

H-2A in a Post-COVID World

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1. Employer Challenges

- State/local quarantines – Numerous states imposed “shelter-in-place” or isolation orders for out-of-state travelers (e.g., 2 weeks). What are employers’ responsibilities?
 - First, read the order in full and try to understand the exact requirements. Note that employers can’t *force* workers to isolate/quarantine. The enforcement mechanism, if any, is limiting work activities.
 - In most states, however, the orders do not preclude work activities. This makes intuitive sense with agriculture – workers are probably better off in the open air than grouped indoors.
- Workplace/housing health and safety – How do employers prevent the spread of COVID at work? How do employers keep workers safe in group housing?
 - Some states (e.g., Virginia, Washington, Oregon) have specific temporary rules/regulations. Most do not. Determine whether your state has a rule in place, and do your best to comply as written.
 - If there are no mandatory state rules, do your best to follow state and CDC guidelines. There is no silver bullet, but you can mitigate the risk. Plan ahead.
 - Capacity limits – secure alternative housing to increase social distancing?
 - Preventative measures – adopt regular and regimented sanitation protocols? What about creating physical separation (e.g., plastic barriers between beds)?
 - Other solutions – encourage workers to designate one person to buy groceries for the group?
 - Have a plan in place for isolating suspected infections. To whom do they report symptoms? Where will the infected worker live? How will you provide meals? What is your “back to work” policy?

2. The Administration’s Response

- U.S. Department of Labor (DOL) – OFLC published several COVID-related FAQs that temporarily provide H-2 employers some additional flexibility.
 - Housing substitutions – employers to add housing units mid-season to facilitate social distancing, etc. (still subject to state inspection/approval)
 - Job duty flexibility – H-2A workers permitted to perform duties outside of the job order, if necessary due to COVID. **Note:** this will expand your corresponding employment obligations.
 - Worksite expansions – employers permitted to add worksites mid-season, if in the same area of intended employment and necessary due to COVID.
 - Contract impossibility – COVID now serves as a near-automatic basis for invoking contract impossibility (i.e., cancelling the contract).
 - Emergency filings – COVID can justify expedited processing of a new application (e.g., filing concurrently with state and DOL).
 - Long extensions – COVID can justify a long extension of the H-2A contract (e.g., more than 2 weeks).
- U.S. Citizenship and Immigration Services (USCIS) – DHS issued temporary rules on named beneficiaries (e.g., in-country H-2A workers extending their stay in the U.S.).
 - 3-Year limit – suspended the 3-year period of stay limitation on workers. This meant that in-country workers approaching the limit could transfer to a new contract without resetting the clock. **Note:** Temporary rule now expired.
 - Work authorization – expanded E-Verify rules to ALL employers. Transferring workers may begin working immediately upon USCIS receipt notice. Do NOT need to wait for approval.
 - Wet signatures – suspended requirement for employers to provide original signature pages.

3. Travel and Consular Issues

- Peak shutdown – concern in the industry as COVID threatened to shut down the program.
 - Mid-March – infection at the Jamaican Embassy caused State Department panic; U.S. consulates and embassies worldwide began to fall like dominoes. In span of 2-3 days, all of Central America went offline. Apparent last-minute intervention kept Mexico open – consensus in the Administration that H-2A too vital to U.S. food supply chain.
 - A few days later – President announced Mexico/Canada border closures. Later, Customs and Border Protection (CBP) guidance clarified that employment-related travel (like H-2A) considered “essential” and permitted to continue.
 - After some initial chaos, the situation stabilized. Ultimately, there were no significant impairments to program functioning in 2020.

- Getting *in* – worker processing at U.S. consulates/embassies is still limited.
 - Mexico – consulate processing both new and returning workers (remote adjudication without interview whenever possible).
 - Limited appointment availability for “221g” cases (administrative processing), for which in-person interviews are required. Expect 3-4 week delay.
 - El Salvador, Guatemala and Jamaica – embassies only scheduling workers eligible for interview waiver program (workers whose previous visa expired within the last 12 months). Passports, DS-160, etc. must be sent to embassy in a bundle. Processing takes about 2 weeks.
 - While Sec. Pompeo authorized a 24-month look-back period, Guatemala is still applying the 12-month standard.

- Getting *out* – travel restrictions and limited transportation options.
 - Mexico – no major travel restrictions, although private bus companies are screening passengers for symptoms, etc.
 - El Salvador and Guatemala – flight passengers in/out of country must have negative COVID test result (PCR test, not rapid) within 72 hours of flight.
 - Jamaica – flight passengers must have negative COVID test result within 7 days of flight.
 - Scarce flight availability – flights have resumed after period of total shutdown, but employers/workers still struggling to find transportation home.
 - Airlines working with governments to facilitate transport, but no certainty.
 - If workers are stranded, consider helping them transfer to another H-2A job.
 - Last resort: file for long-term extension – they can be approved, but the long-term implications regarding temporary need are unclear. Proceed with caution.

4. Lessons Learned

- Given all the uncertainty, probably best to assume COVID (or the preventative measures) are here to stay for 2021. Better to be pleasantly surprised than blindsided.
 - Unclear whether government flexibility measures will be extended. Best to assume worst-case scenario. **Note:** DHS has already dialed-back its flexibility on the 3-year stay.

- On the bright side, 2020 forced both sides of the political aisle to acknowledge the importance of H-2A to the American economy, and as a national security issue. Among numerous other visa programs, only H-2A remained fully intact. Employers should feel confident about program viability in 2021.

- **Non-COVID note:** OFLC ramping up scrutiny of temporary need, especially for horticultural employers. Perception among the ranks that hort employers are inherently year-round.
 - Be prepared for a fight. Gather all the supporting evidence you can muster ahead of filing.
 - Do NOT significantly change your dates of need unless it is absolutely necessary.