Labor and is available online or from your Ginners' association. A copy of the English-Spanish mandatory poster is available here: https://www.dol.gov/agencies/whd/posters/mspa/english-espanol. A copy of the English-Haitian Creole is available here: https://www.dol.gov/agencies/whd/posters/mspa/english-haitian.

Migrant and Seasonal Agricultural Worker Protection Act

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division

OMB NO: 1235-0002
Expires: 09/30/2023

Worker Information—Terms and Conditions of Employment

1. Place of employment: _____

2. Period of employment: From _____ To _____

3. Wage rates to be paid: $ _____ per Hour Piece Rate $_____ per _____

4. Crops and kinds of activities: _____

5. Transportation or other benefits, if any: _____

_____

Charge(s) to workers, if any: _____

6. Workers' compensation insurance provided: Yes ☐ No ☐

Name of compensation carrier: _____

Name and address of policyholder(s): _____

_____

Person(s) and phone number(s) of person(s) to be notified to file claim: _____

_____

Deadline for filing claim: _____

7. Unemployment compensation insurance provided: Yes ☐ No ☐

8. Other benefits: _____ Charge(s) _____

9. For migrant workers who will be housed, the kind of housing available and cost, if any: _____

_____

Charge(s) _____

10. List any strike, work stoppage, slowdown, or interruption of operation by employees at the place where the workers will be employed. (*If there are no strikes, etc., enter "None"*):

_____

_____

11. List any arrangements that have been made with establishment owners or agents for the payment of a commission or other benefits for sales made to workers. (*If there are no such arrangements, enter "None"*):

_____

_____

Name of Person(s) Providing This Information: _____

Note: The Department of Labor–Wage and Hour Division makes this form available in certain other languages to enable employers to satisfy the requirement that the terms and conditions of employment be disclosed in a language common to the workers. Contact the nearest office of the Wage and Hour Division to obtain such forms.

While completion of Form WH516 is optional, it is mandatory for Farm Labor Contractors, Agricultural Employers, and Agricultural Associations to disclose employment terms and conditions in writing to migrant and day-haul workers upon recruitment, and to seasonal workers other than day-haul workers upon request when an offer of employment is made to respond to the information collection contained in 29 CFR §§ 500.75-500.76. This optional form may be used to disclose the required information. Thereafter, any migrant or seasonal worker has the right to have, upon request, a written statement provided to him or her by the employer, of the information described above. This optional form may also be used for this purpose.

We estimate that it will take an average of 32 minutes to complete this collection of information, including the time to review instructions, search existing data sources, gather and maintain the data needed, and complete and review the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, Room S3502, 200 Constitution Avenue NW, Washington, D.C. 20210. ***Do NOT send the completed form to this office.***

Persons are not required to respond to this information unless it displays a currently valid OMB number.

Optional form WH516 ENG
REV 06/14

Ley Para La Protección de Obreros Agrícolas Migratorios y Temporeros

Departamento de Trabajo de EEUU
Sección de Horas y Sueldos

U.S. Wage and Hour Division

OMB No.: 1235-0002
Vence: 09/30/2023

Información Sobre el Obrero -Términos y Condiciones de Empleo

1. Lugar de empleo: _____

2. Período de empleo: De _____ a _____

3. Tasas de salarios a pagar: $ _____ por hora Pago a destajo $ _____ por _____

4. Cultivos y tipos de actividades: _____

5. Transporte u otros beneficios, si los hay: _____

_____

Gastos con cargo a los obreros, si los hay: _____

6. Seguro de indemnización para obreros que se provee: Sí ☐ No ☐

Nombre de la compañía de seguros: _____

Nombre y dirección del (de los) asegurado(s): _____

_____

Persona(s) y número de teléfono de la(s) persona(s) a notificar para presentar reclamación: _____

_____

Fin de plazo para presentar reclamación: _____

7. Seguro de indemnización por desempleo que se provee: Sí ☐ No ☐

8. Otros beneficios: _____ Gasto(s) _____

9. En el caso de que los obreros migratorios necesiten alojamiento, el tipo de alojamiento disponible y el costo, si lo hay: _____

_____

Cargo(s): _____

10. Enumere cualquier huelga, paro de trabajo, retraso o interrupción de las operaciones por parte de los empleados en el lugar donde se empleará a los obreros. (Si no hay huelgas, etc., indique "Ninguna").

_____

_____

11. Indique cualquier acuerdo o convenio que se haya hecho con los propietarios del establecimiento o con los agentes para el pago de una comisión u otros beneficios por ventas hechas a los obreros. (Si no hay ningún acuerdo o convenio, indique "Ninguno"):

_____

_____

Nombre de la(s) persona(s) que proporciona(n) esta información: _____

Nota: La Sección de Horas y Sueldos del Departamento de Trabajo pone a la disposición este formulario en otros idiomas para permitirles a los empresarios que cumplan con el requisito de notificación de los términos y las condiciones en un idioma que sea común a los obreros. Póngase en contacto con la oficina más cercana de la Seccion de Horas y Sueldos para obtener dichos formularios.
Mientras que rellenar el Formulario WH-516 es opcional, se exige que los Contratistas de Trabajo Agrícola, los Empresarios Agrícolas y las Asociaciones Agrícolas les revelen los términos y las condiciones de empleo por escrito a los obreros migratorios y a los jornaleros de cargas al ser reclutados, y a obreros temporeros aparte de jornaleros de cargas a petición cuando se hace una oferta de empleo para responder a la compilación de información contenida en 29 CFR §§ 500.75 – 500.76. Se puede usar este formulario opcional para revelar la información exigida. De allí en adelante, cualquier obrero(a) migratorio(a) u obrero(a) temporero tiene derecho a recibir, a petición, una declaración escrita provista a él/ella por el empresario con la información descrita arriba. También se puede usar este formulario opcional para este propósito.
Se calcula que se tomará un promedio de 32 minutos para rellenar toda esta compilación de información, incluído el tiempo para repasar las instrucciones, buscar las fuentes de datos existentes, recolectar y mantener los datos necesarios y rellenar y repasar la compilación de la información. Si tiene algún comentario con respecto a este cálculo de obligación o cualquier otro aspecto de esta compilación de información, inclusive recomendaciones para reducir esta carga, envíelos a Administrator, Wage and Hour Division, Room S-3502. 200 Constitution Avenue, N.W., Washington, D.C. 20210.
NO Envíe a Esta Oficina el Formulario Con la información.
No es necesario responder a esta información a menos que tenga un número válido de OMB.

Formulario opcional WH-516 Español
Rev. June 2011

MSPA Wages and Payroll Standards

The gin must keep specific payroll records for each migrant agricultural worker and each day haul worker who is employed and, if a farm labor contractor makes the gin's payroll, the farm labor contractor must furnish a copy of his payroll records to the gin. The gin must maintain these records for a period of three years.

The following payroll records must be maintained for each migrant agricultural worker and day haul worker. These records must include the worker's name, the worker's permanent address, and the worker's social security number. The social security number can be formatted as xxx-xx-1234 on the paystub. Additionally, the employer must make and maintain records that show:

(1) the basis on which wages are paid;
(2) the number of piecework units earned, if paid on a piecework basis;
(3) the number of hours worked;
(4) the total pay period earnings;
(5) the specific sums withheld and the purpose of each sum withheld; and
(6) the net pay.

Additionally, an itemized written statement of all of the above payroll information, including the worker's name, the worker's permanent address, and the worker's Social Security number, plus the employer's name, address, and employer identification number assigned by the Internal Revenue Service, **must be given** to each migrant agricultural worker and each day haul worker at the time of payment of his or her wages for each pay period. A copy of the WH-501 form that contains spaces for these required disclosures is available in English and Spanish here: https://www.dol.gov/agencies/whd/forms. Note that state law may require additional disclosures or otherwise govern how and when workers must be paid.

All wages owed must be paid when due. The migrant agricultural workers must be paid no less often than every two weeks or semi-monthly. This information must also be provided to day haul workers. Traditionally, day-haul workers were paid every day. If they are not paid daily, they should be paid as frequently as other gin employees. No wages may be withheld unless the worker was notified of the potential deduction at the time of recruitment that deductions of a particular type may be made. These deductions must be in accordance with the FLSA and MSPA requirements. Many states require all employees to be informed of their regular payday at the time they are hired.

Transportation

Be careful, a farm labor contractor may be registered to perform recruitment and furnishing of workers but not authorized to transport workers. A contractor that is authorized to provide transportation must be licensed to provide driving services or must utilize only persons who are authorized to drive employees under the MSPA licensing requirements Check the farm labor contractor's registration closely.

Each gin that uses or causes to be used any vehicle to transport migrant agricultural workers or day haul workers must ensure that the vehicles used are listed on the contractor's license as having been inspected and approved as conforming to specific vehicle safety and insurance standards at all times the vehicles are in operation. There may be special training requirements applicable to drivers, such as not to allow open alcohol containers within the vehicle. Vehicles used by gins for transporting such workers must be duly inspected and approved as conforming to specific vehicle safety and insurance standards, and drivers employed by the gin must be duly licensed to operate the particular vehicle he or she operates to transport such workers.

Each vehicle utilized to transport migrant agricultural workers or day haul workers must have a minimum level of insurance, $100,000 per seat, with a maximum of $5,000,000 for any one vehicle. Under certain circumstances, no liability insurance is required if the migrant agricultural workers and day-haul workers being transported are covered by the state's worker compensation laws at all times they are transported. If worker compensation insurance is used in lieu of liability insurance, a minimum level of $50,000 for loss or damage of property of others must be provided. Note that some worker comp insurance carriers have successfully contended that their policies did not cover employees before workers were on the employer's payroll, after the last work was performed for the season, and when workers were being transported to stores and recreational facilities. Vehicle safety, driver licensure, and insurance requirements do not apply to carpooling arrangements made by the workers themselves, using one of the workers' own vehicles. Carpooling does not include any transportation arrangements in which a farm labor contractor participates. Carpooling does not include any transportation arrangements that are specifically directed, authorized, or requested by a gin or its representative.

Any farm labor contractor who provides transportation must be authorized by the U.S. Department of Labor to transport workers in the specific vehicle being used to transport the workers.

Be careful; if your gin crew travels together, more likely than not, there will be MSPA covered transportation. This includes the local transportation as well as transportation from the point of recruitment to the job site.

Housing Safety and Health

Each person who owns or controls a facility or real property which is used as housing for any migrant agricultural worker must ensure that this housing complies with all substantive Federal and State standards applicable to the housing.
If more than one person is involved in providing the housing, all parties are responsible for the housing.

A person who, in the ordinary course of that person's business, regularly provides housing on a commercial basis to the general public and provides housing to any migrant agricultural worker of the same character and on the same or comparable terms and conditions as provided to the general public, is not subject to the MSPA housing requirements. Be careful, migrant housing cannot be brought within this exemption simply by offering lodging to the general public. This exemption is sometimes referred to as the "Holiday Inn" exception and can be applicable to a public accommodation if workers make their own arrangements with the hotel and pay for the hotel on their own.

A farm labor contractor who provides housing must be authorized by the U.S. Department of Labor to provide the specific housing being furnished.

Migrant housing may not be occupied by any migrant agricultural worker unless a federal, state or local health agency has certified that the housing meets applicable safety and health standards. A request for preoccupancy housing inspection must be made at least 45 days prior to the date on which it is to be occupied. If a state or local health agency will not inspect the housing, the Wage-Hour Division will conduct a preoccupancy housing inspection. The housing must be maintained in compliance with the housing regulations when it is occupied. Most housing must meet the OSHA housing standards that are available at https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.142. Housing that was completed or under construction before April 3, 1980, or under contract for construction before March 4, 1980, may instead meet the U.S. Department of Labor, Employment and Training Administration's (ETA's) regulations at 20 C.F.R 654.400 if state law permits use of those regulations instead of the OSHA regulations. These ETA housing regulations are available here: https://www.ecfr.gov/current/title-20/chapter-V/part-654, Note also that states may impose additional requirements beyond those imposed under the federal OSHA regulations.
The certificate of occupancy issued by the inspecting agency must be posted at the housing site. Additionally, the terms and conditions of the use of the housing, including but not limited to the name of the person in charge of the housing, must be posted at the housing site. These forms, respectively WH-520 and WH-521 are available here: https://www.dol.gov/agencies/whd/forms.

The housing provider must make sure that the housing remains in compliance with the applicable housing requirements at all times that the housing is in use. Besides giving residents written notice of how they can inform someone in charge of broken screens, refrigerator

malfunctions, and other problems, housing providers may be able to avoid liability for an occasional slip-up if they have at least a weekly housing inspection by a representative who will verify compliance with each of the requirements applicable to that housing and get the problem corrected, making a note both of the problem and the correction with dates for “the record” to be shown to an inspector or other person who complains about the compliance of the housing with applicable requirements. Housing providers may also want to include rules regarding residents’ treatment of the housing as routine parts of their recruitment disclosures. One example might be that residents may not discharge fire extinguishers except in the case of fire or drop papers and other trash on the grounds surrounding the housing.

MSPA Compliance Checklist

RECRUITMENT

Recruit/Employ Migrant Agricultural Workers	YES	NO

If the answer to this question is 'NO,' you are not subject to the MSPA requirements and need to go no further.

Utilized Farm Labor Contractor	YES	NO
Farm Labor Contractor Utilized Registered with US DOL	YES	NO
Terms of Employment Disclosed at the Time of Recruitment	YES	NO
Terms of Employment Accurately Represented in Disclosure	YES	NO
Complied with Terms of Employment	YES	NO
MSPA Poster at Worksite	YES	NO
Consider Joint Employer Implications and Criteria	YES	NO

WAGE AND PAYROLL STANDARDS

Payroll Records Maintained	YES	NO
Wage Statement Provided	YES	NO
Workers Paid by Farm Labor Contractor (Be Careful)	YES	NO
Maintained Payroll Records of Farm Labor Contractor	YES	NO
Paid Wages When Due	YES	NO

TRANSPORTATION

Migrant Agricultural Workers to be Transported	YES	NO
Public Transportation Utilized (Exempt from MSPA)	YES	NO
Voluntary Carpooling (Be Careful)	YES	NO
Person Providing Transportation Registered with US DOL for Transportation	YES	NO
All drivers have a Valid Drivers License	YES	NO
Vehicles Meet Safety Standards	YES	NO
Insurance Provided on Vehicles	YES	NO
DOL or DOT Standards for Vehicles and Drivers Met	YES	NO

HOUSING

Housing Provided	YES	NO
Preoccupancy Inspections	YES	NO
Housing Meets Substantive Safety Standards	YES	NO
Posted Housing Conditions	YES	NO

Housing Maintained in Compliance During all Occupancy	YES	NO

GENERAL PROVISIONS

Discrimination Against Migrant Agricultural Worker	YES	NO
Interfering with US DOL Official	YES	NO

Potential MSPA Violations Checklist

At the conclusion of an investigation by the U.S. Department of Labor, Wage Hour Division, to determine your gin's compliance with MSPA requirements, the investigator will typically provide the gin manager with a completed form called a "Potential MSPA Violations Checklist," a copy of which is on the next page.

You may want to "check" the following one-page listing of potential MSPA violations to see if you understand each requirement. The statutory citation within the United States Code to the MSPA section pertinent to each "potential violation" is listed beside each potential violation in the Checklist. A link to the statutory Code section can be located here: https://www.dol.gov/agencies/whd/laws-and-regulations/laws/mspa. In most cases there are additional regulations in the Code of Federal Regulations that address the statutory issues listed. These regulations are in 29 CFR 500.0-500.271 and are available here: https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-A/part-500.
Additional materials regarding MSPA provided by the U.S. Department of Labor, Wage-Hour Division, are available here: https://www.dol.gov/agencies/whd/agriculture/mspa.

Potential MSPA Violations Checklist

U.S. Department of Labor
Wage and Hour Division

Name and address of person investigated

Permanent Address

Southeast Region Program Operations Office
US Dept. of Labor, ESA, Wage & Hour Div
61 Forsyth St. SE
Room 7M40

A review of your business operations subject to the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) disclosed the potential violations of the Act shown on this preliminary report. The investigation report of the Wage and Hour Investigator(s) will be reviewed to establish whether there were MSPA violations and what, if any, further action will be taken by the Wage and Hour Division.

If it is subsequently determined that civil money penalties are to be assessed against you for any or all of the MSPA violations disclosed, you will be advised by letter concerning specific violations involved and the civil money penalty amounts to be assessed. Persons who violate the provisions of MSPA are subject to both criminal and civil sanctions.

		MSPA Sections Violated							
		Migrant Workers	Both	Seasonal Workers	FLC	AgEr	AgAs	User	HP
Employment conditions disclosure	01 Failure to disclose conditions to workers	201(a), 201(g)		301(a), 301(f)					
	02 Failure to post MSPA poster at worksite	201(b)		301(b)					
	03 Misrepresenting conditions to workers	201(f)		301(e)					
Working arrangements	04 Breach of working arrangements with workers	202(c)		302(c)					
Recordkeeping	05 Failure to make/keep employer records	201(d)(1)		301(c)(1)					
	06 Failure to provide wage statement to workers	201(d)(2)		301(c)(2)					
	07 Failure to provide records to AgAs/AgEr	201(e)		301(d)					
	08 Failure to maintain records provided by FLC	201(e)		301(d)					
Prompt payment	09 Failure to pay wages owed when due	202(a)		302(a)					
Worker purchases	10 Restricting workers in purchase of goods/services	202(b)		302(b)					
Housing standards	11 Failure to provide terms and conditions of occupancy of housing	201(e)		NA					
	12 Failure to ensure housing safety and health	203(a) and (b)		NA					
Transportation	13 Failure to provide safe transportation vehicles	401(b)(1)(A),	401(b)(2)(C)						
	14 Failure to ensure driver has valid license		401(b)(1)(B)						
	15 Failure to obtain prescribed insurance coverage		401(b)(1)(C)						
General Provisions									
Confirmation of registration	16 Using services of unregistered FLC		402						
Discrimination	17 Discriminate, etc. against workers or testifies, etc.		505						
Investigative interference	18 Interfering with DOL official during investigation		512(c)						
Farm Labor Contractor Violations									
Registration	19 Failure to register as an FLC		101(a)						
	20 Failure to register employee		101(b)						
	21 Failure to exhibit certificate		101(c)						
	22 Knowingly made misrepresentation on application		103(a)(1)						
	23 Failure to comply with court judgment or final order		103(a)(4)						
	24 Was not the real party in interest		103(a)(2)						
	25 Transported workers w/o certificate authorization		101(a)						
	26 Housed workers w/o certificate authorization		105(2)(c)						
	27 Failure to provide change of permanent address		105(1)						
	28 Failure to apply to amend certificate		105(2)						
	29a Drove workers w/o certificate authorization		101(a)						
Agreements with users	30 Failure to abide by written agreements with AgEr or AgAs		404						

Wage and Hour Investigator(s) Date

Name and title of individual receiving form Date

FLC - Farm Labor Contractor
AgEr - Agricultural Employer
AgAs - Agricultural Association
User - User
HP - Housing Provider

Case ID:

WH-517 (11/2014)

QUESTIONS AND ANSWERS

Q. **What is a workweek? (29 CFR 778.105)**

A. A workweek is a fixed and regularly recurring period of 168 consecutive hours.

Q. **I have a full-time employee that I limit to 40 hours a week during the dormant season, and I pay that employee a salary. Due to the increase in the number of hours worked during the ginning season, I pay this employee on an hourly basis plus overtime. Is this legal?**

A. Yes, as long as you do not alternate between the two payment systems during the same season to avoid a higher regular rate.

Q. **Can an employee waive his right to overtime?**

A. No. And note that if you employ temporary foreign H-2A visa holders, they are also entitled to overtime under the same requirements that are applicable to U.S. workers.

Q. **I have year-round employees that I pay overtime after 40 hours in the workweek throughout the year. Am I required to put these employees on the 10/48 hours overtime schedule?**

A. No, unless you alternate these employees from the 10/48 hours overtime schedule to the 40 hours overtime schedule to avoid daily overtime.

Q. **Does paying an employee a salary exempt this employee from overtime? (29 CFR 541)**

A. No. It is a combination of a salary and duties that exempt an employee from overtime. Generally, to be exempt from overtime, an employee must be primarily engaged – more than 50% - in the exempt activities. For details, call your contact person.

Q. **Can I pay a salary that covers the minimum wage plus overtime? (29 CFR 778.308-778.310)**

A. No, a fixed salary for the workweek longer than 40 hours does not compensate the employee for overtime.

Q. **How do I pay overtime on a salary? (29 CFR 778.113-778.115)**

A. If, under the employment agreement, a salary sufficient to meet the minimum wages is paid as straight time for whatever number of hours are worked in the workweek, the regular rate is obtained by dividing the salary by the number of hours worked each workweek. Under this agreement, the regular rate will vary in overtime weeks. To compute the extra overtime due, divide the regular rate by two, then multiply the overtime hours by this amount. Be sure that the regular salary covers and is understood to cover the non-overtime or straight-time pay for all hours worked in a workweek. You should have a written memorandum of agreement to this method of payment and confirm that the state in which you operate does not forbid this method of compensation. Also note that if you pay an end of season non-discretionary bonus for remaining on the job until the end of the season, you must pay overtime on the bonus.

Formula: Weekly salary divided by total hours worked equals regular rate of pay. Regular rate divided by two times overtime hours equals extra overtime due (before considering the effect of an end-of-season bonus). Example:

In a 50-hour workweek:
$420.00 divided by 50 hours equals a regular rate of $8.40 per hour.
$8.40 divided by 2 equals $4.20/hour.
$4.20/hour times 10 overtime hours equals $42.00 overtime.
Total wage due equals $462.00.

In a 55-hour workweek:
$420.00 divided by 55 hours equals a regular rate of $7.63 per hour.
$7.63 divided by 2 equals $3.82.
$3.82/hour times 15 overtime hours equals $57.30 overtime.
Total wages due equals $477.3090.00

The calculation is the same in a 10/48 hour week; you just substitute the number of overtime hours over the 10 or 48 standard for the 40-hour standard.

Q. **What is the regular rate? (29 CFR 778.110-778.110)**

A. The regular rate is a rate per hour that includes all remuneration for straight time hours of employment. This is the rate used to calculate overtime.

Example: Hourly rate $8.00 – this is the regular rate – overtime is computed at 1-1/2 times this rate -- $12.00.

Example: Hourly rate $8.00 – bonus $0.10/hour – the regular rate is $8.10/hour – overtime is computed at 1-1/2 times the regular rate -- $12.15/hour.

Q. **Do I have to pay overtime on bonuses? (29 CFR 778.208-778.212)**

A. Generally, yes. Some of the exceptions to this are discretionary bonuses, gifts, and payments in the nature of gifts on special occasions. A bonus is not discretionary if it is promised, tied to hours worked, or tied to production. See the discussion above regarding bonus payments on page 9.

Q. **How do I pay overtime on a bonus? (29 CFR 778.210)**

A. There are numerous ways of paying overtime on a bonus. The easiest and simplest way is to take a percentage of an employee's gross wages. This will automatically compute the extra overtime due.

Q. **Do I have to pay overtime on a safety bonus?**

A. Yes.

Q. **My gin only hires local workers. Do I have to comply with the MSPA provisions? (MSPA Sec. 3(8); Sec. 3(10))**

A. No, the MSPA provisions only apply to migrant agricultural workers and "day haul" workers. Be careful that you can establish that the worker has told you, preferably in writing, that he or she can return each day to his permanent place of residence and that such permanent residence is not housing provided by an agricultural employer or FLC. Note that the payroll records of an FLC and employer must contain the employee's permanent residence. A gin that depends on an FLC to pay employees considered to be solely employees of the FLC must obtain copies of the FLC's payroll records.

Q. **Does the gin have to register as a farm labor contractor? (MSPA Sec. 4(b))**

A. No, but all MSPA protections must be provided to the migrant agricultural workers and day haul workers.

Q. **Does the person that does the hiring at the gin have to register as a farm labor contractor? (MSPA Sec. 4(b))**

A. No, if the person is an employee of the gin, the gin employee is not required to register as an FLC, but all MSPA protections must be provided.

Q. **My gin is in Mississippi. I have a ginner that lives in the Texas Valley, and he works for me on a seasonal basis each year. Each year this ginner recruits a few hands to work at my gin, and they travel to my gin. Does this ginner have to register as a farm labor contractor?**

A. An employee of an agricultural employer or agricultural association is not required to register as a farm labor contractor; however, all MSPA protections must be provided to the migrant agricultural employees. (MSPA Sec. 4(b))

Q. **My gin is in Mississippi. Each year a person from the Texas Valley recruits a few hands to work at my gin. This person transports these hands to my gin. I do not pay for the workers, but I suspect that the workers themselves pay this person for finding them a job and transporting them to my gin. Does this person have to register as a farm labor contractor?**

A. Yes, this person must register with the Department of Labor and must be authorized to transport the workers, using only drivers authorized to provide driving services under MSPA and vehicles that are inspected and certified as being in compliance and covered by required insurance. Note that this person should be engaged to perform this recruitment in his or her role as an employee of the gin. Note that there may be a problem that worker compensation coverage will not provide the required insurance coverages for individual workers before they are employed officially by the gin. There also may be a minimum wage problem to the extent the payment for finding the job cuts into workers' minimum wages for the first week on the job, particularly if the payment to the supervisor is not disclosed. Employers that allow supervisors or other employees to receive money from a prospective employee or existing employee run the risk of allowing an incursion into wages that must be paid to an employee for which the employer may be held liable even if the employer is not an H-2A employer. In an H-2A situation in which the U.S. workers are in corresponding employment to the work to be performed by the H-2A visa holders, no worker should be required allowed to "pay for a job."

Q. **My gin is in Mississippi. Each year a person from the Texas Valley recruits a few hands to work at my gin. This person transports these hands to my gin. I advance wages to the workers to pay this person for finding them a job and transporting them to my gin. Can I deduct these advanced wages from the workers' wages? (29 CFR 531.31)**

A. *Be careful*, if the person is not registered as a farm labor contractor authorized to transport the workers, no deduction may be made as this is in violation of Federal Law, and any payment for transportation or for the job must be disclosed in writing. It is advisable to pay a lawfully registered farm labor contractor a fee for locating workers and to forbid the contractor from receiving or accepting any fee or other money in exchange for finding the worker a job at your gin. State law may also govern the lawfulness of payments by workers in

connection with finding a job and may regulate recruiting activities of farm labor contractors within their borders.

Q. **If the workers arrange among themselves to carpool to my gin, am I responsible for the transportation under the MSPA? (29 CFR 500.100(c); 500.103(c))**

A. Carpooling arrangements made by the workers themselves, using one of the workers' own vehicles, are not subject to the MSPA transportation requirements. However, carpooling does not include any transportation arrangements in which a farm labor contractor participates or that is directed or requested by the gin or its representative.

Q. **If I send money to the individual workers for transportation, am I causing MSPA transportation? (Preamble to Adams Fruit Final Rule)**

A. If the gin provides the individual worker with a travel advance to cover travel to the worksite and the worker is free to choose how to use that travel advance, the gin will not be deemed to have caused the transportation of the individual worker. Caution, you may not be able to recover this travel advance from the worker's wages.

Q. **If I send the money to one worker who then gives it to other workers, am I causing MSPA transportation?**

A. Yes, because you are involved in the transportation arrangements, and the carpooling exception from MSPA coverage does not apply.

Q. **If the drivers and/or owner of the vehicle charge any of the workers for the transportation, must the driver and/or owner register as a farm labor contractor and meet the MSPA transportation requirements? (Preamble to Adams Fruit Final Rule)**

A. If the driver and/or owner charge more than the reasonable pro-rata shared "carpooling" cost of the transportation, the driver and/or owner becomes a farm labor contractor and must meet all MSPA requirements. A gin cannot utilize this farm labor contractor unless the contractor is registered for the services provided, a MSPA authorized and duly licensed driver provides all driving, the vehicle has been inspected and found in compliance with applicable operational requirements, insurance covering the prospective workers and liability is in place, etc. The best and easiest is way for workers to arrange to share the costs of transportation is to determine the mileage rate set by the Internal Revenue Service for the use of a personal vehicle. In March 2022, this rate is $0.585 per mile. This cost can be divided among the workers being transported.

Q. **Does the migrant agricultural worker have to have a copy of the wage statement or is it sufficient to put the required information on the check?**

A. The migrant agricultural worker must have a copy of the wage statement to keep. Once a check is cashed, the worker has no proof of payment.

TEMPORARY LABOR CAMP STANDARDS (*29 CFR 1910.142*)

Introduction

OSHA regulates housing provided by agricultural employers to their migrant agricultural workers. OSHA governs camps in which:

- Housing is provided to migrant agricultural workers.
- Construction was started on or after April 3, 1980.
- Major modifications were made after April 3, 1980.

Completed camps or camps constructed before April 3, 1980, or under a contract to be built before March 3, 1980, may comply with regulations promulgated by:

- OSHA (29 CFR 1910.142) or
- Employment and Training Administration (ETA) of U.S. Department of Labor (20 CFR Part 654)

Employers must meet standards developed for site; shelter; water supply; toilet facilities and upkeep; lighting; sewage and refuse disposal; laundry, handwashing and bathing facilities; construction and operation of kitchens; dining halls and feeding facilities; insect and rodent control; first aid; fire; and reporting of communicable diseases. Note that some states have additional or different requirements, generally providing more rigorous health and safety requirements.

Compliance with Federal and State Housing Safety, Health and Inspection Requirements (29 CFR 500.130-.135)

1. The owner or controller of property used to house migrant workers must ensure that housing complies with all federal and state laws applicable to such housing.

2. If an agricultural employer owns housing but a contractor operates or controls it, both are responsible for meeting safety and health requirements.

3. A person is in control of housing if he or she has authority to oversee, manage, or administer the housing directly or through an agent, with or without compensation.

4. Standards include fire prevention, and adequate and sanitary water supply, plumbing maintenance, sound construction of buildings, adequate heat, and pest and insect protection.

5. OSHA standards govern housing started after April 3, 1980; housing built prior to that may meet either the ETA or OSHA standards unless state standards are more rigorous, in which case the state standards may augment the federal ETA or OSHA standards.

6. Compliance with federal standards does not excuse compliance with state standards. Excluded from these regulations is housing provided by persons who own or control property provided on a commercial basis to the public as long as housing is provided to migrants on the same basis as the general public.

Certificate of Housing Inspection

1. Housing may not be occupied by migrant agricultural workers until a state, local, or federal agency has certified that it meets applicable safety and health standards.

2. Occupancy may not occur until the owner or person who controls the housing posts the certificate of occupancy from the state, local, or federal agency at the housing location. The certificate must be kept for three years and be available for inspection and review. Also, the person who provides such housing must post in the housing a statement of the terms and conditions of the occupancy. The U.S. Department of Labor provides a form for this purpose called a WH-521.

3. Obligation to maintain housing in compliance with health and safety standards continues beyond receipt of certificate of occupancy. Once occupied, housing must continue to comply with standards.

Temporary Labor Camp Requirements

OSHA Standard 29 CFR 1910.142

The following is a summary of the OSHA Housing Standards that can be found here: https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.142, and below the summary you will find a checklist you can use after your housing is certified to make sure it remains in compliance at all times the housing is occupied, assuming that your housing is certified under the federal OSHA regulations.

All sites used for camps shall be adequately drained. They shall not be subject to periodic flooding, nor located within 200 feet of swamps, pools, sink holes, or other surface collections of water unless such quiescent water surfaces can be subjected to mosquito control measures. The camp shall be located so the drainage from and through the camp will not endanger any domestic or public water supply. All sites shall be graded, ditched, and rendered free from depressions in which water may become a nuisance.

All sites shall be adequate in size to prevent overcrowding of necessary structures. The principal camp area in which food is prepared and served and where sleeping quarters are located shall be at least 500 feet from any area in which livestock is kept.

The grounds and open areas surrounding the shelters shall be maintained in a clean and sanitary condition free from rubbish, debris, waste paper, garbage, or other refuse.

Every shelter in the camp shall be constructed in a manner which will provide protection against the elements.

Each room used for sleeping purposes shall contain at least 50 square feet of floor space for each occupant. At least a 7-foot ceiling shall be provided.

Beds, cots, or bunks, and suitable storage facilities such as wall lockers for clothing and personal articles shall be provided in every room used for sleeping purposes. Such beds or similar facilities shall be spaced not closer than 36 inches both laterally and end to end and shall be elevated at least 12 inches from the floor. If double-deck bunks are used, they shall be spaced not less than 48 inches both laterally and end to end. The minimum clear space between the lower and upper bunk shall be not less than 27 inches. Triple-deck bunks are prohibited.

The floors of each shelter shall be constructed of wood, asphalt, or concrete. Wooden floors shall be of smooth and tight construction. The floors shall be kept in good repair.

All wooden floors shall be elevated not less than 1 foot above the ground level at all points to prevent dampness and to permit free circulation of air beneath.

Nothing in this section shall be construed to prohibit "banking" with earth or other suitable material around the outside walls in areas subject to extreme low temperatures.

All living quarters shall be provided with windows the total of which shall be not less than one-tenth of the floor area. At least one-half of each window shall be so constructed that it can be opened for purposes of ventilation.

All exterior openings shall be effectively screened with 16-mesh material. All screen doors shall be equipped with self-closing devices.

In a room where workers cook, live, and sleep a minimum of 100 square feet per person shall be provided. Sanitary facilities shall be provided for storing and preparing food.

In camps where cooking facilities are used in common, stoves (in ratio of one stove to 10 persons or one stove to two families) shall be provided in an enclosed and screened shelter. Sanitary facilities shall be provided for storing and preparing food.

All heating, cooking, and water heating equipment shall be installed in accordance with State and local ordinances, codes, and regulations governing such installations. If a camp is used during cold weather, adequate heating equipment shall be provided.

An adequate and convenient water supply, approved by the appropriate health authority, shall be provided in each camp for drinking, cooking, bathing, and laundry purposes.

A water supply shall be deemed adequate if it is capable of delivering 35 gallons per person per day to the campsite at a peak rate of 2 1/2 times the average hourly demand.

The distribution lines shall be capable of supplying water at normal operating pressures to all fixtures for simultaneous operation. Water outlets shall be distributed throughout the camp in such a manner that no shelter is more than 100 feet from a yard hydrant if water is not piped to the shelters.

Where water under pressure is available, one or more drinking fountains shall be provided for each 100 occupants or fraction thereof. Common drinking cups are prohibited.

Toilet facilities adequate for the capacity of the camp shall be provided.

Each toilet room shall be located so as to be accessible without any individual passing through any sleeping room. Toilet rooms shall have a window not less than 6 square feet in area opening directly to the outside area or otherwise be satisfactorily ventilated. All outside openings shall be screened with 16-mesh material. No fixture, water closet, chemical toilet, or urinal shall be located in a room used for other than toilet purposes.

A toilet room shall be located within 200 feet of the door of each sleeping room. No privy shall be closer than 100 feet to any sleeping room, dining room, lunch area, or kitchen.

Where the toilet rooms are shared, such as in multifamily shelters and in barracks type facilities, separate toilet rooms shall be provided for each sex. These rooms shall be distinctly marked "for men" and "for women" by signs printed in English and in the native language of the persons occupying the camp or marked with easily understood pictures or symbols. If the facilities for each sex are in the same building, they shall be separated by solid walls or partitions extending from the floor to the roof or ceiling.

Where toilet facilities are shared, the number of water closets or privy seats provided for each sex shall be based on the maximum number of persons of that sex which the camp is designed to house at any one time, in the ratio of one such unit to each 15 persons, with a minimum of two units for any shared facility.

Urinals shall be provided on the basis of one unit or 2 linear feet of urinal trough for each 25 men. The floor from the wall and for a distance not less than 15 inches measured from the outward edge of the urinals shall be constructed of materials impervious to moisture. Where water under pressure is available, urinals shall be provided with an adequate water flush. Urinal troughs in privies shall drain freely into the pit or vault and the construction of this drain shall be such as to exclude flies and rodents from the pit.

Every water closet installed on or after August 31, 1971, shall be located in a toilet room.

Each toilet room shall be lighted naturally or artificially by a safe type of lighting at all hours of the day and night.

An adequate supply of toilet paper shall be provided in each privy, water closet, or chemical toilet compartment.

Privies and toilet rooms shall be kept in a sanitary condition. They shall be cleaned at least daily.

In camps where public sewers are available, all sewer lines and floor drains from buildings shall be connected thereto.

There must be a handwash basin per family shelter or per six persons in shared facilities.

There must be a shower head for every 10 persons.

There must be a laundry tray or tub for every 30 persons.

There must be a slop sink in each building used for laundry, hand washing, and bathing.

Floors shall be of smooth finish but not slippery materials; they shall be impervious to moisture. Floor drains shall be provided in all shower baths, shower rooms, or laundry rooms to remove wastewater and facilitate cleaning. All junctions of the curbing and the floor shall be covered. The walls and partitions of shower rooms shall be smooth and impervious to the height of splash.

An adequate supply of hot and cold running water shall be provided for bathing and laundry purposes. Facilities for heating water shall be provided.

Every service building shall be provided with equipment capable of maintaining a temperature of at least 70 deg. F. during cold weather.

Facilities for drying clothes shall be provided.

All service buildings shall be kept clean.

Where electric service is available, each habitable room in a camp shall be provided with at least one ceiling-type light fixture and at least one separate floor- or wall-type convenience outlet. Laundry and toilet rooms and rooms where people congregate shall contain at least one ceiling- or wall-type fixture. Light levels in toilet and storage rooms shall be at least 20 foot-candles 30 inches from the floor. Other rooms, including kitchens and living quarters, shall be at least 30 foot-candles 30 inches from the floor.

For “refuse disposal,” fly-tight, rodent-tight, impervious, cleanable or single service containers, approved by the appropriate health authority shall be provided for the storage of garbage. At least one such container shall be provided for each family shelter and shall be located within 100 feet of each shelter on a wooden, metal, or concrete stand.

Garbage containers shall be kept clean and emptied when full, but not less than twice a week.
In all camps where central dining or multiple family feeding operations are permitted or provided, the food handling facilities shall comply with the requirements of the "Food Service Sanitation Ordinance and Code," Part V of the "Food Service Sanitation Manual," U.S. Public Health Service Publication 934 (1965), which is incorporated by reference as specified in Sec. 1910.6.

A properly constructed kitchen and dining hall adequate in size, separate from the sleeping quarters of any of the workers or their families, shall be provided in connection with all food handling facilities. There shall be no direct opening from living or sleeping quarters into a kitchen or dining hall.

No person with any communicable disease shall be employed or permitted to work in the preparation, cooking, serving, or other handling of food, foodstuffs, or materials used therein,

in any kitchen or dining room operated in connection with a camp or regularly used by persons living in a camp.

Effective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests.

Adequate first aid facilities approved by a health authority shall be maintained and made available in every labor camp for the emergency treatment of injured persons.

A person trained to administer first aid shall be in charge, and first aid supplies shall be readily accessible for use at all times.

It shall be the duty of the camp superintendent to report immediately to the local health officer the name and address of any individual in the camp known to have or suspected of having a communicable disease.

Whenever there shall occur in any camp a case of suspected food poisoning or an unusual prevalence of any illness in which fever, diarrhea, sore throat, vomiting, or jaundice is a prominent symptom, it shall be the duty of the camp superintendent to report immediately the existence of the outbreak to the health authority by telegram, telephone, electronic mail or any method that is equally fast.

WHI:	Date:
Location of Housing Inspected (attach map, if necessary):	Description of Housing (attach drawings or photographs if necessary):
Housing Capacity:	Number of Occupants:
Identity & Address of Housing Owner/Provider:	Identity & Address of Person in Charge of Housing (if FLC, give registration no.):
Current Permits or Licenses (identify by date & agency, attach copy):	Variances, if any, granted by ETA (attach copy):

Instructions: Record each violation of the applicable regulatory standard. In the space and columns provided for each item, record all observations necessary to make an objective determination about the gravity and severity of each violation, including the number of occupants exposed, the precise location, how long the condition has existed, and whether the violation was foreseeable. Corroborate your observations in interview statements and take photos as necessary.

Violation	Site 1910.142(a)	# Exposed	Photo Exhibit
☐	*1910.142(a)(1)* • Inadequate drainage • Drainage endangers domestic or public water supply • Not located at least 200 ft. away from swamps, pools, sink holes or other surface collection of water unless treated for mosquito control • Not graded, ditched, and/or rendered free from depressions in which water may become a nuisance • Subject to periodic flooding		
☐	*1910.142(a)(2)* • Overcrowding • Not 500 ft. from livestock		
☐	*1910.142(a)(3)* • Not free of rubbish, debris, waste paper, garbage, or other refuse		

Comments:

Violation	Shelter 1910.142(b)	# Exposed	Photo Exhibit
☐	*1910.142(b)(1)* • No protection from the elements		
☐	*1910.142(b)(2)* • Sleeping room does not contain at least 50 sq. ft. of floor space per occupant • Sleeping room does not have a 7 ft. ceiling		
☐	*1910.142(b)(3)* • Sleeping room does not contain a bed, cot, or bunk for each occupant • Beds are fewer than 3 ft. apart and/or are elevated fewer than 1 ft. above the floor • Sleeping room does not contain suitable storage facilities such as wall lockers for clothing and personal articles • Double bunk beds are fewer than 4 ft. apart • Fewer than 27 in. between upper and lower bunks • Triple bunk beds are used		
☐	*1910.142(b)(4)* • Floors are not made of wood, asphalt, or concrete • Wooden floors are not smooth and tight construction • Floors are not in good repair		
☐	*1910.142(b)(5)* • Wooden floors are not elevated at least 1 ft. above the ground level at all points & do not prevent dampness or permit free circulation of air		
☐	*1910.142(b)(7)* • Total space of windows in living quarters is less than 10% of the floor area • Windows cannot be opened half way for ventilation purposes		
☐	*1910.142(b)(8)* • Openings not screened with 16-mesh material • Screen doors not equipped with self-closing devices		
☐	*1910.142(b)(9)* • Fewer than 100 sq. ft. per person in a room where workers cook, live, and sleep • Unsanitary conditions for storing and preparing food		
☐	*1910.142(b)(10)* • Stoves provided in a ratio of fewer than one for every ten people • Stoves provided in a ration of fewer than one for every two families • Stoves not provided in an enclosed and screened shelter		
☐	*1910.142(b)(11)* • Heating, cooking, and water heating equipment not installed in accordance with State and local ordinances, codes, and regulations • If used during cold weather, heating equipment for the camp is not adequate		
Comments:			

Violation	Water Supply 1910.142(c)	# Exposed	Photo Exhibit
☐	*1910.142(c)(1)* • An adequate and convenient water supply, approved by the appropriate health authority, is not provided in each camp for drinking, cooking, bathing, and laundry purposes		
☐	*1910.142(c)(2)* • At least 35 gallons of water, is not provided to each person each day at a rate of 2 ½ times the average hourly demand		
☐	*1910.142(c)(3)* • Distribution lines do not supply water at normal operating pressures to all fixtures for simultaneous operation • Where there are no indoor water facilities provided, the shelters are more than 100 ft. away from a yard hydrant		
☐	*1910.142(c)(4)* • Where indoor water facilities are provided, drinking fountains are not provided in the ratio of 1 for each 100 workers, or fraction thereof • Where indoor water facilities are provided, common drinking cups are used		
Comments:			

Violation	Toilet Facilities 1910.142(d)	# Exposed	Photo Exhibit
☐	*1910.142(d)(2)* • Each toilet room is not accessible without passing through a sleeping room. • Each toilet room does not have at least a 6 sq. ft. window opening directly to the outside or is not otherwise adequately ventilated. • Each outside opening in a toilet room is not screened with 16 mesh material. • A fixture, water closet, chemical toilet, or urinal is located in a room used for other than toilet purposes		
☐	*1910.142(d)(3)* • There is not a toilet room within 200 ft. of the door of each sleeping room. • Where privies are used, they are located closer than 100 ft. to a sleeping room, dining room, lunch area, or kitchen		
☐	*1910.142(d)(4)* • Where there are shared toilet facilities, separate toilet rooms are not provided for each sex or these rooms are not distinctly marked with easily understood pictures, symbols, or words in English and the native language. • Where there are shared toilet facilities in the same building, the separate toilet rooms for each sex are not separated by solid walls or partitions extending from the floor to the roof/ceiling.		

Violation	Toilet Facilities 1910.142(d) (cont'd)	# Exposed	Photo Exhibit
☐	*1910.142(d)(5)* • Where there are shared toilet facilities, the number of water closets or privy seats is not provided in the ratio of at least 1 to each 15 occupants (based on the maximum occupancy of persons of that sex for which the camp is designed), with a minimum of 2 units		
☐	*1910.142(d)(6)* • Urinals are not provided in the ratio one unit or 2 linear ft. of trough for each 25 men • 15 in. surrounding the urinal (wall and floor) is not constructed of materials impervious to moisture • Where water pressure is available, urinal does not flush adequately • Where privies are used, urinal troughs do not drain freely into the pit/vault and/or the pit was not constructed to keep out flies and rodents		
☐	*1910.142(d)(7)* • Each water closet installed on or after August 31, 1971 is not located in a toilet room		
☐	*1910.142(d)(8)* • Each toilet room is not lighted naturally or safely by artificial light at all hours of the day and night		
☐	*1910.142(d)(9)* • An adequate supply of toilet paper is not provided in each privy, water closet, or chemical toilet compartment		
☐	*1910.142(d)(10)* • Each privy and toilet room is not kept in a sanitary condition • Each privy and toilet room is not cleaned at least daily		
Comments:			

Violation	Sewage Disposal Facilities 1910.142(e)	# Exposed	Photo Exhibit
☐	*1910.142(e)* • All camp sewer lines and floors drains are not connected to the public sewer, when available		
Comments:			

Violation	Laundry, Hand-washing, and Bathing Facilities 1910.142(f)	# Exposed	Photo Exhibit
☐	*1910.142(f)(1)* • Hand washing facilities are not provided in the ratio of 1 basin per family shelter or 1 basin for every 6 persons in shared facilities • Bathing facilities are not provided in the ratio of 1 shower head for every 10 persons. • Laundry facilities are not provided in the ratio of 1 tray/tub for every 30 persons. • Each building used for laundry, hand washing, and bathing does not contain a slop sink.		
☐	*1910.142(f)(2)* • Floors in laundry, hand washing, and/or bathing facilities are not waterproof, smooth, and/or non-slip • Floor drains are not provided in all shower baths, shower rooms, and/or laundry rooms, or they do not adequately remove waste water and facilitate cleaning • All junctions of the curbing and the floor are not coved • The walls and partitions in shower rooms are not smooth and/or waterproof up to the splash line.		
☐	*1910.142(f)(3)* • An adequate supply of hot and/or cold running water is not provided for bathing and/or laundry purposes • No facilities are provided for heating water for bathing and/or laundry purposes		
☐	*1910.142(f)(4)* • Every service building is not provided with equipment to maintain a temperature of at least 70°F during cold weather		
☐	*1910.142(f)(5)* • No facilities are provided for drying clothes		
☐	*1910.142(f)(6)* • Every service building is not kept clean		
Comments:			

Violation	Lighting 1910.142(g)	# Exposed	Photo Exhibit
☐	*1910.142(g)* • Where electricity is available, there is not at least one ceiling-type light fixture and at least one separate floor or wall type convenience outlet • Laundry and toilet rooms and rooms where people congregate don't have at least one ceiling or wall type fixture • Light levels in toilet and storage rooms is not at least 20 foot-candles 30 in. from the floor • Other rooms (including kitchen and living quarters) do not have at least 30 foot-candles 20 in. from the floor		
Comments:			

Violation	Refuse Disposal 1910.142(h)	# Exposed	Photo Exhibit
☐	*1910.142(h)(1)* • Fly-tight, rodent-tight, impervious, cleanable or single-service containers, approved by the appropriate health authority are not provided for the storage of garbage • At least 1 fly-tight, rodent-tight, impervious, cleanable or single-service container, approved by the appropriate health authority is not provided for each family shelter • Garbage container(s) are not located within 100 ft. of each family shelter • Garbage container(s) located within 100 ft. of each family shelter are not on a wooden, metal, or concrete stand		
☐	*1910.142(h)(2)* • Garbage containers are not kept clean		
☐	*1910.142(h)(3)* • Garbage containers are not emptied when full or are not emptied at least twice per week		
Comments:			

Violation	Construction and Operation of Feeding Facilities 1910.142(i)	# Exposed	Photo Exhibit
☐	*1910.142(i)(1)* • Food handling facilities do not comply with the requirements of the "Food Service Sanitation Ordinance and Code" • Kitchen and dining hall areas are not free from vermin, rodents, flies, etc • Kitchen and dining hall areas do not provide a place to keep food from spoilage • Poisonous and/or toxic chemicals are stored with the food and/or in the cooking or eating facility • The equipment and utensils in the kitchen and dining hall are kept unclean • The kitchen and dining hall are kept unclean • Hot and/or cold running water are not provided in the kitchen and dining hall • Leak-proof garbage containers with tight lids are not provided in the kitchen and dining hall		
☐	*1910.142(i)(2)* • Kitchen and/or dining facilities are not adequate in size • Kitchen and/or dining facilities are not separate from the sleeping quarters • There is a direct opening from the living or sleeping quarters into the kitchen or dining hall		
Comments:			

Violation	Insect and Rodent Control 1910.142 (j)	# Exposed	Photo Exhibit
☐	*1910.142(j)* • Effective measures are not taken to prevent infestation by and/or harborage of animal or insect vectors or pests		
Comments:			

WHI: _____
Date: _____

Violation	Fires Safety and First Aid Facilities 1910.142 (k)	# Exposed	Photo Exhibit
☐	*1910.142(k)(1)* • Adequate first aid facilities are not available in the labor camp for the emergency treatment of injured persons		
☐	*1910.142(k)(2)* • First aid facilities are not maintained by a person trained to administer first aid and/or are not readily accessible for use at all times		
Comments:			

Violation	Communicable Disease and Illness 1910.142(l)	# Exposed	Photo Exhibit
☐	*1910.142(l)(1)* • Failure to report the identity of anyone in the camp suspected of having a communicable disease to local health authorities		
☐	*1910.142(l)(2)* • Failure to report immediately an outbreak of suspected food poisoning or an unusual prevalence of any illness including prominent symptoms of fever, diarrhea, sore throat, vomiting, or jaundice to local health authorities		
Comments:			

Violation	MSPA Section 203(a) General Obligations	# Exposed	Photo Exhibit
☐	• The person who owns or controls the housing facility failed to comply with all applicable Federal, State, and/or local standards for such housing		
Comments:			

Violation	H-2A 20 CFR 655.122(h) General Obligations	# Exposed	Photo Exhibit
☐	• The employer failed to comply with all applicable Federal, State, and/or local standards for the housing facility		
Comments:			

WHI: _____ WH-519b
Date: _____ 8

TEMPORARY FOREIGN WORKERS MAY BE EMPLOYED AT OR BY A GIN UNDER THE H-2A PROGRAM

Introduction

Work "in connection with the ginning of cotton" is expressly recognized as "agricultural labor" in the Internal Revenue Code, 26 U.S.C.A. 3121(g)(3). Work that is "agricultural labor or services" under either the Fair Labor Standards Act or the Internal Revenue Code is recognized as eligible for certification under the H-2A Program whereby temporary foreign workers can be granted work-authorized visas to work for designated employers, under special H-2A conditions of employment, to perform work described in application documents submitted to and approved by the U.S. Department of Labor, Office of Foreign Labor Certification, and then approved in additional application documents submitted to the U.S.C.I.S., which is part of the U.S. Department of Homeland Security.

Once an employer is authorized to employ temporary foreign workers under the H-2A Program, the individual workers must each apply to a U.S. Embassy or Consulate to be issued a personal visa that allows him or her to enter the United States for a specified period of time to work for the petitioning employer.

The materials that follow do not tell you everything a gin operator must know to obtain H-2A certification or to avoid potential serious liability under the H-2A Program. Because many requirements under the H-2A Program are different from what are required and what are forbidden under the FLSA and MSPA, time and resources should be devoted to learning these requirements and prohibitions. The following Outline covers only some of many requirements that are specified in applicable U.S. Department of Labor regulations now published at 20 CFR 655.100—180.

A base civil money penalty for a single violation of some of the regulatory requirements under the H-2A Program is $1898, but a base civil money penalty for laying off, displacing or improperly rejecting a U.S. worker for employment by a business that is operating under the H-2A Program can be $18,970 per affected U.S. worker. Moreover, the H-2A employer would be required to pay backpay to an affected worker who obtained no job or whose job did not pay as much as the employer's H-2A Program job. H-2A employers must affirmatively contact former U.S. employees "by mail or other effective means" except for those workers "who were dismissed for cause or who abandoned" the job in the previous year. H-2A employers must attempt to reach such former employees during the period that the job order for authorization to employ temporary foreign workers is being circulated by the State Workforce Agency where the application is first filed before being

submitted to the U.S. Department of Labor, Office of Foreign Labor Certification. An H-2A employer must retain "documentation sufficient to prove" it has made such contacts with former employees to provide to a U.S. Department of Labor investigator in connection with the employer's compliance with the H-2A requirements. Both the U.S. Department of Labor's Office of Foreign Labor Certification (OFLC) or its Wage-Hour Division (WHD) may conduct compliance audits. Failure to cooperate with such an audit may result in a civil money penalty of $6,386 and debarment so that the employer may not use the H-2A program to obtain workers for a period of up to three (3) years.

Gin operators may be held liable for the acts and omissions of farm labor contractors they have hired to employ H-2A visa-holding gin workers and U.S. workers in corresponding employment, meaning for the period of the H-2A certification, any work the H-2A visa-holders are authorized to perform and any work the H-2A visa-holders do perform even if they are not authorized to perform such work under the certification. Allowing H-2A visa-holding workers to perform work they are not authorized to perform under the application documents and certification approval is a separate violation of the H-2A rules.

Most beginning H-2A employers want to hire experienced agents who can assist them in preparing the documents necessary to make the U.S. governmental applications and in locating temporary foreign workers and complying with the disclosure and other requirements applicable to employing them. Some agents provide more "hands-on" guidance and assistance than others.

Complying with the current H-2A requirements requires study and understanding of complex requirements that are not applicable except for work covered by the H-2A Program requirements.

While it is possible to hire an H-2A labor contractor (H-2ALC) to employ H-2A workers at a gin, there are substantial risks that both the U.S. Department of Labor and worker advocacy lawyers will contend that the gin is a joint employer with the H-2ALC. Recently, Gregory S. Schell, a long-time pro bono worker advocacy lawyer said, "Those of us in the farmworker advocacy community do not view the 11th Circuit's decision in Garcia-Celestino as any sort of a death knell to future claims against farm operators who obtain their H-2A's through farm labor contractors. Because Garcia-Celestino involved harvesting of citrus for processing, there was relatively little hands-on supervision provided by the grower. We think that makes the decision readily distinguishable from many other fruit and vegetable harvesting situations, where growers are far more actively involved in overseeing the quality of the work done by the labor contractor's crew. In instances where the grower exerts more direct control over the harvest than was the case in Garcia-Celestino, we will not hesitate to sue the grower as a joint employer along with the labor contractor if the facts in the particular case warrant it."

While Mr. Schell's comments were directed toward potential joint employment claims in connection with fruit and vegetable farming and packing, the same admonitions are applicable to gins that establish working days and working times and are involved in managing the quality of the work and the workers' treatment of the gin's equipment.
Also as of March 2022, the U.S. Department of Labor has said that it is currently preparing to issue new H-2A regulations. We do not know how different the "new" H-2A regulations will be from the H-2A regulations that, except for the minimum pay requirements, have generally been in effect since 2010. The Department of Labor already issued new wage regulations that govern required minimum pay for H-2A covered jobs. While in the past, employers have generally been required to pay only a single minimum hourly wage rate, known as the Adverse Effect Wage Rate (AEWR), for all jobs, under recently adopted regulations, employers may be required to pay at least a rate based on OES surveys for particular types of work within a state or region. H-2A employers may be required to pay the OES rate for employees who are authorized to be engaged in driving trucks, the OES rate for employees who are authorized to perform equipment repairs, and the OES rate for performing other work that includes higher skills. Check your state's OES rate for Job Code 45-2091 for "agricultural equipment operators" and study what tasks may be assigned to an employee who has that job title and that pay rate. Be alert that employing H-2A workers who are authorized to perform a variety of tasks may be substantially more expensive under the new wage rules than in the past. Remember that under the H-2A Program, U.S. workers in corresponding employment include all workers who perform any task within the H-2A approved Job Order work description or who perform any task that H-2A workers perform even if doing so by the H-2A workers is a violation of applicable rules because such work by H-2A workers was not listed in the Job Order and approved. Moreover, no minimally qualified U.S. worker may be denied an H-2A Program covered job that is subject to all H-2A wage and other benefit requirements so long as he or she applies for such employment on or before the 50% period of the certified period of employment.

You may want to start your study of whether the H-2A Program can meet your needs by checking out how other employers have described their jobs and requirements at this public website, but note whether the job description is current and whether the pay rate meets current wage requirements that are still being implemented. See: https://seasonaljobs.dol.gov/ and search for H-2A or agricultural jobs.

1. ***Caveats and to reiterate:***
    a. H-2A employers must invite each and every U.S. worker who successfully completed last season and be able to prove they did so unless the employer can prove employment-disqualifying misconduct by the former employee.

b. H-2A employers must hire any minimally qualified U.S. worker and pay that U.S. worker the required AEWR, prevailing wage, or other mandatory wage, even if the worker does not perform all of the job duties in the H-2A job description, and provide all benefits under the H-2A Program.

c. Joint employment is alive and well under the FLSA and MSPA. Worker advocates are looking for a "test case" to file on "joint employment" in the H-2A Program when the farmer or gin operator decides when, what and how many hours will be worked, mixes its employees with those of a contractor and in other ways controls work on the job.

d. Aside from the joint employer issue, worker advocates are looking for another "test case" to file under the H-2A Program, particularly on work rules that are not job-related (making your bed daily was the example given) and racial or ethnic discrimination.

2. Disclosures of the Job Order terms and conditions of the job in a language "understood by the worker."

a. Giving U.S. "recruited" "migrant agricultural workers" to be working in "corresponding employment" a copy of the Job Order or other H-2A contract when they are recruited and before they relocate are H-2A and MSPA requirements.

b. Giving local U.S. workers who will be employed in "corresponding employment" and who will return to their permanent homes every day a copy of the Job Order or other H-2A contract no later than their first day on the job is an H-2A requirement.

c. Proposed H-2A visa holders must be provided a copy of the Job Order or other H-2A contract no later than the time the worker applies for his or her visa.

d. Make sure all proposed employees know the terms of the job before they sign on and that you can prove you provided that written document to each person.

3. Avoid unlawful discrimination – even actions that "look like" discrimination based on any protected status.

a. U.S. workers are protected from H-2A workers taking any job for which a U.S. worker is minimally qualified.

b. Many suits being filed that allege long-time U.S. workers were displaced to hire H-2A visa-holders.

c. Even a U.S. worker who only worked last season is protected even if he or she was just a marginally productive employee or often absent. Workers who completed last year generally must be invited to return and must be paid the AEWR, the OES prevailing wage or other higher wage. You can't fail to address a problem employee this year in the hope he or she won't want to come back next season.

d. You may not pay U.S. workers less than you pay H-2A visa holders because they are U.S. workers. You may not fail to provide U.S. workers benefits you must provide to H-2A workers. You may not fail to provide U.S. workers benefits you choose to provide H-2A workers just because they are not H-2A workers. If you expect to provide extra wages or benefits to some workers, state objective reasons for doing so in the Job Order that is filed with the U.S. Department of Labor, Office of Foreign Labor Certification, and that is approved by that agency. It is permissible to pay more for certain skills, based on an employee's length of service, etc. If an employer anticipates that it may pay a discretionary bonus for work over the full season, it likely should say that it may, not will, do so but also say that it will not make a decision regarding whether to pay any bonus or in what amount any bonus may paid be until close to the end of the season if that is your intent. If the employer knows it will pay an end-of-season bonus in some amount or based on a percentage of each employee's respective earnings over the course of the season, that plan should be stated in the Job Order. Criteria for eligibility should be in the OFLC-approved Job Order. If the gin is a new-comer to the H-2A Program, it should obtain advice from an experienced and knowledgeable agent, lawyer, or association contact.

4. What else is unlawful vis-à-vis U.S. workers and H-2A visa holders?

a. Segregating U.S. workers to the less desirable tasks, housing, food, etc. Anything that makes your U.S. workers think they are getting the shorter end of the stick can cause you serious problems and big money.

b. An H-2A employer must hire a minimally qualified U.S. worker (even one who did not work last season) for 50% of the certification period even if the employer doesn't "need" more workers and will have to arrange for more approved housing.

c. Make sure someone in your office doesn't answer the telephone or an email, tell a U.S. worker that no more employees are needed in a job certified for H-2A visa-holders and dig a hole for your business.

5. Seasonality of grower's and contractor's needs to establish H-2A eligibility.

a. While most gins will need an augmented workforce only during a limited period during the year, employers should expect that any need for temporary foreign workers of more than ten (10) months will be denied.

6. Will your operation be allowed to hire only workers with certain specific skills and experience?

a. According to the current rules at 20 CFR 655.122(b), job qualifications and requirements "must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops."

b. You must be prepared to "substantiate the appropriateness of any job qualification" you include in your Job Order, and you may not impose any job qualification you do not state in your Job Order.

c. Particularly for truck drivers, if they must have CDL licenses or the Mexican CDL equivalent, a Licensia Federal (not a Mexican state license), state those requirements in your Job Order for truck drivers. Find out your gin's liability insurance carrier requirements as to truck drivers' minimum age and years of experience, include those requirements in your Job Order and be prepared to show the carrier's requirements to the U.S. Department of Labor, Office of Foreign Labor Certification Certifying Officer.

d. Your worker comp carrier may have something to say about driver qualifications as well.

e. Note new DOT driver training requirements as of February 7, 2022, for basic license and any upgrade.

f. If you specify that applicants must have certain experience, make sure you have verified that your H-2A visa holders have that level of experience.

7. DOL's H-2A rules are mandatory: no side deals are permitted.

a. Put realistic daily and weekly working hours in your Job Order. Wage Hour is fining H-2A employers for estimating too low, especially if the actual hours worked are more than 20% above the "planned hours" stated in your Job Order. Be prepared to explain why your operation ended up not needing as many work hours as expected if your employees do not have as many work hours offered as contemplated. Set your expected hours based on some objective fact– like the last 3 years' average weekly worked hours, and expect a civil money penalty if you underestimate hours worked by more than 20%.

b. No retaliation, coercion, intimidation, sexual or ethnic/racial harassment can be permitted in connection with the job itself, the housing, or employees' interactions with each other and supervisors. The best practice is affirmatively to say to no such treatment will be permitted and that there will be no adverse treatment if someone brings a problem to supervisor's or management's attention. Train supervisors to understand this requirement. Have a safety valve to prevent a more serious problem.

c. An H-2A employer must pay fully all wages then due every payday and must reimburse incoming transportation expenses to avoid those expenses cutting into the employee's FLSA or other state law minimum wages for the first workweek. The employer must fully reimburse the H-2A employees for their visa and border crossing expenses no later than that time.

d. If you commit to providing food instead of providing free and convenient cooking and kitchen facilities in the workers' housing, you must provide

three (3) meals a day, not two (2), and not just reimburse workers for purchasing their meals from a third party or provide a food allowance. The maximum amount per day that H-2A employers may charge workers for employer-provided meals is $14.00 per day unless a higher meal charge is requested, supported by evidence of costs, and approved by the U.S. Department of Labor, Office of Foreign Labor Certification. We are seeing complaints that workers are not being provided enough food or that the food is spoiled. Look at USDA guidelines for meal requirements and make sure your caterer can back up menu composition, quantity, and quality issues.

e. H-2A employers must contractually forbid foreign "helpers" and agents and their employees and agents, who assist you with recruitment and coordination of travel and visa-applications of prospective H-2A visa holders, from charging prospective workers or workers on the job for services. Gins should also forbid their supervisors and anyone who can recommend someone for a job from accepting any money, free work or other favors in return for a job, extra hours, time off, etc. The H-2A rules contain suggested language. 20 CFR 655.135(j).

f. Investigate and resolve any claims that H-2A visa-holding workers were charged or are paying anyone, including a friend, relative or supervisor on your payroll for a job. Employers have two (2) days to report suspected violations to the U.S.C.I.S. and they must investigate and resolve allegations.

8. But besides Job Order mandatory provisions in 20 CFR 655.122(a)-(q) and mandatory employers' assurances and acknowledged obligations in 20 CFR 655.135:

a. Add work rules and housing rules, together or separated, to protect your operation. Leave yourself the option to impose penalties that are appropriate to the misconduct. Some offenses may be appropriate for tiered discipline: a warning, suspension, then separation. Immediate termination may be appropriate for other offenses. Decide what you want to fight worker advocates about--- for example, making up a bed daily as compared to placing toilet paper in the toilet and flushing the toilet after each use to avoid

clogs, etc. Apply rules on a consistent basis so you are not open to "disparate treatment" claims.

b. Include permissible terms in your Job Order regarding job performance, attendance, work conduct, experience, and other matters that protect your operation.
c. Describe the job tasks fully in your Job Order so you can demonstrate by reference to the written job description that an employee is not handling the job properly if necessary. Reference meeting USDA, GAP, and customer standards if applicable.

d. Study how others describe their jobs, their rules, etc.

e. Try not to pay for anything in cash. Try hard. If you do pay in cash, get signed receipts, and keep them, but you will be much better off paying by check made to each worker that the worker does not cash with your company or a manager. If state law permits such payments, employees are willing to accept such payments, you have disclosed in your Job Order that you plan to make payments by "check card" that will allow each worker maintain the account without charge and to access his or her account at least once per week without charge, you and your workers, H-2A visa holders and U.S. workers in corresponding employment, may want the weekly pay by funds electronically credited to such a "check card."

9. What else should be in work or housing rules that are included with the Job Order – in languages in which the workers are fluent?

a. Reasons for discharge. Note that an H-2A visa holder and all U.S. employees in corresponding employment are NOT "at will employees." They may not be fired or disciplined unless the reason for such action has been fairly included in the Job Order and the Job Order was approved.

b. Required compliance with work quality (USDA and customer requirements; GAP), housing safety and maintenance, personal and food safety rules.

c. A rule forbidding personal use of cell telephones during working time.

d. Consider implementing a general drug and alcohol abuse policy.

e. Consider including a no harassment/no discrimination rule and policy that is applicable to employees and other persons working on the premises or with whom employees have contact in connection with their jobs.

f. Consider including rules related to avoidance of COVID-19 spread. Consider possible restrictions on guests and outreach workers inside shared housing especially if there is an outbreak of a serious variant. Consider retaining the right to impose possible mask and glove wearing requirements and other safety requirements required by governmental authorities, suggested by the CDC and other recognized health experts, and required by the employer.

g. Note the possible application of the Family and Medical Leave Act or a state variation if applicable and need for a policy and procedures for requesting such leave if your business employs enough workers – 50 or more employees in 20 weeks in the current or preceding calendar year.

h. Worker advocates are urging DOL that work rules in connection with H-2A employment must be "prevailing practices" and "job-related." Remember that the Job Order functions as a contract and that while employers may not fire or discipline H-2A visa holders and U.S. workers in corresponding employment unless the terms for such terminations or discipline are included in the Job Order and approved, in the future, employers may not be able to implement job requirements and rules that have not previously been part of the job.

i. Be sure you can prove the Job Order, with the work and housing rules as part of the Job Order in the language of the workers, was given to H-2A workers no later than the time they applied for their visas, was distributed before migrant agricultural workers relocated to accept employment, and was provided to local workers no later than their first day on the job.

j. Note there are restrictions in the H-2A context on productivity requirements based on pre-H-2A requirements and other job-related requirements as "normal and accepted." 20 CFR 655.122(b).

10. Worker Comp and liability issues:

a. Make sure liability insurance is in place if worker comp will not cover a circumstance for which you could be held liable. Worker compensation may

not cover transporting workers before they are on the gin payroll, and other exceptions to coverage have been litigated.

b. Worker comp may not cover moving employees between, for example, Texas and another state before employment has begun or after employment has ended and workers are being transported home at the end of the season. Driving employees to Walmart, the soccer field, etc. may not be covered under a worker compensation policy. Note that if you rely on a payroll company or PEO to provide worker comp insurance, such insurance may not cover workers at times and in circumstances your gin could be liable.

11. Transportation provided to workers. 20 CFR. 655.122(h)(1)-(4).

a. Be sure each vehicle used to transport workers is inspected in accordance with applicable requirements, AND inspect brakes, tires, and other safety features regularly. Document that you do make routine checks of all vehicles and make any repairs that are necessary.

b. Make sure whoever is providing transportation has a DOT medical certificate, the proper license for the vehicle, and insurance that covers the actual use.

c. Under DOT requirements an employer may not permit operation of a vehicle when the driver is under the influence. Prove you or somebody has instructed drivers not to operate vehicles under the influence of drugs or alcohol. No open containers in the vehicle. Put it in writing.

d. Remember H-2A regulations make all “transportation” subject to DOT operator, equipment, insurance, and inspection requirements.

12. Housing requirements for H-2A visa holders and U.S. workers in corresponding employment who are not reasonably able to return to their permanent residence each day. 20 CFR 655.122(d).

a. Housing must be provided free of charge and without any deposit charges for bedding or other similar incidentals.

b. Employers must establish that the housing meets OSHA or ETA standards or higher state law requirements unless the housing is a rental or public accommodation and meets applicable state or local requirements. Charges for the use of such housing must be paid for by the H-2A employer.

13. More mandatory benefits:

a. Daily home to work transportation must be provided for H-2A visa holders and for all workers in corresponding employment for whom free housing is required.
b. Transportation must comply with all applicable Federal, State, and local laws and regulations in terms of vehicle safety and inspections, driver licensing, insurance.

c. H-2A employers must continue to hire minimally qualified U.S. workers for the already certified H-2A job even if H-2A visa holders are present and on the job under the H-2A Program's "50% Rule" that requires hiring such U.S. workers until ½ of the certified employment period has passed, regardless of how many H-2A employees your operation employs or how many employees your operation needs and even if your gin must obtain other authorized housing or send H-2A visa holders home.

d. H-2A employers must notify H-2A visa holders of their duty to leave the U.S. at the end of their certified employment or when their employment ends, generally a provision of the Job Order.

e. H-2A employers must take active, written contractual steps to forbid foreign recruiters to ask for or accept money from the workers and must comply with the Department of Labor's rule against workers paying fees that must be paid by the employer.

f. H-2A employers must post a mandatory H-2A poster. Links to English, Spanish and Haitian posters are available at the Department's website here: https://www.dol.gov/agencies/whd/agriculture/h2a.

g. State in the Job Order the frequency of pay and pay at least 2x monthly and in accordance with the prevailing practice in the area of intended employment and state law. H-2A and U.S. workers in corresponding employment are typically paid weekly.

h. Notify the U.S. Department of Labor, Office of Foreign Labor Certification, if an H-2A visa-holding worker or a U.S. worker in corresponding employment quits or is fired for cause. Notify the U.S.C.I.S. if an H-2A visa-holding worker quits or is fired for cause. All such notices must be made within 2 working days of the worker's departure. If a worker is absent for 5 consecutive working days without the consent of the employer, the worker is deemed to have abandoned the job and such notice is required to be provided to the DOL in the case of a U.S. worker in corresponding employment or of an H-2A visa-holding worker and to the U.S.C.I.S. in the case of an H-2A visa holding worker. Your gin may be liable for the ¾ guarantee of wages the worker could have earned if you fail to notify these agencies of the voluntary or involuntary terminations of H-2A visa holding workers and U.S. workers in corresponding employment although there may be defenses if you or someone in your office fails to make these notices. Information regarding how to make such notices to the U.S.C.I.S. can be found under the heading "Employment-Related Notifications to U.S.C.I.S." here: https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers. Information regarding how to make such notices to the U.S. Department of Labor, Office of Foreign Labor Certification, from its website FAQs is pasted here:

> **What happens if a worker or is terminated for cause from the job?**
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> The employer must provide the Chicago National Processing Center (NPC) with written notification when any worker voluntarily abandons or is terminated for cause from the job before the end of the certified work period. A worker who fails to report for work at the regularly scheduled time for five (5) consecutive working days, without the employer's consent, is considered to have abandoned the job.
>
> - Submit the written notification directly to the Chicago NPC within two (2) working days of the abandonment or termination from the job.
>
> To make compliance with this requirement simple and fast, the employer may e-mail the notification directly to the Chicago NPC using TLC.Chicago@dol.gov with the words

"H-2A Abandonment/Termination Notice" contained in the subject line of the e-mail.

Employers without internet access may also send written notification by facsimile to (312) 886-1688 (ATTN: H-2A Abandonment and Termination) or by U.S. mail to the following address:

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification,
Chicago National Processing Center
11 West Quincy Court
Chicago, IL 60604-2105
ATTN: H-2A Abandonment and Termination

To ensure prompt and effective processing, please make sure the signed notification includes the following information:

- Case number(s) on the H-2A certification(s);
- Employer's name, address, telephone number, and Federal Employer Identification Number (FEIN);
- Number of U.S. worker(s) and H-2A worker(s) who abandoned or was/were terminated from the job;
- Name of each worker and last known physical address (other than employer-provided housing);
- Date of abandonment or termination; and
- Reason(s) for notification (for example, explain that the worker was either an "absconder" or "termination for cause") or late notification, if applicable.
- The employer will receive a courtesy notification from the Chicago NPC acknowledging receipt of the written notification within 48 hours and an indication as to whether additional information is needed from the employer.

DON'T FORGET! If the worker who abandons or is terminated from the job is in H-2A visa status, the employer must also notify the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS) within 2 working days. To obtain information on how to submit notifications to the USCIS, please visit www.uscis.gov.

i. H-2A employers must make, maintain, and provide individual workers detailed records regarding the hours workers have been offered the opportunity to work, the hours and days they have worked, what work they have performed, and many other details as explained in 20 CFR 655.122(j)-(l). These detailed records must be provided to each employee no later than when the employees are paid, and these detailed records must be retained by the employer and available for inspection.

j. H-2A employers must offer H-2A visa holders and U.S. workers in corresponding employment certain minimum work opportunities based on the way the regulations contemplate are "hours offered" to the worker until the end of the certified period of employment unless the employer requests and a Department of Labor Certifying Officer agrees that the employer has suffered an Act of God, allowing the so-called ¾ guarantee to be measured over a shorter period than the full certified season. 20 CFR 655.122(i).

k. H-2A employers may make only deductions that are disclosed in Job Order and permitted under the applicable regulations. They must make visa and border-crossing fee reimbursements and early reimbursements of travel, in transit food and lodging expenses as part of DOL's rules and Arriaga Court of Appeals decision.

l. Meet visa (MRV fee) and border-crossing fee reimbursement requirements no later than the first payday.

m. Make early, i.e., first payday reimbursements of incoming travel expenses as part of DOL's position that this money is owed under the FLSA on or before the first payday to the extent these costs cut into the minimum rate to be paid for all hours worked in that pay period. Applies to relocating U.S. workers as well.

n. Make any other required reimbursements including any remaining incoming travel, in-transit food at the required minimum reimbursement rate per day even without receipts and more with receipts– (note increases likely every year) and lodging expenses from the worker's home (not just the consular city as under the Bush regulations) to avoid FLSA or state minimum wage violations by the first payday and the rest on or before the 50% date to H-2A visa-holders and any U.S. workers entitled to such.

14. Joint Employment:

a. Under FLSA and MSPA, the "joint employer" doctrine is alive and well. That analysis is focused on the "economic realities" of the relationship between the claimed "joint employers" as reaffirmed in Garcia-Celestino v. Ruiz Harvesting, Inc., 843 F.3d 1276 (11th Cir. 2016)

b. Joint employment under the H-2A program can be established in the Eleventh Circuit (whose jurisdiction includes Georgia, Alabama and Florida) only under common law standards that focus on who has the "right of control" of the work performance, but that factor is not the only pertinent factor. Garcia-Celestino v. Ruiz Harvesting, Inc., 2018 WL 3652010 (11th Cir. Aug. 2, 2018). As noted at the outset of this Section of this Guide, worker advocates will not hesitate to make claims that gins and H-2A labor contractors the gins retain to obtain workers are joint employers where the gins set the times, hours and days of work, intermix the gin's own employees and the contractor's employees, and take other steps to control how the work is performed, either directly or indirectly by giving instructions to the contractors.

15. Useful US DOL web links for more information regarding the H-2A Program:

a. https://www.foreignlaborcert.doleta.gov/ (for OFLC information regarding the H-2A program),

b. https://www.dol.gov/whd/ (for information about laws enforced by the Wage-Hour Division) and

c. https://enforcedata.dol.gov/homePage.php (for public information regarding US DOL enforcement actions against employers).

d. https://www.dol.gov/agencies/eta/foreign-labor/performance (Scroll down to H-2A performance data, information regarding the file layout for the data, etc. While all data is not entered into the computer in a consistent way, you should be able to see which other gins have experience with the H-2A Program.)

Potential H-2A Violations Checklist

At the conclusion of an investigation by the U.S. Department of Labor, Wage Hour Division, of an investigation to determine your gin's compliance with the H-2A Program requirements. The investigator will typically provide the gin manager with a completed form called a "Potential H-2A Violations Checklist," which is on the next two pages.

As part of your preparation to determine if your gin is ready to undertake the complex H-2A Program, you may want to "check" the two-page listing of potential violations that follows to see if you understand each requirement. The regulatory citation within the Code of Federal Regulations to the current H-2A regulation that is pertinent to each "potential violation" is listed beside each potential violation.

Potential H-2A Violations Checklist

U.S. Department of Labor
Wage and Hour Division

Name and address of person investigated

A review of your business operations relating to the requirements applicable to the employment of H-2A and other workers under the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act, disclosed the potential violations shown on this preliminary report. The investigation report of the Wage and Hour Investigator(s) will be reviewed to establish whether there were H-2A violations and what, if any, further action will be taken by the Wage and Hour Division.

If it is subsequently determined that civil money penalties are to be assessed against you for any or all of the H-2A violations disclosed, you will be advised by letter concerning specific violations involved and the civil money penalty amounts to be assessed.

U.S. Worker Protections	
☐ 01 H-2A workers given preferential treatment	20 CFR 655.122(a)
☐ 02 Unlawful rejection of U.S. workers	20 CFR 655.135(d)
☐ 35 Failed to contact prior U.S. worker(s)	20 CFR 655.153
☐ 36 Position vacant due to strike, layoff, etc.	20 CFR 655.135(b)
☐ 37 Layoff or displacement of U.S. workers	20 CFR 655.135(g)
☐ 38 Failed to accept SWA referrals	20 CFR 655.135(c)
☐ 39 Failed to satisfy requirements of the job order by not stating actual terms and conditions	20 CFR 655.121(a)(3)
Disclosure	
☐ 26 Failed to provide copy of work contract	20 CFR 655.122(q)
☐ 51 Failed to post H-2A poster	20 CFR 655.135(l)
Wage-Related Violations	
☐ 06 Failed to provide housing at no cost	20 CFR 655.122(d)(1)
☐ 09 Unlawful charges for public housing	20 CFR 655.122(d)(4)
☐ 10 Unlawful deposits - bedding/other items	20 CFR 655.122(d)(3)
☐ 13 FTC - Employer provided items requirements	20 CFR 655.122(f)
☐ 14 Failed to provide meals or kitchen facilities	20 CFR 655.122(g)
☐ 15 FTC - Inbound transportation requirements	20 CFR 655.122(h)(1)
☐ 18 FTC - Outbound transportation requirements	20 CFR 655.122(h)(2)
☐ 19 FTC - 3/4 guarantee	20 CFR 655.122(i)
☐ 27 Failed to pay required rate(s) of pay	20 CFR 655.122(l)
☐ 28 Unlawful deductions	20 CFR 655.122(p)
☐ 29 FTC - frequency of pay requirement(s)	20 CFR 655.122(m)
☐ 41 Unlawful cost-shifting	20 CFR 655.135(j)
Recordkeeping	
☐ 20 Failed to record why HW<hours offered	20 CFR 655.122(j)(3)
☐ 22 FTC - earnings records requirements (up to 8 reqs.)	20 CFR 655.122(j)(1)
☐ 23 Failed to make required records available	20 CFR 655.122(j)(2)

☐ 24 Failed to keep records for 3-years	20 CFR 655.122(j)(4)
☐ 25 FTC - pay statement requirements (up to 8 reqs.)	20 CFR 655.122(k)
Housing Violations	
☐ 04 Failed to provide housing	20 CFR 655.122(d)(1)
05 Housing failed to meet safety and health requirements	20 CFR 655.122(d)(1)
☐ 05a Housing violation resulting in death/serious injury	20 CFR 655.122(d)(1)
☐ 05b Repeat/willful Housing violation resulting in death/serious injury	20 CFR 655.122(d)(1)
☐ 07 Failed to get housing pre-occupancy inspection	20 CFR 655.122(d)(1)
☐ 08 Family housing required but not provided	20 CFR 655.122(d)(5)
☐ 11 Failed to notify SWA of change in certified housing	20 CFR 655.122(d)(6)
Transportation Violations	
☐ 16 Failed to provide daily transportation to/from worksite	20 CFR 655.122(h)(3)
17 Transportation failed to meet safety requirements	20 CFR 655.122(h)(4)
☐ 17a Transportation violation resulting in death/serious injury	20 CFR 655.122(h)(4)
☐ 17b Repeat/willful Transportation violation resulting in death/serious injury	20 CFR 655.122(h)(4)
Legal Requirements	
☐ 12 FTC - workers' compensation requirements	20 CFR 655.122(e)
☐ 32 Sought waiver of rights from workers	29 CFR 501.5
☐ 33 Failed to cooperate with investigation	29 CFR 501.7
☐ 40 Failed to follow all applicable federal, state, and local laws and regulations	20 CFR 655.135(e)
☐ 42 Failed to contractually forbid cost-shifting	20 CFR 655.135(k)
☐ 44 Discriminate, intimidate, threaten, etc.	20 CFR 655.135(h)
H-2ALC Only Violations	
☐ 48 H-2ALC provided invalid "fixed-site" information	20 CFR 655.132(b)(1)
☐ 49 H-2ALC provided invalid MSPA FLC information	20 CFR 655.132(b)(2)

Wage and Hour Investigator(s) Date

SELECTED H-2A REGULATIONS IN 20 CFR 655.100 *ET SEQ*.

Although someone in your organization should be knowledgeable regarding all H-2A regulatory requirements, some of the most critical regulations, many of which contain detailed requirements beyond the summaries provided above, are below. The U.S. Department of Labor auditors and investigators and worker advocates seeking damages for regulatory violations look for full compliance with these and other H-2A requirements.

§ 655.120. Offered wage rate

(a) To comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment.

(b)

(1) Except for occupations governed by the procedures in §§ 655.200 through 655.235, the OFLC Administrator will determine the AEWRs as follows:

(i) If the occupation and geographic area were included in the Department of Agriculture's (USDA) Farm Labor Survey (FLS) for wages paid to field and livestock workers (combined) as reported for November 2019:

(A) For the period from December 21, 2020 through calendar year 2022, the AEWR shall be the annual average hourly gross wage for field and livestock workers (combined) in effect on January 2, 2020; and

(B) Beginning calendar year 2023, and annually thereafter, the AEWR shall be adjusted based on the Employment Cost Index (ECI) for wages and salaries published by the Bureau of Labor Statistics (BLS) for the most recent preceding 12 months.

(ii) If the occupation or geographic area was not included in the USDA FLS for wages paid to field and livestock workers (combined) as reported for November 2019:

(A) The AEWR shall be the statewide annual average hourly gross wage for the occupation if one is reported by the Occupational Employment Statistics (OES) survey; or

(B) If no statewide wage for the occupation and geographic area is reported by the OES survey, the AEWR shall be the national average hourly gross wage for the occupation reported by the OES survey.

(iii) The AEWR methodologies described in paragraphs (b)(1)(i) and (ii) of this section shall apply to all job orders submitted, as set forth in § 655.121, on or after December 21, 2020, including job orders filed concurrently with an Application for Temporary Employment Certification to the NPC for emergency situations under § 655.134.

(2) The OFLC Administrator will publish a notice in the FEDERAL REGISTER, at least once in each calendar year, on a date to be determined by the OFLC Administrator, establishing each AEWR.

(3)-(4) [Reserved]

(5) If the job duties on the Application for Temporary Employment Certification do not fall within a single occupational classification, the applicable AEWR shall be the highest AEWR for all applicable occupational classifications.

(c) If the prevailing hourly wage rate or piece rate is adjusted during a work contract, and is higher than the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, in effect at the time the work is performed, the employer must pay that higher prevailing wage or piece rate, upon notice to the employer by the Department.

(85 FR 70477, Dec. 21, 2020) 20 CFR 655.120 Offered wage rate (Code of Federal Regulations (2021 Edition))

§ 655.121. Job orders

(a) Area of intended employment.

(1) Prior to filing an Application for Temporary Employment Certification, the employer must submit a job order, Form ETA-790, to the SWA serving the area of intended employment for intrastate clearance, identifying it as a job order to be placed in connection with a future Application for Temporary Employment Certification for H-2A workers. The employer must submit this job order no more than 75 calendar days and no fewer than 60 calendar days before the date of need. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites.

(2) Where the job order is being placed in connection with a future master application to be filed by an association of agricultural employers as a joint employer, the association may submit a single job order to be placed in the name of the association on behalf of all employers that will be duly named on the Application for Temporary Employment Certification.

(3) The job order submitted to the SWA must satisfy the requirements for agricultural clearance orders in 20 CFR part 653, subpart F and the requirements set forth in § 655.122.

(b) SWA review.

(1) The SWA will review the contents of the job order for compliance with the requirements specified in 20 CFR part 653, subpart F and this subpart, and will work with the employer to address any noted deficiencies. The SWA must notify the employer in writing of any deficiencies in its job order no later than 7 calendar days after it has been submitted. The SWA notification will direct the employer to respond to the noted deficiencies. The employer must respond to the deficiencies noted by the SWA within 5 calendar days after receipt of the SWA notification. The SWA must respond to the employer's response within 3 calendar days.

(2) If, after providing responses to the deficiencies noted by the SWA, the employer is not able to resolve the deficiencies with the SWA, the employer

may file an Application for Temporary Employment Certification pursuant to the emergency filing procedures contained in § 655.134, with a statement describing the nature of the dispute and demonstrating compliance with its requirements under this section. In the event the SWA does not respond within the stated timelines, the employer may use the emergency filing procedures noted above. If upon review of the Application for Temporary Employment Certification and the job order and all other relevant information, the CO concludes that the job order is acceptable, the CO will direct the SWA to place the job order into intrastate and interstate clearance and otherwise process the Application in accordance with the procedures contained in § 655.134(c). If the CO determines the job order is not acceptable, the CO will issue a Notice of Deficiency to the employer under § 655.143 of this subpart directing the employer to modify the job order pursuant to paragraph (e) of this section The Notice of Deficiency will offer the employer the right to appeal.

(c) Intrastate clearance. Upon its clearance of the job order, the SWA must promptly place the job order in intrastate clearance and commence recruitment of U.S. workers. Where the employer's job order references an area of intended employment which falls within the jurisdiction of more than one SWA, the originating SWA will also forward a copy of the approved job order to the other SWAs serving the area of intended employment.

(d) Duration of job order posting. The SWA must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each U.S. worker who applies (or on whose behalf an Application for Temporary Employment Certification is made) for the job opportunity.

(e) Modifications to the job order.

(1) Prior to the issuance of the final determination, the CO may require modifications to the job order when the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions. Such modifications must be made or certification will be denied pursuant to § 655.164 of this subpart.

(2) The employer may request a modification of the job order, Form ETA-790, prior to the submission of an Application for Temporary Employment Certification. However, the employer may not reject referrals against the job order based upon a failure on the part of the applicant to meet the amended

criteria, if such referral was made prior to the amendment of the job order. The employer may not amend the job order on or after the date of filing an Application for Temporary Employment Certification.

(3) The employer must provide all workers recruited in connection with the Application for Temporary Employment Certification with a copy of the modified job order or work contract which reflects the amended terms and conditions, on the first day of employment, in accordance with § 655.122(q), or as soon as practicable, whichever comes first. 20 CFR 655.121 Job orders (Code of Federal Regulations (2021 Edition))

§ 655.122. Contents of job offers

(a) ***Prohibition against preferential treatment of aliens***.

The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) ***Job qualifications and requirements***.

Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

(c) ***Minimum benefits, wages, and working conditions***.

Every job order accompanying an Application for Temporary Employment Certification must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) ***Housing***.

(1) *Obligation to provide housing*. The employer must provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Housing must be provided through one of the following means:

(i) *Employer-provided housing*. Employer-provided housing must meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system, will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) *Rental and/or public accommodations*. Rental or public accommodations or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. The employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards.

(2) *Standards for range housing*. Housing for workers principally engaged in the range production of livestock must meet standards of DOL OSHA for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock must meet guidelines issued by OFLC.

(3) *Deposit charges*. Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been

responsible for damage which is not the result of normal wear and tear related to habitation.

(4) *Charges for public housing*. If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer must pay any charges normally required for use of the public housing units directly to the housing's management.

(5) *Family housing*. When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, it must be provided to workers with families who request it.

(6) *Certified housing that becomes unavailable*. If after a request to certify housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, State, or Federal housing standards applicable under this section. The employer must promptly notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, State or Federal safety and health standards, in accordance with the requirements of this section. If, upon inspection, the SWA determines the substituted housing does not meet the applicable housing standards, the SWA must promptly provide written notification to the employer to cure the deficiencies with a copy to the CO. An employer's failure to provide housing that complies with the applicable standards will result in either a denial of a pending Application for Temporary Employment Certification or revocation of the temporary labor certification granted under this subpart.

(e) ***Workers' compensation.***

(1) The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the

course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment.

(2) Prior to issuance of the temporary labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage meeting the requirements of this paragraph, including the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or, if appropriate, proof of State law coverage.

(f) ***Employer-provided items***.

The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(g) ***Meals***.

The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173.

(h) ***Transportation; daily subsistence*** -

(1) Transportation to place of employment. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad to the place of employment. When it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H-2A workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation

charges for the distances involved. The amount of the daily subsistence payment must be at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under § 655.173(a). Note that the FLSA applies independently of the H-2A requirements and imposes obligations on employers regarding payment of wages.

(2) *Transportation from place of employment*. If the worker completes the work contract period, or if the employee is terminated without cause, and the worker has no immediate subsequent H-2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer who has not agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for such expenses. If the worker has contracted with a subsequent employer who has agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses. The employer is not relieved of its obligation to provide or pay for return transportation and subsistence if an H-2A worker is displaced as a result of the employer's compliance with the 50 percent rule as described in § 655.135(d) of this subpart with respect to the referrals made after the employer's date of need.

(3) *Transportation between living quarters and worksite.* The employer must provide transportation between housing provided or secured by the employer and the employer's worksite at no cost to the worker.

(4) *Employer-provided transportation*. All employer-provided transportation must comply with all applicable Federal, State or local laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.105 and 29 CFR 500.120 to 500.128. If workers' compensation is used to cover transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that

vehicle insurance exists to provide coverage for travel not covered by workers' compensation and they must have property damage insurance.

(i) ***Three-fourths guarantee***

(1) *Offer to worker*. The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

(i) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and that has been approved by the CO.

(ii) The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect.

(iii) Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (10 weeks * 48 hours/week = 480 hours * 75 percent = 360). If a Federal holiday occurred during the 10-week span, the 8 hours would be deducted from the total hours for the work contract, before the guarantee is calculated. Continuing with the above example, the worker would have to be guaranteed employment for 354 hours (10 weeks * 48 hours/week = 480 hours - 8 hours (Federal holiday) * 75 percent = 354 hours).

(iv) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If during the total work contract period the employer affords the U.S. or H-2A worker less employment than that required under this paragraph, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time as specified in the job order.

(2) *Guarantee for piece rate paid worker.*
If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(3) *Failure to work.*
Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with this subpart.

(4) *Displaced H-2A worker.*
The employer is not liable for payment of the three fourths guarantee to an H-2A worker whom the CO certifies is displaced because of the employer's compliance with the 50 percent rule described in § 655.135(d) with respect to referrals made during that period.

(5) *Obligation to provide housing and meals.*
Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and meals in accordance with paragraphs (d) and (g) of this section for each day of the contract period up until the day the workers depart for other H-2A employment, depart to the place outside of the U.S. from which the worker came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) ***Earnings records.***

(1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

(2) Each employer must keep the records required by this part, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G-28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative, and by the worker and designated representatives as described in this paragraph.

(3) To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reason or reasons therefore.

(4) The employer must retain the records for not less than 3 years after the date of the certification.

(k) ***Hours and earnings statements.***
The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (i) of this section, separate from any hours offered over and above the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages;

(6) If piece rates are used, the units produced daily;

(7) Beginning and ending dates of the pay period; and

(8) The employer's name, address and FEIN.

(l) ***Rates of pay.***
If the worker is paid by the hour, the employer must pay the worker at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, for every hour or portion thereof worked during a pay period.

(1) The offered wage may not be based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, semi-

monthly, or monthly basis that equals or exceeds the AEWR, prevailing hourly wage or piece rate, the legal Federal or State minimum wage, or any agreed-upon collective bargaining rate, whichever is highest; or

(2) If the worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate:

(i) The worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

(ii) The piece rate must be no less than the piece rate prevailing for the activity in the area of intended employment; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for H-2A temporary labor certification after 1977, such standards must be no more than those normally required (at the time of the first Application for Temporary Employment Certification) by other employers for the activity in the area of intended employment.

(m) ***Frequency of pay.***
The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(n) ***Abandonment of employment or termination for cause.***
If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the NPC, and DHS in the case of an H-2A worker, in writing or by any other method specified by the Department or DHS in a manner specified in a notice published in the FEDERAL

REGISTER not later than 2 working days after such abandonment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section. Abandonment will be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer.

(o) ***Contract impossibility.***

If, before the expiration date specified in the work contract, 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. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three- fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination, as described in paragraph (i)(1) of this section. The employer must make efforts to transfer the worker to other comparable employment acceptable to the worker, consistent with existing immigration law, as applicable. If such transfer is not affected, the employer must:

(1) Return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2A employer, whichever the worker prefers;

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment; and

(5) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence must be computed as set forth in paragraph (h) of this section. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) ***Deductions.***

(1) The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such circumstances, the job offer must state that the worker will be reimbursed the full amount of such deduction upon the worker's completion of 50 percent of the work contract period. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(2) A deduction is not reasonable if it includes a profit to the employer or to any affiliated person. A deduction that is primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore the cost of such an item may not be included in computing wages. The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. The principles applied in determining whether deductions are reasonable and payments are received free and clear, and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(q) ***Disclosure of work contract.***

The employer must provide to an H-2A worker no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. For an H-2A worker going from an H-2A employer to a subsequent H-2A employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H-2A employer. At a minimum, the work contract must contain all of the provisions required by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and the certified Application for

Temporary Employment Certification will be the work contract. 20 CFR 655.122 Contents of job offers (Code of Federal Regulations (2021 Edition))

§ 655.135. Assurances and obligations of H-2A employers.

An employer seeking to employ H-2A workers must agree as part of the Application for Temporary Employment Certification and job offer that it will abide by the requirements of this subpart and make each of the following additional assurances:

(a) Non-discriminatory hiring practices.

The job opportunity is, and through the period set forth in paragraph (d) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. Rejections of any U.S. workers who applied or apply for the job must be only for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hires and rejections as required by § 655.167.

(b) No strike or lockout.

The worksite for which the employer is requesting H-2A certification does not currently have workers on strike or being locked out in the course of a labor dispute.

(c) Recruitment requirements.

The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an Application for Temporary Employment Certification is made) for the job opportunity until the end of the period as specified in paragraph (d) of this section and must independently conduct the positive recruitment activities, as specified in § 655.154, until the date on which the H-2A workers depart for the place of work. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of business.

(d) Fifty percent rule.

From the time the foreign workers depart for the employer's place of employment, the employer must provide employment to any qualified, eligible U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed. Start of the work contract timeline is calculated from the first date of need stated on the Application for Temporary Employment Certification, under which

the foreign worker who is in the job was hired. This provision will not apply to any employer who certifies to the CO in the Application for Temporary Employment Certification that the employer:

(1) Did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in sec. 203(u) of Title 29;

(2) Is not a member of an association which has petitioned for certification under this subpart for its members; and

(3) Has not otherwise associated with other employers who are petitioning for temporary foreign workers under this subpart.

(e) Compliance with applicable laws.

During the period of employment that is the subject of the Application for Temporary Employment Certification, the employer must comply with all applicable Federal, State and local laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 18 U.S.C. 1592(a), the employer may not hold or confiscate workers' passports, visas, or other immigration documents. H-2A employers may also be subject to the FLSA. The FLSA operates independently of the H-2A program and has specific requirements that address payment of wages, including deductions from wages, the payment of Federal minimum wage and payment of overtime.

(f) Job opportunity is full-time.

The job opportunity is a full-time temporary position, calculated to be at least 35 hours per work week.

(g) No recent or future layoffs.

The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment except for lawful, job-related reasons within 60 days of the date of need, or if the employer has laid off such workers, it has offered the job opportunity that is the subject of the Application for Temporary Employment Certification to those laid-off U.S. worker(s) and the U.S. worker(s) refused the job opportunity, was rejected for the job opportunity for lawful, job-related reasons, or was hired. A layoff for lawful, job-related reasons such as lack of work or the end of the growing season is

permissible if all H-2A workers are laid off before any U.S. worker in corresponding employment.

(h) No unfair treatment.

The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188, or this subpart or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder.

(i) Notify workers of duty to leave United States.

(1) The employer must inform H-2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under paragraph (i)(2) of this section, unless the H-2A worker is being sponsored by another subsequent H-2A employer.

(2) As defined further in DHS regulations, a temporary labor certification limits the validity period of an H-2A petition, and therefore, the authorized period of stay for an H-2A worker. See 8 CFR 214.2(h)(5)(vii) A foreign worker may not remain beyond his or her authorized period of stay, as determined by DHS, nor beyond separation from employment prior to completion of the

H-2A contract, absent an extension or change of such worker's status under DHS regulations. See 8 CFR 214.2(h)(5)(viii)(B).

(j) Comply with the prohibition against employees paying fees.

The employer and its agents have not sought or received payment of any kind from any employee subject to 8 U.S.C. 1188 for any activity related to obtaining H-2A labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(k) Contracts with third parties comply with prohibitions.

The employer has contractually forbidden any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers to seek or receive payments or other compensation from prospective employees. This documentation is to be made available upon request by the CO or another Federal party.

(l) Notice of worker rights.

The employer must post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary in English, and, to the extent necessary, any language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and protections for workers employed pursuant to 8 U.S.C. 1188. 20 CFR 655.135 Assurances and obligations of H-2A employers (Code of Federal Regulations (2021 Edition))

DON'T LET YOUR GIN BE AN EMPLOYER THAT MUST AGREE TO HAVE AN OUTSIDE MONITOR EVALUATE ITS LEGAL COMPLIANCE AND REPORT TO THE U.S. DEPARTMENT OF LABOR, AT YOUR EXPENSE, CONCERNING THE EMPLOYER'S COMPLIANCE FOR THREE (3) YEARS

Even though the H-2A employer that had to agree with paying an outside monitor to investigate its compliance with H-2A requirements did not violate every requirement or agree to monitoring of every H-2A requirement, this listing of areas the audit must cover is another good source of information regarding mistakes you don't want to make. Make sure your gin will be able to show it complied with all of these requirements:

1. Any H-2A job opportunity was and is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. U.S. workers who applied for the job were rejected only for lawful, job-related reasons, and the gin retained records of all hires and rejections. See also 20 C.F.R. § 655.135(a).

2. There is no strike or lockout at the gin's worksite within the area of intended employment for which the gin is requesting H-2A certification. See also 20 C.F.R. § 655.135(b).

3. The gin conducted and is conducting all required recruitment and hiring activities as required by 20 C.F.R. § 655.135(c) and (d), has and will continue to cooperate with the State Workforce Agency ("SWA") by accepting referrals and will hire all qualified and eligible U.S. workers who apply for the job opportunity as required by 20 C.F.R. § 655.135(c) and will independently conduct the positive recruitment activities, as specified in section 655.154 and as set forth in 20 C.F.R. § 655.135(c). The gin will also comply with the recruitment requirements set forth in 20 C.F.R. § 655.121(a)(3).

4. The gin's H-2A job opportunities are bona fide, full-time temporary positions (with at least 35 hours per work week), the qualifications and requirements for which are consistent with the normal and accepted qualifications and requirements imposed by non-H-2A employers in the same or comparable occupations and area of intended employment. The gin listed all qualifications and requirements in the job order. See also 20 C.F.R. §§ 655.122(b), 655.135(f).

5. The gin has not and will not offer terms, wages, and working conditions to U.S workers that are less favorable than those offered or will be offered to H-2A workers or impose restrictions or obligations on U.S. workers that are not imposed on H-2A workers. The gin is providing H-2A workers with at least the minimum benefits, wages, and working conditions that must be offered to U.S. workers under 20 C.F.R. § 655.122(a). See also 20 C.F.R. § 655.122(a).

6. The gin's offered wage equals or exceeds the highest of the AEWR, the most recent prevailing wage that is or will be issued by the Department of Labor to the gin for the time period the work is performed, or the applicable federal, state, or local minimum wage, and the gin has paid and will continue to pay at least the offered

wage during the entire period of the application. The gin will supplement a piece rate wage if at the end of the workweek, the piece rate does not result in average hourly piece rate earnings during the workweek at least equal to the offered wage. The offered wage is not based on commissions, bonuses or other incentives, unless the gin guarantees a wage earned every workweek that equals or exceeds the offered wage. See 20 C.F.R. § 655.122(l) and 655.120.

7. The gin is complying and will comply with applicable federal, state and local employment-related laws and regulations, including, but not limited to, employment-related health and safety laws. The gin and its agents and attorneys are not holding or confiscating workers' passports, visas, or other immigration documents pursuant to 18 U.S.C. § 1592(a).

8. The gin has not laid off and will not lay off any similarly employed U.S. workers in the occupation that is the subject of any Application for Temporary Employment Certification in the area of intended employment within the period beginning sixty (60) days before the date of need through the end of the period of certification, unless the layoff is for lawful, job-related reasons and all H-2A workers are laid off first. See also 20 C.F.R. § 655.135(g).

9. The gin and its agents, attorneys, and/or employees have not sought or received payment of any kind from the worker for any activity related to obtaining certification or employment, including but not limited to payment of the gin's attorney or agent fees, application or petition fees, or recruitment costs. Payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. See also 20 C.F.R. § 655.135(j).

10. 10.The gin has complied and will continue complying with the three-fourths guarantee described in 20 C.F.R. § 655.122(i), which requires the gin to guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period.

11. The gin has complied and will continue complying with the notice requirements of workers' abandonment of employment or termination for cause set forth in 20 C.F.R. § 655.122(n). Specifically, if an H-2A worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the gin notifies the National Processing Center [of the U.S. Department of Labor,

Office of Foreign Labor Certification], and the United States Department of Homeland Security ("DHS") in the case of an H-2A worker, in writing or by any other method specified by the Department of Labor or DHS in a manner specified in a notice published in the FEDERAL REGISTER not later than two (2) working days after such abandonment occurs, the gin will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in 20 C.F.R. § 655.122(i). See also 20 C.F.R. § 655.122(n).

12. The gin will make all deductions from workers' paychecks required by law and only those additional authorized and reasonable deductions disclosed in the job order. Deductions not disclosed are prohibited. Reasonableness of authorized deductions is determined under the principles stated in 29 C.F.R. Part 531.

13. The wage payment requirements set forth in 20 C.F.R. § 655.120 will not be met where unauthorized or unreasonable deductions, deposits, rebates, or refunds reduce the wage payment below the offered wage or where the worker "kicks back" any part of the wages to the employer or another person for the employer's benefit. See also 20 C.F.R. § 655.122(p).

14. The gin provides workers free and convenient cooking facilities or three (3) meals a day in accordance with 20 C.F.R. § 655.122(g).

15. The gin has specified in the job order any applicable minimum productivity standard which the workers must meet in order to retain the job. With respect to any applicable productivity standard, the gin is able to demonstrate that such standard is normal and usual for non-H-2A employers for the same occupation in the area of intended employment. See also 20 C.F.R. § 655.122(l)(2)(iii).

16. The gin has also specified in the job offer the frequency with which the worker will be paid, which shall be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. The gin has kept and will continue to maintain and keep a record of workers' earnings and provide the workers with the required earnings statements on or before each payday. See also 20 C.F.R. § 655.122(m).

17. The gin has furnished and will continue to furnish to its workers on or before each payday via written statement(s) of the earning statement information set forth in 20 C.F.R. § 655.122(k).

18. 18 The gin has provided and will continue to provide a copy of the work contract or job offer to all H-2A workers no later than when the worker applies for a visa if located abroad, no later than the time of the job offer if the H-2A worker is changing employment from one H-2A employer to a subsequent H-2A employer, and to other protected workers no later than on the day work commences. (Note that under MSPA, migrant agricultural workers must be provided detailed information concerning the terms and conditions of employment as part of their recruitment. Thus, waiting until the first day on the job to provide such employees would not violate the H-2A rules but would violate MSPA) The disclosure must be in a language understood by the workers, as necessary and reasonable. See 20 C.F.R. § 655.122(q).

19. The gin has complied and continues to comply with the transportation to/from the place of employment and daily subsistence requirements described and set forth in 20 C.F.R. § 655.122(h)(l) and (2).

20. The transportation provided by the gin for its workers complies and will continue to comply with all applicable federal, state, and local laws and regulations without cost to the worker in accordance with the requirements set forth in 20 C.F.R. § 655.122(h)(4).

21. The housing provided by the gin for its workers complies and will continue to comply with the applicable housing safety and health standards pursuant to 20 C.F.R. § 655.122(d)(l).

22. The gin has provided and will continue to provide to workers, without charge or deposit, all tools, supplies, and equipment required to perform the duties assigned. See 20 C.F.R. § 655.122(f).

23. The gin must provide worker's compensation insurance coverage in compliance with state law covering injury and disease arising out of and in the course of the worker's employment pursuant to 20 C.F.R. § 655.122(e).

24. The gin has posted a Department of Labor-provided poster detailing H-2A and other protected workers' rights and protections in a conspicuous location at the place of employment. The gin will request and post additional posters in languages common to a significant portion of the workers if they are not fluent in English.

25. The gin has not and will not (and has not and will not cause another person to) intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any person who, with respect to 8 U.S.C. § 1188, or any Department of Labor regulation promulgated thereunder; has filed a complaint; instituted or caused to be instituted any proceeding; testified or is about to testify; consulted with a worker's center, community organization, labor union, legal assistance program, or attorney; or exercised or asserted on behalf of himself/herself or others any right or protection. See also 20 C.F.R. §655.135(h).

26. The gin has and will cooperate with any agent of the Secretary of Labor who is exercising or attempting to exercise the Department of Labor's investigative or enforcement authority to determine compliance with obligations under 8 U.S.C. § 1188, 20 C.F.R. part 655, subpart B, or the regulations in 29 C.F.R. part 501. The gin has and will continue to cooperate and adhere to the requirements set forth in 29 C.F.R. §§ 501.21 (cooperation with any employee of the Secretary exercising investigative or enforcement authority) and 501.7 (cooperation with Federal officials).

27. The gin will retain all documents pertaining to its application for H-2A workers, the recruitment-related documents, and records concerning any worker who was terminated and the reason for such termination. The gin will also retain all earning related records for three (3) years as required by the regulations at 20 C.F.R. § 655.122(j), and retain records as required by 20 C.F.R. § 655.167.