FARM CREDIT EAST

KNOWLEDGE EXCHANGE PARTNER

VOLUME 15 | ISSUE 1 | JANUARY 2021

THIS ISSUE:

Editor: Chris Laughton
Chris.Laughton@FarmCreditEast.com

Contributors:
Tom Cosgrove
Chris Laughton

Under the Americans with Disabilities Act (ADA), employers can require vaccines if they are "job related and consistent with business necessity."

COVID-19 and the Workplace: Key Employer Questions Answered

The COVID-19 pandemic has dramatically affected our society over the past several months by limiting our activities and ability to gather in public. It has also raised several key questions for employers. In this article, we look at a few of these issues.

Can employers require employees to get the COVID-19 vaccine when it becomes widely available?

The answer is yes, but with a few caveats. Under the Americans with Disabilities Act (ADA), employers can require vaccines if they are "job related and consistent with business necessity." There are exceptions, however.

If an employee has a disability or medical condition that prevents him or her from getting vaccinated, or a "sincerely held religious belief" that he or she cannot be vaccinated, employers must make "reasonable accommodations." Such accommodations could include remote working arrangements, requiring mask wearing, or alternative scheduling, as long as the work can still get done. If the possible reasonable accommodations are not practical, employers do generally have the right to terminate workers who refuse the vaccine.

Another matter to consider is whether a vaccine mandate makes sense from a business perspective if it would be disruptive to operations or employee morale.

Can employers require employees to wear personal protective equipment (PPE), such as masks and face shields, and must employers provide it without charge?

The answers are yes, and yes. Employers can require employees to wear appropriate PPE while working or on the premises, under threat of discipline or termination. This is consistent with PPE requirements for any other workplace hazard. Employers must also provide this equipment at no charge and replace it when appropriate.

Can employers require employees to be tested for COVID-19?

Yes. The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity."

Continued on next page

Continued from previous page

Given the easy spread and severity of COVID-19, an employee with the virus could pose a threat to the health of others. Thus, an employer may require COVID-19 testing of employees (usually those who are symptomatic or have been in close contact with someone who has tested positive). Employers who do this should be consistent in their application and enforcement of this mandate.

What should an employer do if an employee is known or suspected to have COVID-19?

If an employee is confirmed to have COVID-19 or exhibits symptoms, they should immediately be separated from other employees and customers and sent home or told to stay home. Employers should not require sick employees to provide a COVID-19 test result or healthcare provider's note to validate their illness, qualify for sick leave or return to work. Healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely manner.

State laws may apply here as well: CT, ME, MA, NJ, NY and RI all have laws requiring employers who meet designated criteria to provide paid leave. Links to these state laws are provided at the end of the article.

The federal Families First Coronavirus Response Act (FFCRA), which required paid sick leave in 2020 was not renewed. So, the mandated FFCRA leave ended on December 31, 2020. However, the tax credit to reimburse employers for paid leave was extended through March 31, 2021. In other words, FFCRA leave is no longer required, but if employers decide to provide it (or are required to under state or local regulations) they are eligible to take the tax credit for leave taken through the end of March.

For employers who do not need to provide sick leave, or when available sick leave is insufficient, they may wish to consider an emergency leave policy so employees who have, or may have, COVID-19 do not come to work. Businesses with 50 or more employees generally have to comply with the federal Family and Medical Leave Act (FMLA), which requires leave be made available for a "serious health condition."

If an employee tests positive for COVID-19, OSHA requires that employers take appropriate actions to protect workers from infection, such as cleaning and disinfecting affected areas, notifying other employees and/or implementing a screening program in the workplace (i.e. temperature checks and/or employee questionnaires).

When should an employee known or suspected to have COVID-19 be allowed to return to work?

CDC guidelines[1] advise employees be allowed to return to work if:

- At least 10 days have passed since symptom onset and;
- At least 24 hours have passed since resolution of fever without the use of fever-reducing medications and;
- Other symptoms have improved.

Persons infected with the virus who never develop COVID-19 symptoms may discontinue isolation and other precautions 10 days after the date of their first positive test. Be aware if state or local authorities have more stringent requirements.

Can I be liable as an employer if an employee claims they contracted COVID-19 at work? Could it be a workers' compensation claim?

The answers to these two questions are unclear at present. To address the workers' compensation claim question first, under workers' compensation law, if an employee is injured or becomes ill as a result of workplace exposure, damages are automatic. The question is whether an employee contracted COVID-19 at work or in public on their own time.

Generally, workers' compensation does not cover routine community-spread illnesses because they usually can't be directly connected to the workplace. However, some states are considering steps to create a rebuttable presumption that an employee who has been working contracted COVID-19 while at the workplace, particularly for workers in so-called "high risk" positions, such as health care. This presumption places the burden on the employers and/or their insurers to prove that the infection was not tied to the workplace. In any case, the best

[1] https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html

Continued on next page

Continued from previous page

defense (and a best practice to prevent sickness in the first place) is to follow CDC guidelines closely, including placing shields and guards, providing PPE, and mandating that workers adhere to these guidelines as well.

In some cases, employees have filed claims in court, hoping to get larger damages than through workers' compensation. The normal standard for winning a liability claim is that the plaintiff has to show that the employer owed a duty to the employee to provide a safe work environment, but breached or failed to meet that duty and, as a result, the employee became ill or was injured. Again, the best defense to such a claim is to be diligent about following CDC guidelines and providing as safe a workplace as possible.

The U.S. Senate has proposed the "Safe to Work Act," which would provide employers some level of protection against COVID-19 claims, but it has yet to be passed as of this writing, and such protection for employers was specifically not included in the recent COVID-19 relief bill.

Links to state leave requirements:

- Connecticut
- Maine
- Massachusetts
- New Jersey
- New York
- Rhode Island

Please be advised that the author of this article is not an attorney, and no attorney-client relationship is created by its publication. The article is for information purposes only, and employers should discuss any policies or practices with experienced employment law counsel.

Foreign Labor Options for Northeast Agricultural Producers

Finding, hiring, developing and retaining adequate labor resources are some of the most pressing challenges for agricultural employers. Local workers are often not available in sufficient numbers to meet the needs of farm employers, or are uninterested in seasonal or temporary jobs, or farm work in general.

Immigration and Customs Enforcement (ICE) raids and I-9 audits are increasing each year. Immigration violations of undocumented workers can't be resolved within the United States. Persons who entered illegally, or overstayed visas, must return to their home countries to fix their status.

However, there are a number of immigrant and non-immigrant visa categories available to Northeast agricultural producers, as well as some fishing and forest product producers. Recently, Harris Beach law firm presented a webinar series sponsored by Farm Credit East which provided an overview of three options: H-2B, H-2A and Permanent Residency. This article is a brief summary of these programs. For more information, please review the webinar recordings.

H-2B – Temporary or seasonal nonagricultural workers

H-2 visas are for lower-skilled temporary or seasonal workers (as opposed to H-1 visas, which are generally given for higher-skilled positions). H-2A is for agricultural workers and will be addressed later, while H-2B is for nonagricultural workers.

The biggest issue with H-2B is that there is an annual cap for the number of visas that can be issued: 66,000 – split between two seasons – October 1 (first half of the fiscal year), and April 1 (second half of the fiscal year).

Continued on next page

Continued from previous page

The second half is most competitive, with only 33,000 visas for the whole country. The U.S. Department of Labor (DOL) will receive as many as 200,000 requests for these visas. In some recent years, additional visas have been made available on an ad hoc basis, but this has been inconsistent.

H-2B workers must fill a temporary or seasonal job. The job cannot be year-round and has a 10-month limit (effectively nine months under current DOL regs). The work must be full-time (35 or more hours per week).

There is a specific multi-step process to obtaining H-2B workers. Employers are advised to begin about six months in advance of their anticipated need for workers. Employers must pay "prevailing wage" for the category of employment as determined by DOL, a benchmark of what businesses in the local area are paying for comparable workers. Employers must also pay in- and out-bound transportation costs, and all consular and agent fees. As with most regular employees, employers must also have workers' compensation, pay overtime for hours worked over 40 hours, and withhold applicable state and federal payroll taxes. Employers must also pay at least the H-2B prevailing wage to all U.S. workers performing the same duties as the H-2B workers.

Notably, with H-2B, employers are not required to provide or pay for housing, but they should make arrangements for workers' housing in advance of their arrival, as their ability to quickly find suitable accommodations will be limited.

H-2B workers cannot be used for "agricultural work." However, there is some overlap between H-2B and H-2A, and some farms do use H-2B workers, such as equine operations or for work on the farm that does not qualify as "agricultural work," such as shipping, retail or other positions. The most common sectors for H-2B are hospitality and resort businesses, landscaping, and construction. Some fishing and forestry businesses use them as well.

Regarding the visa cap, because the H-2B visa is so oversubscribed, DOL enters all applications received during the initial three calendar days of the filing period (Jan 1-3 for April 1 start) into a lottery. Even if employers do not get allocated any visas, they may still get a job certification that could be used for transfers. H-2B workers can be transferred from one employer to another without being subject to the cap.

So, if you are a landscaper for example, it may make sense for you to partner with say, a ski area, who has H-2B workers in the winter. You could transfer them to your business for the growing season, and then they could return to the ski area again next winter. Workers can transfer in that fashion for up to three years before they are required to leave the country for a period of time to reset their eligibility.

As with all visas for foreign workers, employers must demonstrate that no U.S. workers (either U.S. citizens or those legally present on eligible visas) are available. This is done through a process of recruitment, as specified by DOL. U.S. workers must be preferentially hired before the arrival of H-2 workers, and for a period of time after their arrival.

H-2A – Temporary or seasonal agricultural workers

In a similar fashion to H-2B, H-2A is for temporary or seasonal workers, but for agricultural positions. This program serves about 15,000 agricultural employers nationwide, for more than 268,000 positions. Unlike the H-2B visa, the H-2A has no cap.

What is agricultural work? Agricultural work includes: The cultivation of soil; raising, feeding, caring for, training, or management of livestock, bees, poultry, fur-bearing animals or wildlife; or the raising or harvesting of any other agricultural or horticultural commodity. Notably, services performed in connection with production or harvesting of maple sap, in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry constitute agricultural labor only if such services are performed on a farm.

Continued on next page

Continued from previous page

Processing of commodities raised on the employer's farm is considered agricultural labor, but any processing of products raised on another farm does not qualify as agricultural labor.

Similar to the H-2B, employers must pay prevailing wage, which for H-2A is referred to as the Adverse Effect Wage Rate, or AEWR. This varies by state. For New York, that rate was $14.29 per hour in 2020. The work must be full-time and temporary or seasonal (up to 10 months). Year-round positions are not eligible. On top of the AEWR pay rate, employers must provide housing free of charge, as well as transportation to and from their home country. The worker housing must be inspected by the State Workforce Agency (SWA). Drinking water from non-municipal sources (i.e. wells) must be tested annually.

Employers must also recruit and preferentially hire U.S. workers over H-2A workers. This means contacting any U.S. employees laid off from the prior season to see if they are willing to return, as well as conducting domestic recruitment. Employers must submit a recruitment report and must provide the name of each U.S. worker who applied for the job and whether they were hired or why they weren't. These records must be retained for a period of three years. Employers must continue to cooperate with the SWA in recruiting and hire any U.S. workers until 50% of the work period is completed. Employers must complete and retain a final recruitment report at the 50% mark of the work period.

Employers must report any termination or abandonment of workers within two working days. It's also worth noting that the terms and conditions of H-2A contract apply to all – including domestic workers – they must receive the AEWR rate as well if performing similar duties to H-2A workers.

Permanent foreign labor options for U.S. employers

Another option for U.S. employers to obtain foreign workers is by sponsoring them for permanent residency – a "green card."

It's noteworthy that nearly any position can qualify if it is full-time and year-round. The position need not be "highly skilled." If timed carefully, the employer can continue to bring in H-2 workers until the last stage of the green card process is filed. Permanent foreign worker sponsorship is open to all sectors and not limited to agriculture.

Immigration sponsorship through employment is a three-step process. First, the employer must get a prevailing wage determination, then file the I-140 form, after which they can get either adjustment of status (if in the U.S.) or consular processing (if outside the U.S.), and finally a green card is issued. The total process can take up to two years. Government fees total approximately $2,000 (higher if expedited processing is requested). Legal fees are additional.

Once workers receive their green card, they can live and work without restriction in the U.S. as their status is not tied to their employment. However, many employers enter into a reimbursement arrangement or minimum tenure period with the employee. It is possible to have an agreement requiring workers to stay with the employer for a certain period after receiving their green card or else reimburse the employer for expenses.

There are limits on number of green cards issued each year – approximately 140,000 employment-based and 226,000 family-based green cards are issued annually. Each country also has a ceiling number of visas. When either preference group or country quota are met, waiting lists build. India and China typically have a backlog, but most other countries do not.

As with non-immigrant work visas, employers must conduct recruiting of U.S. workers meeting the job criteria, and complete and retain a recruitment report.

Continued on next page

Continued from previous page

Conclusion

Finding adequate labor has been a challenge for Northeast farming, fishing and forestry producers for a long time. However, there are several options to secure foreign workers for U.S. employers. While each of the three options presented can be a bit complicated, with assistance, they have become viable solutions for thousands of businesses across the country.

Note that the above descriptions are only high-level summaries of the processes involved. For more information, we encourage you to view the recordings of the Harris Beach webinars sponsored by Farm Credit East, which are available at FarmCreditEast.com/webinars.

Please be advised that the author of this article is not an attorney, and no attorney-client relationship is created by its publication. The article is for information purposes only, and employers should discuss any policies or practices with experienced employment law counsel.

CONTACT INFORMATION

We look forward to your questions about Knowledge Exchange Partner and your feedback:

KnowledgeExchange@FarmCreditEast.com

KNOWLEDGE EXCHANGE PARTNER