



Emerging Enforcement Trends: Navigating Pay Practices for Foreign and Domestic Employees

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Preventive Strategies and
Positive Solutions for the Workplace

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Overview

Topics for today:

- **New York AG case study**
- **H-2B foreign temporary worker program**
- **Wage and hour investigations: who is selected and why?**
- **Federal wage and hour standards**
- **Pitfalls under state wage and hour laws**
- **What to do? What to do?**
- **The next wave**



New York AG Case Study

Basic Facts:

- In 2007 and 2008, respectively, Dreamland employed approximately 32 and 22 H-2B foreign workers.
- On DOL certification, Dreamland stated workers would earn :
 - 2007: \$8.61/hour and work regular 40 hour week
 - 2008: \$8.13/hour and \$12.20/overtime hour.
- Nonprofit immigrant organizations referred complaint to NY Attorney General stating weekly hours exceeded 40 hours and no overtime pay.

The New York Attorney General Investigation:

May 2008 NY AG's Office initiated investigation regarding :

1. False statement to State of New York SWA (NYSDOL) regarding wages and hours worked in support of H-2B applications;
2. Non-payment of prevailing wage and overtime; and
3. Disparate treatment in housing and other working conditions of workers from Mexico

NY AG Investigation Findings:

- H-2B workers paid flat weekly salary ranging between \$275 and \$350.
- For 2007 and 2008, ride operators paid less than \$5.00/hour.
- No overtime paid.
- Violation of state and federal minimum wage and prevailing wage.
- Failure to maintain H-2B employee records.
- Disparate and substandard housing of H-2B workers v. U.S. workers.

The Bottom-Line: - August 11, 2009 Settlement:

- \$325,000 settlement, place personal property as collateral.
- Assurance of Discontinuance agreement entered, Dreamland neither admits or denies AG's Findings.
- Enhanced Notice of Rights to U.S. and H-2B workers; OSHA training.
- Develop complaint process and employee Handbook.
- Hire Independent Monitor to evaluate agreement compliance.



H-2B Foreign Temporary Worker Program

H-2B Visa Program

- **Non-Agricultural industries**
- **Address one-time occurrence, peak load, seasonal, or intermittent labor needs**
- **Fill slots for which there are no U.S. workers available**
- **66,000 workers per Fiscal Year**
- **Employer sponsors the foreign worker; the foreign worker is committed to its sponsor(s) pursuant to labor certificate and visa petition**

Part I: Department of Labor (DOL) Certification Process:

- Employer through State Workforce Agency (SWA) posts job vacancy, runs two ads, and conducts union consultations if applicable.
- **Employer certifies and submits labor application under penalty of perjury to DOL indicating wages, duties, hours, location, and same work conditions as U.S. workers. (1001 Violation)**
- DOL determines if no available U.S. workers and establishes minimum prevailing wage.
- DOL determines any effect to U.S. worker wages/work conditions.
- DOL Issues labor certification for specific number of workers, position(s), timeframes, and location(s).

Part II: DHS – U.S. Citizenship and Immigration Services & Consulate Processing:

- Approves H-2B application pursuant to DOL certification.
- Also submitted by employer under federal penalty of perjury.
- Confirms initial information and seasonal need.
- Forwards approval to overseas U.S. consulate office.

- Agree to pay the highest of the prevailing wage, Federal minimum wage, the State minimum wage, or local minimum wage.
- Pay overtime if applicable under federal, state, local law.
- Maintain certified work week/schedule.
- Pay H-2B visa costs where shifting costs would to employees would effectively bring their wages below the FLSA minimum wage.
- Pay transportation expenses (except 5th Circuit).
- Pay H-2B overseas recruiter fees, if any.
- No employee “kick-backs” for items that primarily benefit the employer (e.g. uniform/special clothing, tools of the trade, electric power).

- Same working conditions as U.S. workers.
- Not place employee outside area of intended employment.
- Maintain H-2B records for three years.
- Notify DHS of terminations/abandonments.

BUT

- Do not have to reimburse employee for passport and related costs. 😊



Wage and Hour Investigations: Who Is Selected and Why?

U.S. DOL's Wage and Hour Division

- Enforces the FLSA (MW, OT, and CL), the FMLA, **and as of this year the labor provisions of H-2B certifications**, among other things
- Approximately 1,000 investigators (**up 30% in 2009**) in 220 offices around the country
- Conducts around 30,000 compliance actions each year
- Around 80% of these begin with a complaint by a worker
- The agency initiates the remaining cases
- Agency's focus: low-wage industries, workers who are less likely to know their rights

State enforcement

- **Some states have labor departments that enforce laws vigorously**
- **Some states have active attorneys general who pursue litigation to vindicate workers' rights**
- **These matters can arise from worker complaints, information provided by union organizers, and agency enforcement priorities, among other sources**

Don't forget about class action litigation brought by private attorneys



Federal Wage and Hour Standards

General requirements under federal Fair Labor Standards Act:

- **\$7.25 per hour for non-exempt employees**
- **Time-and-a-half for hours beyond 40 in a workweek for non-exempt employees**
- **Restrictions on child labor (under age 18)**
- **Record-keeping**
- **Posting of notices**

Section 13(a)(3) of the FLSA provides a minimum wage and overtime exemption for:

- “[A]ny employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center” ***if either of the following applies:***
 - The establishment does not operate more than 7 months in any calendar year ***or***
 - During the preceding calendar year, the average receipts from any six months did not exceed 33-1/3% of the average receipts for the other six months
- Does not apply on certain federal sites

Section 18(a) of the FLSA states:

“No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act”

The FLSA does NOT ordinarily pre-empt state law



Pitfalls Under State Wage and Hour Laws

The laws vary from state to state

- **Some states follow federal law or do not regulate workers covered by the FLSA (e.g., Florida, Georgia, Virginia)**
- **Some states recognize the seasonal amusement or recreational establishment exemption for overtime purposes but require payment of minimum wage (e.g., Maryland, New York)**
- **Some states do not recognize the exemption at all and require payment of minimum wage and overtime (e.g., Connecticut, North Carolina)**

If workers are not exempt from state wage and hour laws, you may be responsible for:

- Tracking and compensating based on actual hours worked, including:
 - Set-up and tear-down time
 - Work-related travel time
- Paying at least minimum wage for all hours worked
- Daily overtime, weekly overtime, seventh-day overtime, and other local variants
- Mandatory meal and rest periods, which can limit worker availability to staff booths, concessions, rides, etc.



What To Do? What To Do?

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- **Fully understand your state and federal prevailing wage and overtime requirements and how they apply to H-2B workers – they do differ!**
- **Understand your H-2B immigration obligations.**
- **Maintain uniform company procedures regarding wages and immigration.**
- **Avoid Civil Rights violations.**
- **Know your overseas H-2B recruiters – you are tied to them.**
- **Avoid illegal H-2B employee kick-backs.**
- **Before you jump into another “easy” visa category (J-1?), make sure you understand the visa requirements and obligations.**



The Next Wave

“Fair Workers – Fair Wages” Campaign: A Good Time for An H-2B Check-Up



NOCHE DE CIEN CENAS Host Packet Contents

- Altar Instructions
- Menu Suggestions
- Carnival Facts Quiz
- Carnival Stories of Struggle
- Carnival Tales of Heroism
- CDM 2009 Victories and Facts
- Donation Information
- Guest Volunteer/Contribution Form
- Support CDM
- Fair Outreach Addresses and Maps

Thank you!

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PRACTICE AREAS

- **Affirmative Action and OFCCP Diversity Planning**
- **Disability, Leave and Health Management**
- **Employee Benefits, including Complex ERISA Litigation, Workplace Privacy and Executive Compensation**
- **Global Immigration**
- **Labor, including Preventive Practices**
- **Litigation, including Class Actions, Complex Litigation and e-Discovery**
- **Trade Secrets, Non-Competes and Workplace Technology**
- **Wage and Hour Compliance**
- **Workplace Safety Compliance**



OTHER WORKPLACE LAW AREAS

- **Alternative Dispute Resolution**
- **College and University Employment Law and Compliance Issues**
- **Corporate Diversity Counseling**
- **Corporate Governance and Internal Investigations**
- **Drug Testing and Substance Abuse Management**
- **International Employment Issues**
- **Government Relations**
- **Management Education, including e-Based Training**
- **Public Sector Issues**
- **Reductions in Force, WARN Act**