



The H-2A Program and COVID-19

By Tom Bortnyk

Brief Refresher:

- Non-immigrant, temporary foreign worker visa program for agricultural employers. Employers can hire foreign workers for tough-to-fill seasonal job positions.
- Must demonstrate a temporary or seasonal labor need; year-round labor needs NOT eligible.
- Must demonstrate insufficient U.S. workers able, willing, and qualified to perform the job AND no adverse effect on wages/working conditions of U.S. workers.
- Agencies responsible for administering the H-2A program: U.S. Department of Labor (DOL), U.S. Department of Homeland Security (DHS), and the U.S. Department of State (DOS).



2020, In Hindsight

- The H-2A program faced unprecedented challenges in the COVID-19 era, including (but certainly not limited to):
 - Travel restrictions, consular shutdowns, and scarce flight availability
 - Unprecedented lockdowns, curfews, and curtailing of everyday life
 - Economic turmoil caused by lockdowns and restrictions
 - White House that disfavored non-immigrant visa programs
 - Testing availability and accuracy (or lack thereof)
 - Tangled web of workplace health/safety requirements
 - Chaos, panic, and uncertainty about the future
- **The optimist's take:** Despite these challenges, the program continued to function. Even its harshest critics implicitly or explicitly acknowledged that the H-2A program is a vital part of the U.S. critical infrastructure, and (with a little prodding from industry stakeholders) the institutions of government worked to ensure its viability.



Responding to the Crisis

- During the peak lockdown period, **DOL** issued emergency guidance that loosened some program requirements. Guidance included:
 - Flexibility to add housing units/worksites post-certification
 - Flexibility to add job duties post-certification
 - More liberal application of procedural tools (e.g., contract impossibility, emergency filings, long-term extensions)
- DHS's Citizenship and Immigration Services (**CIS**) also introduced relaxed standards, including:
 - Temporary suspension of 3-year limit (now expired)
 - "E-Verify" rule for transfers – no need to wait for petition approval
 - Acceptance of electronic or reproduced signatures
- **DOS** doing its best to process as many visa applicants as possible without requiring in-person interviews. More importantly, Mexico *stayed open* during the peak worker crossing season!



Current Challenges: Workplace Safety

- **Social distancing:** H-2A workers travel together, live together, and work together. Is social distancing even possible?
 - Employers have implemented a variety of solutions, either on their own initiative or in response to state/local requirements.
 - Washington, for example, permits a “group shelter” model (15 workers) for bunk beds, transportation, etc. Even if not mandatory in your state, this may nonetheless be a best practice.
- **PPE:** Making sure workers are protected. In addition to mask mandates, many states (including Oregon and Washington) require employers to provide appropriate PPE at no cost to workers.
- **Sanitation protocols:** Making sure common areas are routinely disinfected, and giving workers access to supplies.



Future Challenges: Workplace Safety

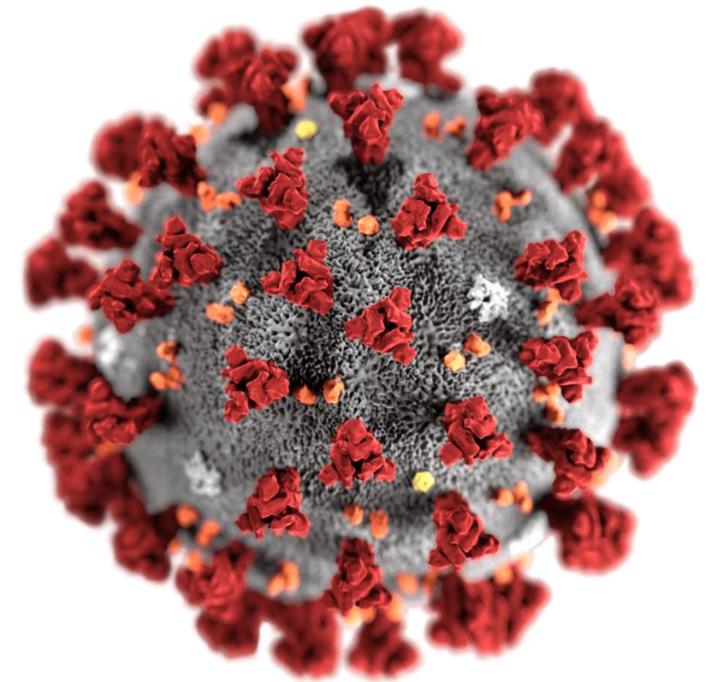
While hoping for the best, you should always plan for the worst. We have not yet turned the corner on the pandemic, and do not know what new challenges may await. Contingencies to consider:

- **Bunk beds** – currently allowed in Washington under certain conditions, but prohibited in Oregon, California, etc. If you are in Washington, do you have a plan for increasing your housing capacity, if needed?
- **Isolation/treatment** – For workers in isolation, Washington now requires employers to “ensure that a licensed health care professional visits occupant twice per day, at the employer’s expense.” Do you have a plan for workers getting sick?
- **Retrofitting** – Various states have imposed physical requirements for certain workplaces (e.g., impermeable barriers). Are you prepared to meet these and any *new* requirements that may be imposed?



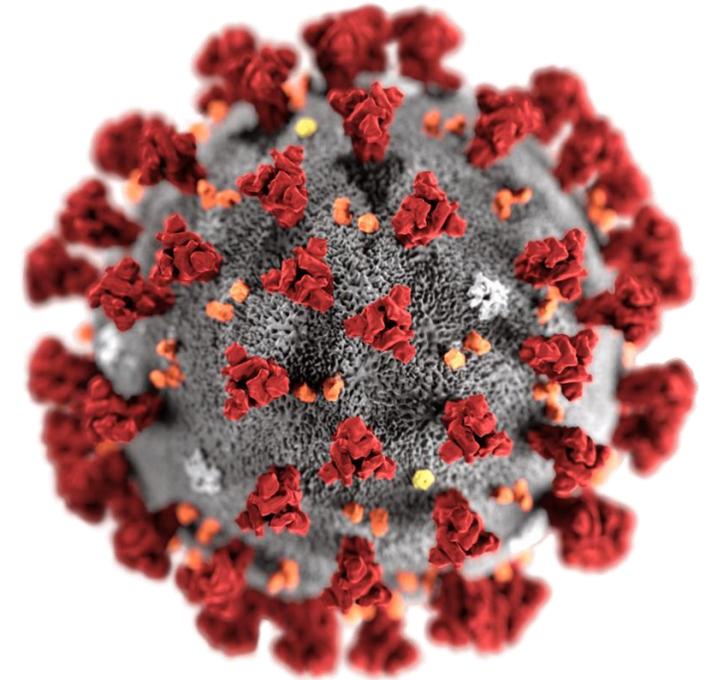
Current Challenges: COVID-19 Testing

- Some states (e.g., New York) have imposed mandatory testing requirements for out-of-state travelers. This can be problematic if tests are in short supply or take several days to deliver results.
- Effective **January 26, 2021**, the CDC requires all international air passengers to test negative for COVID-19 prior to boarding their flights.
 - Must receive negative viral test within 3 days of flight, and provide documentation to airline (or proof of prior infection/recovery).
 - Affects H-2A workers coming from key source countries like Costa Rica, El Salvador, Guatemala, Peru, etc.
- Many countries already imposed this requirement for air travelers *from* the U.S. (El Salvador, Guatemala, etc.).



Future Challenges: COVID-19 Testing

- Do you have a testing plan in place if your state adopts a mandatory testing requirement?
- As previously mentioned, workers from certain countries (e.g., El Salvador, Guatemala) may also need tests to *depart* the U.S. In 2020, numerous workers were stranded due to lack of available testing.
- CDC testing requirement for international travel does not currently apply to land border crossings (e.g., H-2A workers from Mexico or Canada). But will that change under the Biden Administration? You should have a contingency plan for dealing with any new testing requirements.
 - Visa issuance in Mexico is usually a 3-day process. If the CDC were to mirror the air travel timeline, that means workers would need to be tested when they arrive for consular processing.



Current Challenges: Self-Isolation

- Most states now have workplace rules that require H-2A employers to have an isolation protocol for sick workers. This includes providing alternative sleeping areas, bathrooms, etc.
- States may also require employer to make meal provisions for workers in isolation, and/or to provide basic necessities.
- Families First Coronavirus Response Act (FFCRA) imposed emergency paid sick leave provisions, H-2A workers included. This provision expired on December 31, 2020.
- But, state law may separately impose sick leave requirements:
 - **Oregon:** 1 hour paid leave for every 30 hours worked, or 1-1/3 hours of paid leave for every 40 hours worked (max. 40 per year)
 - **Washington:** 1 hour paid leave for every 40 hours worked.



Current Challenges: Self-Isolation

Some states (especially in the Northeast) have instituted mandatory quarantine periods for out-of-state travelers. Some have even imposed *criminal* penalties for violations.

- **Idaho:** No mandatory quarantine at this time, although out-of-state travelers are encouraged to do so for at least 14 days.
- **Oregon:** No mandatory quarantine at this time, although out-of-state travelers are encouraged to do so for at least 14 days.
- **Washington:** Effective December 21, 2020, travelers from the U.K. and South Africa *must* self-quarantine for 14 days after arrival in the state. All other out-of-state travelers are *encouraged* to self-quarantine.



Future Challenges: Self-Isolation

Some things to be thinking about proactively:

- **Coercion:** You are not the police, and cannot *force* workers to abide by quarantine requirements. You can only enforce access to the workplace, and impose disciplinary action for violations.
- **The fine print:** What does quarantine actually mean in your state, from a legal standpoint? Does it prohibit work activities? Read closely!
- **No work, no pay:** Workers need to be able to buy food and other essentials while in quarantine. How will they pay for these things with no paycheck? Consider payroll advances or loans.
- **Meet the new boss:** Will the Biden Admin seek to renew the mandatory sick leave provisions? Will there be nationwide quarantines for interstate travel?



Current Challenge: Vaccination

Idaho

Group 2 – Frontline essential workers

Timeline: February/March

Oregon

Phase 1B – High-risk critical workers

Timeline: TBD (Phase 1B expected to begin mid-February, but ag workers are not first in line)

Washington

Phase 1B, Tier 4 – High-risk critical workers

Timeline: April

Note: Older workers and workers with underlying health conditions may fall into an earlier priority tier.



Future Challenges: Vaccination

- **Equal Employment Opportunity Commission (EEOC)** updated its guidance in mid-December 2020. Employers *are* permitted to require workers to be vaccinated, with caveats:
 - If a worker/applicant cannot be vaccinated due to disability, the ADA requires employer to show that unvaccinated employee would pose a **direct threat** to others' health/safety that cannot be eliminated or reduced by **reasonable accommodation**.
 - If a sincerely-held religious belief prevents an employee/applicant from being vaccinated, Title VII of the Civil Rights Act requires employer to provide reasonable accommodation unless it would pose **undue hardship**, i.e., more than *de minimis* cost or burden.



Future Challenges: Vaccination, cont'd

- **H-2A regulations:** Keep in mind that your Job Order must enumerate all material terms and conditions of employment, including any requirements that might preclude an applicant's hiring eligibility. If you intend to require vaccination, you must **disclose** the requirement.
- **Can the *government* require vaccination?** Yes, probably. CDC has authority to impose vaccination requirements, in certain circumstances, for immigration purposes. That includes both immigrant and non-immigrant (e.g., H-2A) visa issuance. Vaccinations currently required for common diseases like measles, mumps, rubella, etc.
 - To our knowledge, the Biden Administration has not spoken to this particular question.



The Bottom Line

- **Keep calm and carry on:** We enter 2021 with a lot of uncertainty. But the H-2A program is resilient, and COVID did not stop its momentum. Employers continue to rely on the program to meet their critical, seasonal labor needs.
- **Pendulum swing:** President Biden enters office with Democrats in control of the House and Senate. Does this mean more aggressive COVID-19 requirements for H-2A employers (or ag employers, generally)? Potentially. But, it's unlikely that any national mandate will go beyond the requirements imposed by states like Washington, Oregon, etc. If anything, the Pacific Northwest will be the model for the rest of us!
- **On an unrelated note:** The Trump Admin's proposed H-2A reform is dead-on-arrival. But the Final Rule was NOT as pro-employer as one might imagine. Unclear how much, if any, the Biden Admin will retain.



Questions or Comments? Please ask.

Or follow up with me directly:

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