



## **Employment of H-2A Workers Employer Federal Withholding & Reporting Requirements**

The Internal Revenue Service (IRS) introduced new guidance for the reporting of compensation paid to H-2A workers for tax years beginning with 2011. The new guidance is complex and confusing. The following is an attempt to boil down the new guidance to its simplest form and provide employers of H-2A workers a practical resource for complying with the new IRS guidelines. *This document pertains to federal tax implications only. Please refer to individual state laws for state tax withholding and reporting requirements.*

### **I. Employer Withholding Requirements for H-2A Workers**

Compensation paid to H-2A workers is subject to different withholding and reporting requirements than wages paid to other agricultural workers.

**Social Security and Medicare (FICA) Taxes:** Unlike other workers, payments to H-2A workers are not (under current 3/2012 rules) subject to Social Security and Medicare withholding (also known as FICA withholding). Employers should not withhold Social Security and Medicare taxes from an H-2A worker's compensation.

**Federal Income Tax:** In general, employers should not withhold federal income tax from an H-2A worker's pay. There are two exceptions to this rule.

**Exception 1: Backup Withholding is Required if H-2A Worker Fails to Furnish Social Security Number or Individual Taxpayer Identification Number to Employer.**

- H-2A workers are required to provide their employer with a Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN).
- If an H-2A worker does not provide a SSN or ITIN, and the worker's aggregate annual wages are \$600 or more, the employer must do Backup Withholding.

Backup Withholding is a special type of federal income tax withholding set at 28%.

- Employer must continue to withhold Backup Withholding at 28% until H-2A worker provides SSN or ITIN. *Employer may become liable for any uncollected amount, if they do not collect and pay Backup Withholding as required.*
- Payments subject to Backup Withholding have special year-end reporting requirements and must be reported on Form 1099-MISC and Form 945 (see below).

**Exception 2: H-2A Worker and Employer Agree to Voluntary Withholding.**

- If H-2A worker provides SSN or ITIN, worker is not subject to Backup Withholding and employer should not withhold federal income tax unless H-2A worker voluntarily decides he/she would like employer to withhold federal income tax.
- Employer should not withhold federal income tax unless H-2A worker has provided a completed Form W-4, *Employee's Withholding Allowance Certificate*. If worker has not requested voluntary withholding, the employer does not need to obtain a W-4 from the worker.
- If employer agrees to withhold federal income tax, there are separate withholding requirements depending on whether worker is a resident alien or non-resident alien.
  - If worker is a resident alien, withhold according to the same withholding charts and formulas that apply to workers who are U.S. citizen employees. See Publication 15 <http://www.irs.gov/pub/irs-pdf/p15.pdf> for income tax withholding charts and formulas. *These are also the rates that are typically pre-programmed into most payroll software.*
  - If worker is a non-resident alien, special withholding rules apply and are published in Chapter 9 of Publication 15 <http://www.irs.gov/pub/irs-pdf/p15.pdf>
- Voluntary withholding only applies to income tax. Employer should not withhold Social Security and Medicare Tax (FICA).

## **II. Employer Deposit Requirements for H-2A Workers**

If the employer withholds federal income tax either as: (1) Backup Withholding or (2) Voluntary Withholding, the employer must deposit the federal income tax withheld with the IRS. The IRS requires deposits to be specifically identified.

- The IRS labels Backup Withholding as "945 tax" because compensation subject to backup withholding will be reported on Form 945, *Annual Return of Withheld Federal Income Tax* at the end of the year. Employers with \$2,500 or more of total annual 945 tax liability must deposit by electronic funds transfer, either on a monthly or semi-weekly basis. Employers with less than \$2,500 of 945 liability may make payment with a timely filed Form 945.
- Voluntary withholding is "943 tax" because it will be reported on Form 943, *Employer's Annual Federal Tax Return for Agricultural Employees* at the end of the year. For deposit purposes, the employer may combine the voluntary withholding from H-2A workers with other 943 tax. Employers with \$2,500 or more of total annual 943 tax liability must deposit by electronic funds transfer, either on a monthly or semi-weekly basis. Employers with less than \$2,500 of 943 liability may make payment with a timely filed Form 943.

## **III. Year-End Reporting Requirements**

Employers must report H-2A compensation differently at year-end, depending on whether or not the H-2A worker furnished his/her SSN or ITIN. Annual compensation of \$600 or more must be reported as follows.

### **Scenario 1: Worker Furnished SSN or ITIN (Use Forms W-2, W-3, and possibly 943)**

- Since H-2A worker furnished SSN or ITIN to employer, worker was not subject to Backup Withholding.
- Report compensation (not subject to back-up withholding) paid to H-2A worker during the year and voluntary federal income tax withholding (if applicable) on Form W-2, *Wage and Tax Statement*.
  - Report compensation paid to H-2A worker in Box 1 (Wages, tips, and other compensation).
  - Leave Box 3 (Social Security Wages) and Box 5 (Medicare Wages) blank.
  - If applicable, report federal income tax that was voluntarily withheld in Box 2. If federal income tax was not withheld, leave Box 2 blank.
- Include compensation and any federal income tax withheld on Form W-3, *Transmittal of Wage and Tax Statements*.

- If employer withheld voluntary federal income tax, include on Form 943, *Annual Federal Tax Return for Agricultural Employees*.
  - Include federal income tax withheld on Line 6 (Federal Income Tax Withheld)
  - Do not include compensation on Line 2 (Wages Subject to Social Security Tax) or Line 4 (Wages subject to Medicare Tax).
  - Include federal income tax withheld on Line 15 (Monthly Summary of Federal Tax Liability) if employer is a Monthly Depositor.
- Do not report compensation that is not subject to backup withholding or federal income tax withheld on Forms 1099-MISC, 1096, or 945.

**Scenario 2: Worker Failed to Furnish SSN or ITIN (Use Forms 1099-MISC, 1096, and 945)**

- Since H-2A worker failed to furnish SSN or ITIN, Backup Withholding was required.
- Report compensation paid to the H-2A worker that was subject to Backup Withholding and the federal income tax withheld on Form 1099-MISC.
  - Report compensation subject to Backup Withholding in Box 3 (Other Income).
  - Report Backup Withholding in Box 4 (Federal Income Tax Withheld).
- Include compensation subject to Backup Withholding and federal income tax withheld on Form 1096, *Annual Summary and Transmittal of U.S. Information Returns*.
- Report the federal income tax withheld on Form 945, *Annual Return of Withheld Federal Income Tax*.
  - Report federal income tax withheld in Box 2 (Backup Withholding)
- Do NOT report the compensation subject to backup withholding or the Backup Withholding on Forms W-2, W-3, or 943.

This general overview of agricultural employer federal tax reporting requirements for H-2A workers was prepared for the National Council of Agricultural Employers (NCAE) by Kristiana Coutu ([kmcoutu@varnumlaw.com](mailto:kmcoutu@varnumlaw.com)), an attorney with Varnum, LLP in Kalamazoo, Michigan; March 2012 and represents IRS regulations and rulings in place at that time. For more detailed information and directions including case or state specific needs consult your tax and/or legal professionals.