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## Three-Fourths Wage Guarantee for H-2 Workers During COVID-19 Outbreak

**Legal Update**

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In response to the COVID-19 national emergency, many H-2A and H-2B employers may not be able to provide full-time employment pursuant to their filed H-2 petitions. See advice below concerning the three-fourths wage requirement regulation and the currently available guidance.

### H-2A and H-2B Regulations Require That the Employer Guarantee Three-Fourths of Employment, Unless There Is an Event Outside of the Employer's Control That Makes Employment Impossible

H-2A and H-2B regulations require that the employer guarantee three-fourths of employment, unless there is an event outside of the employer's control that makes such employment impossible.

#### H-2A Temporary Agricultural Worker

Per 20 CFR 655.122(i), in order to qualify for an H-2A, the employer must guarantee that it will offer employment during three-fourths of the employee's hours. However, as stated in DOL Fact Sheet #78E: Job Hours and the Three-Fourths Guarantee under the H-2B Program, if "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." See 20 CFR 655.122(o).

#### H-2B Temporary Non-Agricultural Worker

Per 20 CFR 655.20(f), the above provision regarding Acts of God similarly applies. As stated in DOL Fact Sheet #78E, if the Certifying Officer (CO) makes the determination that an event has occurred that makes it impossible for the employer to fulfill the three-fourths requirement, the employer must do so at least until the date that the contract is terminated due to such event, and make efforts to transfer the employee to a comparable workplace.

The three-fourths guarantee obligation begins with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ends on the termination date indicated in the job order (or its extensions, if any). A workday means the number of hours in a workday as stated in the job order.

Interestingly, the Appropriations Act of 2018 prohibits the enforcement of the three-fourths guarantee. Therefore, H-2B employers are obligated to meet the three-fourths guarantee requirement, but DOL is not allowed to enforce it.

## The Certifying Officer Has the Discretion to Determine If an Event Has Occurred That Renders the Job Impossible to Complete

The CO has discretion to determine whether employer must complete the three-fourths requirement, or whether there has been an event outside the employer's control that relieves the employer of that duty. To have an employment contract cancelled, the employer must apply directly to the CO for such a cancellation.

## Is COVID-19 an Act of God?

Acts of God are construed narrowly and are "the result of a direct, immediate and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention."

COVID-19 has been classified as a "pandemic" by the World Health Organization (WHO), and the CDC has put certain measures in place to mitigate the virus' spread. All of these facts make COVID-19 more likely to trigger "Act of God" language. Even if COVID-19 is not considered an Act of God, it may fall within the list of exceptions laid out in 20 CFR 655.20(g) for H-2B, or 20 CFR 655.122(O) for H-2A, as an employer may be able to argue that COVID-19 was an "other" unforeseeable event that made fulfillment of the contract impossible. Examples of these events include fire, weather, other Act of God, or similar, man-made catastrophic events.

During these events the employer may terminate the job order with approval of the CO. Even if early termination is approved, the employer still must fulfill the three-fourths guarantee until the time of termination.