

H-2A Employer flexibilities due to impact of Hurricane Ian

October 6, 2022

DOL QUESTION: Can workers perform debris removal and other clean-up duties resulting from a hurricane even where these duties were not disclosed in the H-2A job order?

ANSWER: Yes. H-2A workers and domestic workers employed in corresponding employment can perform duties related to hurricane “clean-up” on farms even if such duties are not specifically listed in the job order due to the unforeseen/uncontrollable nature of the employer’s circumstance. Hurricane-related duties are specifically incorporated into the Department’s definition of agricultural labor or services at 20 CFR 655.103(c)(1)(i)(B). Accordingly, those duties qualify as agricultural labor or services that may be performed pursuant to an *H-2A Application for Temporary Employment Certification* and may be performed on the employer’s farm or other farms within the area of intended employment certified by the Department. However, work that is not performed on farms is not within the scope of agricultural labor or services by IRS and not permitted, and work performed outside the area of intended employment on the certified *Application for Temporary Employment Certification* issued by the Department is not permitted.

DOL QUESTION: Some worksites listed on my certified *Application for Temporary Employment Certification* and job order can no longer support employment due to the unforeseen impacts of the hurricane. However, there are other worksites within the certified area of intended employment where work can be performed. Can I place workers at other worksites not specifically listed in the certified *Application for Temporary Employment Certification* but are still within the same area of intended employment?

ANSWER: Yes. A certified *Application for Temporary Employment Certification* is valid only for the number of H-2A positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer(s) named on the certified application, including any approved modifications. Due to the impacts of the hurricane, the Department will permit an employer to place H-2A workers and domestic workers in corresponding employment at additional worksites not previously disclosed on the certified H-2A application as long as such worksites are within the same area of intended employment. For worksites that are outside of the certified area of intended employment and where the impacts of the hurricane constitute good and substantial cause, the employer may file a new application under the Department’s emergency situations at 20 CFR 655.134. The Department must be assured that critical protections such as housing, transportation, and meals will be provided to all workers performing work at worksites not covered by the certified H-2A application and job order.

QUESTION: Due to the impacts of the hurricane, my workers may not be able to work for many weeks or months. Should I invoke contract impossibility?

This information was sourced from Administrator Brian Pasternak with Office of Foreign Labor Certification, Employment and Training Administration (ETA), U.S. Department of Labor (DOL).

ANSWER: Yes. Although there may be circumstances in which full-time work due to weather cannot be offered during the course of a given workweek, an employer who cannot offer work for many weeks or even months due to an Act of God or other unforeseen events should invoke and execute the contract impossibility provision under the approved job order, in accordance with the Department's regulations.

Important Reminder: Employers who have corresponding workers must prioritize retaining the U.S. workers and cannot just dismiss – or otherwise state they have “no work available” for— U.S. workers while retaining, or bringing in more, H-2A workers.

QUESTION: Due to the impacts of the hurricane, can I amend my certified *Application for Temporary Employment Certification* and job order to accommodate different arrival times for my workers?

ANSWER: Yes. Absent amendments approved by the CO under 20 CFR 655.145, the Department considers the certified start date of work to represent the first date of need for all workers; not just some. This is a critical element in the recruitment of U.S. workers both before foreign workers depart for the place of employment and through 50% of the work contract period. However, the Department recognizes that the domestic labor market has been significantly and temporarily disrupted due to the impacts of a hurricane, and appreciates the need for employers to have greater flexibility in beginning work for some or all of its workers. Therefore, the Department is waiving the need for employers to obtain formal approval from the Certifying Officer for amendments to the start date of work in order to accommodate the arrival of workers at different times can be waived in this temporary, unique circumstance. This waiver includes the need for employers to “move up” their start dates of work in the event workers are needed earlier than expected due to the effects of a hurricane.

[View DOL Disaster Guidance here.](#)