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H-2B Coronavirus Impacts FAQ

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Current Trends

1. What is Pabian Law currently seeing in terms of how winter-season H-2B employers are handling coronavirus?

Many winter-season H-2B employers in the hospitality industry are significantly scaling back operations or are closing entirely for the remainder of their H-2B employment period (which typically lasts through April or May).

2. How are 2020 summer-season H-2B employers planning for business needs?

Many summer-season clients that we have spoken to are expecting to have slow April and May. However, they are expecting and planning to be very busy again starting in June. Nearly all of our summer-season H-2B clients are currently still planning on proceeding with their summer 2020 petitions.

3. How are 2020-2021 winter-season employers planning for next year?

Based on conversations with our clients, it does not seem that coronavirus concerns have impacted planning for the 2020-2021 winter season at this point. Our clients remain hopeful that the winter 2020-2021 season will be back to business as usual by the time we reach October, November, and December.

4. PREMIUM PROCESSING UPDATE

Importantly, U.S. Citizenship and Immigration Services (USCIS) announced on March 20, 2020 that they would be suspending Premium Processing service on all petitions (including H-2Bs). Therefore, for the time being, H-2B petitions will take up to 2-3 months to process, rather than the typical 15 calendar days. We expect this to be temporary. Once this restriction is lifted, we can file applications to upgrade the petitions to premium processing and pay the additional premium processing filing fee. However, this will cause significant delays to any H-2B petition that has not yet been filed with USCIS.

For summer-season H-2B organizations, this could actually be great news as it will delay the start date of your petition as well as the $\frac{3}{4}$ guarantee payment obligation if you are filing in-country transfer/extension applications.



Travel & consulate restrictions

5. Are certain consulates in H-2B eligible countries closed for visas applications?

As of March 20, 2020, all U.S. consulates and embassies worldwide have suspended routine visas services indefinitely. If your out-of-country H-2B workers have not yet applied for their H-2B visas, we would expect significant delays before they are able to do so.

****UPDATE:** On March 26, 2020, the U.S. Department of Labor announced that it may begin waiving in-person interview requirements for H-2 visas. This announcement was made in an H-2A visa press release, and therefore, it is unclear whether it applies to both H-2B visas and H-2A visas. However, this may indicate that H-2B workers may be able to apply for their visas during the consulate shutdown. We will provide updates as we learn more information.

6. Has the U.S. banned travel of foreign nationals from certain countries?

The U.S. government has suspended travel for foreign nationals from most European countries for thirty (30) days starting on March 13th. This applies to the twenty-six (26) countries in the Schengen region, as well as the UK and Ireland. If a foreign national was in one of these countries during the fourteen (14) days prior to their planned arrival in the United States, they cannot travel to the U.S. until the restriction is lifted. This does not apply to U.S. citizens or green card holders.

- Note: if a worker is able to travel to a third country and wait 14 days before attempting to enter the U.S., they may be granted entry. However, this raises an entirely separate set of questions and potential complications (e.g., will the worker be granted entry to the third country? Will the worker need a visa to do so? Will the travel ban be extended to that country as well?)

7. Have certain airlines cancelled travel?

As of now, we are hearing rumors about certain airlines suspending all flights to certain countries. Additionally, we have been hearing more and more from clients that flights have been cancelled, even if the country indicates that its borders are open. Therefore, we strongly recommend that organizations check with airlines before all international and domestic flights to get the most updated information. This includes travel from the U.S. to get workers home, as well as travel to the U.S. at the beginning of the season.

8. What if a foreign national's home country will not let them travel home?

No government has fully closed its borders to its own citizens. Although Peru instituted a complete border shutdown March 15th, they have since begun repatriating citizens. However, some countries (e.g., Argentina) have instituted self-imposed quarantines for any individuals travelling from affected countries, which may include the U.S.



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Note: border closures and travel restrictions seem to be changing on an hour-by-hour basis. Therefore, we would recommend reviewing the below resources. Although they are not always updated with the most recent possible information, they are a good start. Additionally, calling the airline before travel is another best practice.

Some useful resources are the following:

- Countries with travel bans/suspensions:
<https://www.cnn.com/travel/article/coronavirus-travel-bans/index.html>.
- Additional article re: travel bans/suspensions (seems to be updated regularly):
<https://www.aljazeera.com/news/2020/03/coronavirus-travel-restrictions-border-shutdowns-country-200318091505922.html>
- Restrictions on U.S. visas/entry: <https://www.nafsa.org/regulatory-information/covid-19-restrictions-us-visas-and-entry>.

If a foreign worker is not allowed to leave the U.S. at the end of their H-2B visa, s/he has two options:

- (1) file an application to change his/her status to B-2 (tourist visa); or
- (2) overstay their visa.
 - To date, the government has not passed any legislation that would forgive overstaying one's visa status due to the Coronavirus. Therefore, it remains illegal to remain in the United States without valid visa status and we do not recommend that the worker does so.
 - Given uncertainty, the safest course of action – and the legal one – is to apply for a tourist visa.

Given the above, the best option for a foreign national no longer working in the United States is to depart the U.S. as soon as possible. If the worker is unable to do so, we recommend that s/he apply for tourist visa status to legally remain in the United States.

9. What other concerns should foreign workers consider when travelling?

The following are several questions to consider:

- Is the U.S. government allowing travel from that country?
 - (see above regarding European travel ban)
- Are there restrictions on travel back to a worker's home country?
 - (this is a fluid situation – please see end of Q&A for links to further information)
 - Some countries are beginning to close their borders, including some to their own citizens and permanent residents. The vast majority of the world's countries are continuing to allow their own citizens and permanent residents to return.
- Are airlines flying to and/or from that location?
- If flying, is the individual's flight connecting through a country with travel restrictions?
 - (we recommend checking with the airline for specific questions)



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10. Does the U.S. Government have any plans to provide relief for some of the immigration-related consequences of the coronavirus?

No. The government, including the U.S. Department of Labor and U.S. Department of Homeland Security appear to be all consumed with other aspects of the coronavirus response. Therefore, we do not expect any H-2B-related immigration relief to be provided. Additionally, it seems that H-2B cap relief initiatives may be delayed.

Questions about decreases in business and the impacts on H-2B employment

11. **IMPORTANT:** what if business levels drop, and I can no longer fully employ H-2B workers?

This depends on the specific scenario you are encountering, as follows:

- As you may know, you have an obligation to offer workers full-time employment in a way to comply with the three-fourths guarantee¹. This hour obligation only ends in two circumstances:
 - The worker voluntarily abandons employment or is terminated for cause and the employer notifies the government of the early end of employment; or
 - There is an “impossibility of fulfillment” of the employment (see below).
- If you can reduce hours for all full-time, temporary workers in a way that complies with the three-fourths guarantee, then you would not need to take any further action.
- If some workers leave voluntarily, and that reduction in workforce allows you to continue employing other workers on a full-time basis, then you may continue to do so without taking further action.
- However, you cannot terminate workers (unless for cause) without continuing to pay them for the rest of the season (in compliance with the three-fourths guarantee).
 - Exception: if you cannot meet your three-fourths guarantee, you could file an application to cancel the H-2B job order (called “impossibility of fulfillment”). This is a rare allowance due to an “Act of God.” If accepted by the government, your three-fourths obligation would end and you may legally layoff H-2B workers and schedule their travel home.
 - Note: if the government approves an “impossibility of fulfillment” application, you must terminate all H-2B workers under that application.

¹ **The three-fourths guarantee:** this means that you must offer workers three-fourths of the total full-time hours averaged over a 12-week period. The total hours obligation is calculated based on the full-time hours that you listed on the H-2B application (either 35 or 40) – therefore, the obligation would be either 26.25 or 30. As long as hours do not fall below this minimum threshold, when averaged over a 12-week period, then you would remain compliant with the three-fourths guarantee. The 12-week periods are unique to each individual worker. The first 12-week period begins when the employee arrived at your property at the beginning of the season. The last period is almost always shorter than 12 weeks, as it would end when the worker ends employment. Hours required for partial weeks at the end of the last period would be calculated on a pro-rata basis.



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12. Can I lay off U.S. workers?

The H-2B program places restrictions on the ability to layoff U.S. workers, as follows:

- During the season: the employer may not lay off any similarly employed U.S. workers during the H-2B employment period without first laying off all H-2B workers in that position (but see “three-fourths guarantee” above regarding protections for H-2B workers).
- Before the next season: the employer may not layoff any similarly employed U.S. worker within 120 days prior to the beginning of the next season (otherwise the employer would be prohibited from participating in the H-2B program in the following season).
 - ***Update***: However, there is an exception to this if the layoffs are for a lawful reason such as lack of work caused by an unforeseen event and the laid off U.S. workers are hired back before any H-2B workers begin employment.

13. What if an H-2B worker needs to be quarantined?

It is legally possible for an H-2B worker to be placed on a leave of absence. However, as you likely know, the H-2B program has a minimum hours requirement called the “three-fourths guarantee” (see footnote #1 above). Therefore, if a worker is on unpaid leave from work for long enough where his/her average hours fall below the three-fourths guarantee minimum, you may need to pay them for a certain minimum number of hours to ensure they do not fall below the legal requirement. This is a very fact-specific requirement (again, see footnote #1), and therefore, we would be happy to discuss the specifics if such a situation arises.

14. If I am a summer-season employer and business levels in April and May have been significantly impacted, can I delay the arrival of H-2B workers?

The H-2B regulations contain a prohibition against “staggering,” which means that employers cannot typically delay the arrival of workers due to ramping up of business levels during the shoulder season. Business impacts caused by the Coronavirus would not eliminate this prohibition, and therefore, we cannot advise you that staggering would be 100% legally compliant. However, based on our experience with government audits, we anticipate that the government would be willing to consider Coronavirus concerns and potentially overlook staggering violations this year. Please note, though, that if you decide that you cannot bring your H-2B workers in at the beginning of your employment period, we would strongly recommend maintaining documentation regarding lost business to produce in the event of an audit.

15. Should I stop moving forward with the H-2B program for the 2020 summer season?

Even if you are worried about significant impacts to business levels this summer, we would not recommend ceasing your H-2B applications. There is no benefit of withdrawing the H-2B application at the current time. Instead, we would recommend waiting to see how significant the impacts are. If the outbreak is short-lived, and business levels return to normal in the summer, a wait-and-see approach will allow you the flexibility to still hire your workers.



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16. If I am a winter-season employer, how should I handle our 2020-2021 H-2B visa petitions?

We will be starting work on winter-season petitions in early April. We can delay the start a bit until May. Based on where things stand today, we recommend moving forward with next season's petitions if you were worried about staffing for next season prior to the outbreak. At the moment, it sounds like health officials are optimistic that the coronavirus will be behind us by the fall/winter, when the winter-season H-2B visas will take effect.

In-country H-2B transfers between employers

17. What about workers transferring to their next employer in the U.S.? How do H-2B in-country transfer petitions work if winter-season H-2B employees are leaving early or being terminated due to lack of work?

For an H-2B in-country transfer petition to be approved, an H-2B worker should be employed in the U.S. at the time the H-2B petition is filed with U.S. Citizenship and Immigration Services (USCIS). Therefore, if a winter-season employer shuts down or lays off workers, then the summer-season employer may not be able to file an in-country H-2B transfer petition.

Here are some steps to take if you are worried about this situation:

- If you are a winter-season employer: be sure to communicate your plans with any summer-season H-2B recruiting partners (and/or encourage your workers to communicate with their summer employers). If you shut down and fly workers home immediately without giving workers time to communicate with their summer-season employers, it may create panic. If it is possible to keep workers on payroll for a few days or more, that may go a long way toward helping workers and summer employers plan for the transfer to occur (or to make alternative plans).
- If you are a summer-season employer:
 - Be sure to communicate with your workers and your winter-season recruiting partners. If they can delay terminating workers/sending workers home until after you file your in-country transfer petition, that could solve any potential issues.
 - However, if one or more of your workers are terminated before you are able to file your petition, this may create problems. Please see the below questions for more detail.

18. As a summer-season employer, if a worker has ceased employment early with their winter-season employer, are they allowed to travel to our property now?

As long as you have already filed an in-country transfer petition with USCIS for that worker, they may legally remain in the U.S. pending adjudication of the petition and could travel to your property. However, as you know, the worker cannot work until your employment start date.



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19. As a summer-season employer, what if I have not yet filed my in-country transfer petition with USCIS and some of my employees are laid off?

If you have not yet filed your in-country transfer petition, you will want to file it as soon as possible. However, if workers are being laid off there are no guarantees that it will be approved (as outlined at the beginning of this section). If you have workers travel to your property during this time, there is a risk that the petition will not be approved and you would have to pay to fly the workers home.

20. As a summer-season employer, what do I do if I was planning to file an in-country transfer petition and my workers are laid off before I can file?

As stated in the question above, you could still file your petition, but there is a significant risk that it may not be approved. Additionally, if winter-season employers are willing to keep workers on payroll for a little longer to help you file in time, that could solve the issue. However, if none of these solutions are viable, there is an additional option that could work to allow you to hire laid off workers, called an “out-of-country, cap-exempt” (OOCCE) petition.

What is an OOCCE petition? If a worker originally came from outside of the U.S. to begin work at its winter-season employer, that worker was already counted against the Fiscal Year 2020 H-2B cap. Therefore, even though the 2020 H-2B cap has already been hit, and the worker needs to leave the U.S., these workers would be exempt. Accordingly, if your workers are laid off and leave the country, you may still be able to hire them for summer 2020 by filing an OOCCE petition. However, if you are planning to file an in-country petition for some of your workers who have not yet been laid off, and also filing an OOCCE petition for other workers in the same position that have been laid off, then that would require the filing of two separate H-2B petitions, which would increase costs.

Who is eligible? Remember, your workers would need to have come from outside the U.S. to begin employment with their winter-season employer. **Otherwise, they would not be eligible.**

Are there any benefits to an OOCCE petition instead of an in-country transfer? Yes. If your workers are eligible for an OOCCE petition, filing such a petition may have a big benefit. If you file an in-country transfer, you would need to start paying workers on a full-time basis beginning on your start date. Therefore, an OOCCE petition could allow you more flexibility to bring in workers later in the summer when your business actually picks up. As we mentioned above in #14, this would typically raise staggering concerns, but the government may be willing to excuse staggering given coronavirus.

21. Can an H-2B employee work for their summer-season employer while the in-country transfer petition is pending?

No. We have heard that some H-2B recruiters may be giving very dangerous legal advice that workers can work for their summer-season H-2B employer as soon as the employer files an H-2B transfer petition. **This is not correct – an H-2B employee cannot begin work until the**



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petition is approved. This is a good reminder of why it is extremely important to work with an experienced immigration attorney, rather than relying on a recruiter alone, when using the H-2B program.

Filing strategy for summer season employers

22. As a summer-season employer, if my winter-season partner is shutting down, and I have not yet filed my in-country transfer H-2B petitions with USCIS what is my best filing strategy?

There are two possible filing strategies:

- 1) File the in-country transfer petition as soon as possible
 - a. As outlined above in #17-20, if you can file the petition before the workers are terminated, then you may have no issues.
 - b. However, if you cannot file before the workers are terminated, even if you are able to have the workers stay in the U.S., the petition will be at risk.
- 2) File an OOCCE petition (see #20 above)
 - a. If you file an OOCCE petition, all workers would need to be cap-exempt (as outlined above) and all workers would need to leave the country, apply for a visa at a consulate abroad, and return to the U.S. at a later date.

Neglecting the risks associated (which are outline above) and assuming I will receive approval, what are the costs/benefits of filing an in-country petition vs. and OOCCE petition?

- 1) In-country transfer petition:
 - a. Pros:
 - i. Your workers remain in the U.S. and you have peace of mind that they will not be subject to quarantine, travel restrictions, denials of visas at consulates, etc.
 - ii. Your workers should be able to arrive right at the beginning of your season if you want them to do so.
 - iii. You do not have to pay for international flights for your workers to arrive.
 - b. Con:
 - i. You must begin employing your workers (or at least complying with the three-fourths guarantee) on the first day of your employment period.
- 2) OOCCE petition:
 - a. Pros:
 - i. You may have more flexibility in when to bring your workers into the country, and therefore, may have more financial flexibility if your season starts slow.
 - b. Cons:
 - i. Workers must be eligible by being “cap-exempt” (outlined above).
 - ii. Given the unknown nature of the times we live in, workers may get stuck abroad for a long time due to consulate closures, travel restrictions, etc.



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Other considerations for in-country transfer petitions

The suspension of Premium Processing has created a situation where workers may be in the U.S. for up to a few months without having employment authorization. Below are some of the most frequently asked questions regarding this situation

23. When would the hours obligation (three-fourths guarantee) begin?

The three-fourths guarantee only begins after three things happen:

- 1) The petition is approved;
- 2) You are within your H-2B employment period; and
- 3) The worker has arrived at the work location.

However, please be aware that if you have an April 1st start date and the workers travel to your property while the petition is pending, and the petition gets approved earlier than you anticipate, your three-fourths obligation would begin, even if you do not have work for them to do.

24. If a worker travels to a summer-season employer's property while the petition is still pending, am I allowed to provide free housing and meals to the workers?

Please keep in mind that you are technically not yet their H-2B employer, and therefore, there is a lot of grey area involved in the relationship. It is more of a landlord/tenant relationship than an employer/employee relationship. Given the uncertainty, there is some risk in providing housing during this time. The government could take the position that giving benefits to H-2B workers (free housing), but not stating that this was a possibility when we filed the H-2B application, could be viewed as discriminatory against U.S. workers. We think this would be an absurd stance for the DOL to take, and we hope that they would take a more human and understanding approach given the unprecedented situation we are in. However, we wanted you to know that this risk exists.

25. What if we have an H-2B petition pending and we later decide that we do not need the workers?

You would need to let Pabian Law know that you would like us to withdraw the H-2B petition, and you would need to pay for the workers' flights home.

Note, however, that if the petition has already been approved and the three-fourths guarantee has already begun, you would need to file an impossibility of fulfillment application in order to cancel your H-2B contract and three-fourths obligation.



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26. What if a worker needs to leave the U.S. while the in-country transfer petition is pending?

All workers on an in-country transfer petition must be in the U.S. for the entire time while the petition is pending. If a worker must leave the U.S., you would likely receive a Request for Evidence (RFE) from the government and you would need to remove the worker from the petition. This would likely mean that you would not be able to hire the worker for the 2020 summer season (unless the worker is cap-exempt, as outlined above, and you are willing to file an OOCCE petition for him/her).

27. Is there a chance that the H-2B petition may be approved quicker than 2-3 months from now?

Yes. Given that USCIS is likely processing far fewer petitions than normal, they may be able to process petitions quickly, even though they have suspended premium processing. Therefore, if you have filed an in-country petition and are hoping that it will be adjudicated slowly to give you some flexibility before you have to employ the workers, this may not be the case.

Public Assistance/Benefits

28. Can a worker receive emergency medical benefits, given the new “public charge” rule?

The U.S. government recently instituted a “public charge” rule, which prohibits some foreign nationals from receiving visas if they have received certain public benefits. The rule prohibits certain specific benefits, most of which are need-based (and not medical-based). Additionally, the government specifically excludes disaster relief and medical benefits for the prevention of communicable disease from the public charge rule. Therefore, it is unlikely that any public assistance directly-related to Coronavirus would impact a worker’s ability to apply for visas in the future. However, Medicaid is one of the listed prohibited benefits, and therefore, any H-2B workers should avoid applying for any Medicaid benefits.

More resources

29. Where can I find more information?

- We at Pabian Law are always happy to help!
 - (617) 939-9444
 - www.pabianlaw.com
- Consulate/Embassy Closures: <https://www.usembassy.gov>.
- U.S. Citizenship & Immigration Services:
<https://www.uscis.gov/news/alerts/uscis-response-2019-coronavirus>.
- U.S. Citizenship & Immigration Services office closings:
<https://www.uscis.gov/about-us/uscis-office-closings>.
- U.S. Department of State: <https://www.state.gov/coronavirus>.



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- Travel advisories/suspensions: <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html>.
- U.S. Department of Labor: <https://www.dol.gov/coronavirus>.
- Centers for Disease Control and Prevention: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>.
- Countries with travel bans/suspensions: <https://www.cnn.com/travel/article/coronavirus-travel-bans/index.html>.
- Restrictions on U.S. visas/entry: <https://www.nafsa.org/regulatory-information/covid-19-restrictions-us-visas-and-entry>.

To learn more about Pabian Law, our incredible H-2B Visa Team, and our services, please contact Keith Pabian at (617) 939-9444 or keith@pabianlaw.com. You can also visit our website at www.pabianlaw.com.