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U.S. Wage and Hour Division

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FIELD ASSISTANCE BULLETIN No. 2012-1

MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND DISTRICT DIRECTORS

FROM: NANCY J. LEPPINK
Deputy Administrator

SUBJECT: H-2A "Abandonment or Termination for Cause"
Enforcement of 20 CFR § 655.122(n)

This memorandum provides guidance to Wage and Hour Division (WHD) staff regarding the appropriate sanctions and remedies when an employer fails to qualify under 20 C.F.R. § 655.122(n), which provides relief from the requirements relating to transportation, subsistence, and the three-fourths guarantee when an H-2A employer timely reports the departure of a worker who abandons employment or is terminated for cause. [1] Questions about this Bulletin should be directed to the Division of Enforcement Policy and Procedures, Branch of Immigration & Farm Labor Programs (DEPP-IMM & FL).

20 C.F.R. § 655.122(n) provides that:

> 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.

As a matter of enforcement policy, claims that workers have abandoned employment or have been terminated for cause must be appropriately investigated because of the potential for abuse

[1] The "transportation and daily subsistence" requirements are set forth in 20 C.F.R. § 655.122(h), and the "three-fourths guarantee" requirements are contained in 20 C.F.R. § 655.122(i).

of this section of the regulations in an effort to evade transportation, subsistence, and three-quarter guarantee obligations.

The notification requirement serves three important functions. Notification to the Department provides a means by which the Employment and Training Administration's (ETA's) Office of Foreign Labor Certification (OFLC) can provide information to the State Workforce Agencies (SWAs) to share with potential employees about the newly available employment opportunity. Second, notification to DHS of the abandonment of employment or termination for cause of an H-2A visa worker better enables DHS to carry out its important homeland security functions. Finally, and important to the WHD in discharging its enforcement responsibilities for the H-2A program, such notice allows for timely inquiry about the facts underlying the claimed abandonment or termination for cause.

Employer Notification Requirements

The regulation provides the employer relief from the three-fourths guarantee and return transportation/subsistence obligations upon an employee's voluntary abandonment of employment or termination for cause if the employer provides proper notification. However, how notification is to take place has changed over time and care must be taken to ensure that failure to properly notify violations are appropriately investigated and documented.

The 1987 Rule (*see* 20 C.F.R. § 655.102(b)(11)) required the employer to notify the "local office" (i.e., the SWA) when a worker voluntarily abandoned employment or was terminated for cause in order to qualify for relief. The reference to "worker" has been interpreted to include both workers in corresponding employment and H-2A visa workers.

The 2008 Rule (*see* 20 C.F.R. § 655.104(n)) required the employer to notify "the Department" (which ETA interprets to mean the OFLC's Chicago National Processing Center (NPC)) to qualify for relief. The 2008 Rule further specified that, in the event of abandonment or abscondment by an H-2A visa worker, DHS be notified by the employer "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 or abscondment occurs." On December 18, 2008, DHS published a notice in the Federal Register specifying that notification of abandonment or abscondment of H-2A workers could be made electronically (via e-mail) by submitting the necessary information to CSC-X.H-2AAbs@dhs.gov, or in writing by mail to "California Service Center, Attn: Div X/BCU ACD, P.O. Box 30050, Laguna Niguel, CA 92607-3004".[2] The DHS notification requirements (*see* 8 C.F.R. § 214.2(h)(5)(vi)(B)(1)), became effective on January 17, 2009. The DHS notice provides that an employer who fails to make proper notification may be subjected to liquidated damages.

[2] *See* FR Vol. 73, No. 244, December 18, 2008, pgs. 77047-77049.

The 2010 Rule (effective March 15, 2010 – *see* 20 C.F.R. § 655.122(n)), modified the language to make the notice requirement specific to voluntary abandonment of employment (rather than abscondment) and termination for cause, and to clarify that, in order to qualify for relief, in addition to notifying ETA for both H-2A workers and workers in corresponding employment, the employer must also notify DHS when an H-2A visa worker has abandoned employment or has been terminated for cause. On April 14, 2011, ETA published in the Federal Register a notice requiring that written notification be made no later than 2 working days after the abandonment or termination occurs by one of the following means: by e-mail to H2A.abandonment&termination.chicago@dol.gov, or written notification by facsimile to (312) 353-6666; or U.S. Mail to: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, 536 South Clark Street, 9th Floor, Chicago, Illinois 60605-1509.[3]

Sanctions and Remedies

Determining the appropriate sanctions and remedies when an employer fails to qualify for relief from the transportation, subsistence and three-fourths guarantee requirements because it has not satisfied the notification provisions of 20 C.F.R. § 655.122(n) (or 20 C.F.R. § 655.104(n) under the 2008 Rule) is dependent upon the circumstances of the failure to notify and the circumstances of the worker's departure.

If it is determined during an investigation that the regulatory provisions for notification were not met and the workers either voluntarily abandoned employment or were terminated for cause, the employer will not be required to pay such former employees for transportation, subsistence and the three-fourths guarantee in connection with 20 C.F.R. § 655.122(h) or (i). In addition, if it is a first-time violation, no civil money penalties will be computed in connection with these employees. Instead, when a first-time violation occurs, violations of 20 C.F.R. § 655.122(h) and/or (i) will be recorded but no civil monetary penalty will be computed. A violation of 20 C.F.R. § 655.135(e) (20 C.F.R. § 655.105(e)(1) under the 2008 Rule) for failing to comply with other laws will also be recorded when no notice is provided to DHS in connection with H-2A workers. A referral to DHS through proper channels is also appropriate. However, the Wage and Hour investigator must specifically inform the employer and agent (if any) of the notification requirement for relief; inform the employer and agent that a subsequent failure to meet this requirement may result in WHD seeking other remedies and sanctions including but not limited to civil monetary penalties; inform the employer that a failure to notify DHS in connection with H-2A workers may result in sanctions for violating another law; and provide each with written information about the notice requirements, documenting this in the case file.

In any subsequent investigation, when the regulatory provisions for notification were not met and the worker either voluntary abandoned employment or was terminated for cause and it can be demonstrated based on documentation in the case file that the DHS notification requirement and the WHD notice provisions for relief were previously

[3] See FR Vol.76, No. 72, April 14, 2011, pg. 21041.

explained to the employer, the violation is to be treated as willful. Civil money penalties for willful violations of the requirement to comply with other laws (in connection with the notification to DHS regarding H-2A workers) and employer obligations regarding the three-fourths guarantee, transportation, and subsistence are to be computed using the $5,000 amount per willful violation (*see* 29 C.F.R. § 501.19(c)(1)), applying the appropriate mitigating factors. The criteria for debarment are to be considered and fully documented. Referral to DHS for the violation of its notice requirement is to be made via appropriate channels.

It is important to address the reasons associated with the worker's departure from employment. Reasonable efforts must be made to investigate whether the worker's departure was voluntary abandonment or termination for cause as opposed to constructive discharge.

If the Wage and Hour investigator determines the worker's abandonment was <u>not</u> voluntary (factors sufficient to constitute constructive discharge were present and substantiated – see further below) or termination was not for cause, computation of the three-fourths guarantee (20 C.F.R. § 655.122(i)), return transportation, and subsistence monies (20 C.F.R. § 655.122(h)(2)) is appropriate. Reinstatement or other appropriate make-whole relief for any U.S. worker improperly laid off or displaced may also be sought pursuant to 29 CFR 501.16(a)(1). Civil money penalties for violations of 20 C.F.R. §§ 655.122(i) and .122(h)(2) are computed by multiplying the base amounts (i.e., $1,500 under the 2010 Rule, or $1,000 under the 2008 Rule) times the number of violations (i.e., the number of workers affected), and the subtotals are then reduced by 10% for each mitigating factor, if any.

Even where notification has been made, it is important to address the reasons associated with the worker's departure from employment. In the preamble to the 2010 Rule, the Department stated that the factual basis underlying any notification is subject to review during an investigation and if the investigation finds that fraud, misrepresentation, or other violations are present, the employer would not be relieved from the three-fourths guarantee requirement nor from the obligation to provide outbound transportation (*see* FR Vol. 75, No. 29, February 12, 2010 at 6914). If, for example, it is determined that the employer told the workers to leave before the end of the contract period (when there may be little or no work left to perform) and then provided notification, the employer would not be relieved of the three-fourths guarantee and outbound transportation obligations. Similarly, if the worker is found to have been constructively discharged due to the types of working conditions described below, this is not abandonment and the employer is not relieved of these obligations.

Investigations that substantiate fraud or misrepresentation in connection with notification of purported abandonment or termination for cause must be fully documented. Computations for three-fourths guarantee and outbound transportation are to be made, CMPs computed, and other appropriate remedies and sanctions, including debarment or referral for criminal prosecution, should be discussed with the RO and DEPP-IMM & FL.

Abandonment of Employment/Constructive Discharge

In many cases, abandonment is apparent to the employer (e.g., a worker tells the employer his last day will be next Friday; or a worker tells the employer he quits and walks off the job). However, in some instances the worker simply does not return to work. In such cases, the regulation provides that abandonment of employment "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.[4]

Abandonment of employment prior to the end of the contract period must be voluntary. Enforcement experience has shown that some employers seek to influence workers to leave a job prior to the end of the contract period. This may occur at any point during the contract period and can manifest itself in various ways. Further, if a worker departs employment because working conditions have become so intolerable that a reasonable person in the worker's position would not stay, the worker's departure may constitute a constructive discharge and not abandonment.

In order to find that the worker's decision to leave the job was actually a constructive discharge, the terms and conditions of the worker's employment must have been effectively altered by the employer's conduct. Moreover, these working conditions must have become so difficult that a reasonable person would have felt compelled to leave the job. This determination requires a fact-specific inquiry into the events leading up to the worker's departure from the job.

Constructive discharge may occur in a wide variety of situations in the H-2A context, including:

- Constructive discharge may exist when a worker leaves the job because the housing conditions in which the worker is required to live are intolerable and violate applicable safety and health standards (i.e., grossly inadequate heating during the winter, lack of running water, exposure of bare electrical wires). Constructive discharge likely does not occur, however, when a worker quits the job because of general dissatisfaction with the quality, appearance, size, or location of the housing.

- Constructive discharge may occur where a worker departs work because, even after raising concerns to the employer, the worker is required to labor in a field that has been recently sprayed with a pesticide before the required re-entry interval has elapsed. Constructive discharge likely does not exist, however, when a worker departs the job because he or she does not want to perform a particular type of work or is unhappy with the general nature of work assignments.

- Constructive discharge may occur when a worker departs the job because he or she has received no work assignments for an extended period of time, despite being available and willing to take on new work. Constructive discharge likely does not occur, however, when a worker leaves the job because he or she has been unable to

[4] *See* 20 C.F.R. § 655.122(n).

work for a few days due to poor weather conditions or has received somewhat fewer work projects than anticipated.

The mere fact that a worker departed the place of employment prior to the end of the contract period should not be accepted as conclusive evidence that the departure was voluntary or that the worker intended to abandon employment. Reasonable efforts (documented in the case file) should be made to obtain interview statements in order to determine whether a worker's departure was in fact voluntary. Interviews of current workers about the conditions earlier in the season may provide evidence of whether other workers had a basis to leave for reasons that were not truly voluntary.

The Regional Solicitor's Office should be consulted whenever investigations involve constructive discharge.

Termination for Cause

Generally, "termination for cause" refers to termination based on specific act(s) of omission or commission by the employee. For example, insubordination, deliberately violating company policies or rules, lying, stealing, breaching the employment contract, and other job-related misconduct are all possible bases for termination for cause. As with assertions of "abandonment of employment," it is important to inquire into the circumstances surrounding the termination of the worker's employment. It is also necessary to remember that the regulations specifically prohibit any person from intimidating, threatening, restraining, coercing, blacklisting, *discharging, or in any manner discriminating against any person who has* in connection with H-2A filed a complaint; instituted or caused to be instituted any proceedings; testified or is about to testify in any proceeding; consulted with an employee of a legal assistance program or an attorney; or exercised or asserted on behalf of himself or others any right or protection afforded under H-2A (*see* 29 C.F.R. § 501.4(a)). [5] The specific conditions of employment contained in the job order or work contract also state the specific productivity and other job-related requirements and should be examined to determine if the termination comports with these provisions.

Again, because of the potential for the employer to mischaracterize termination for cause, the underlying facts of any such assertion should be explored through interviews and any other relevant documentation that can be obtained.

Circumstances encountered which do not appear to come within the guidance provided herein are to be construed as new and unsettled issues and are to be referred, through channels, to the NO/DEPP-IMM & FL.

[5] *See* FR Vol.75, No. 29, Feb. 12, 2010, pg. 6981.