

H2B in Agriculture

Dan Bremer
AgWorksH2, LLC

What is H2B

- H2B vs. H2A
- Primary Agriculture
- Secondary Agriculture
- Fair Labor Standards Act Definitions
- IRS 3121(g) Definitions
- Seasonal/Temporary
- Agricultural Applications
- Pros and Cons
- Summary

H2B vs. H2A

- H2A is for seasonal agricultural work like planting, tending, harvesting of agricultural products
- H2B is for seasonal/temporary non agricultural work like landscape, grass mowing and tree planting
- There is a fine line between agriculture and non agriculture on the exact same product
- Application procedure for H2B is similar but different
- Expenses for H2B are similar but no housing is required except for reforestation
- Overtime generally applies to H2B employers but could, in some instances, apply to H2A employers

Primary Agriculture and Secondary Agriculture – Fair Labor Standards Act

- 29 CFR 780.105
- Cultivation, tillage, growing and harvesting and others are Primary Agriculture, regardless if employed on a farm or by a farmer
- Secondary Agriculture operations are performed by a farmer or on a farm as an incident to or in conjunction with “such” farming operations
- Packing house, building agri buildings on a farm, fixing farm machinery, taking a commodity to market, office work, etc. is secondary agriculture
- Employment not within the scope of Primary Agriculture or Secondary Agriculture is not employed in agriculture

IRS 26 CFR 31.3121 (g)

- Basically describes primary agriculture like the Fair Labor Standards Act
- But, also includes “The ginning of cotton,” as in the employ of any “person” and not limited to the employ of a “farmer” only
- Among other things the packing of agricultural commodities is covered as agriculture if: employed by the operator of a farm or in employ of a group of operators (other than a cooperative organization)
- This makes cotton gins available for work by a Farm Labor Contractor
- There are some other areas of work under .3121(g) but cotton gins are the most important for this discussion

Seasonal / Temporary

- Like H2A the use of the H2B Visa Program is dependant on the seasonality of the business for H2A and or the seasonality or temporary nature of the business for H2B
- Must be 9 months or less (although 10 months is considered at this time because of a Congressional mandate)
- Mostly used by landscape companies who mow lawns in the summer, hotels that cater to a season like Summer in Michigan and other non agricultrure entities
- For the H2B laws, forestry is not considered agriculture but forestry is considered covered by the Migrant and Seasonal Agricultural Worker Protection Act
- This would include pine straw gathering
- Again, overtime must be considered

Agricultural Applications

- Peanut Processing Operations that provide service for multiple farmers
- Peanut Buying Points that provide service for multiple farmers
- Peanut Drying Operation
- Produce Packing Houses that provide service for multiple farmers
- Farm Labor Contractor Restrictions
- Associations vs. cooperatives

Pros and Cons

- H2B is for employers who are seasonal/temporary and who can't find enough USA workers to accomplish their non agricultural tasks
- It is a totally legal program and has been working for many employers for many years
- If you fit into the definitions, you can do it
- However, there is a CAP!!!!
- 66,000 per year = 33,000 in each of the six months of the federal fiscal year
- October 1 = 33,000 and April 1 = 33,000
- Cost of H2B vs. H2A
- Time of application of H2B

Summary

- “To H2B or not to H2B” that is the question
- Complicated dynamic for Agriculture
- It can be done
- It is a longer process than H2A
- The CAP is the worst part of the program