



Jerry Faulring

# Your H2A and H2B Audit is Coming

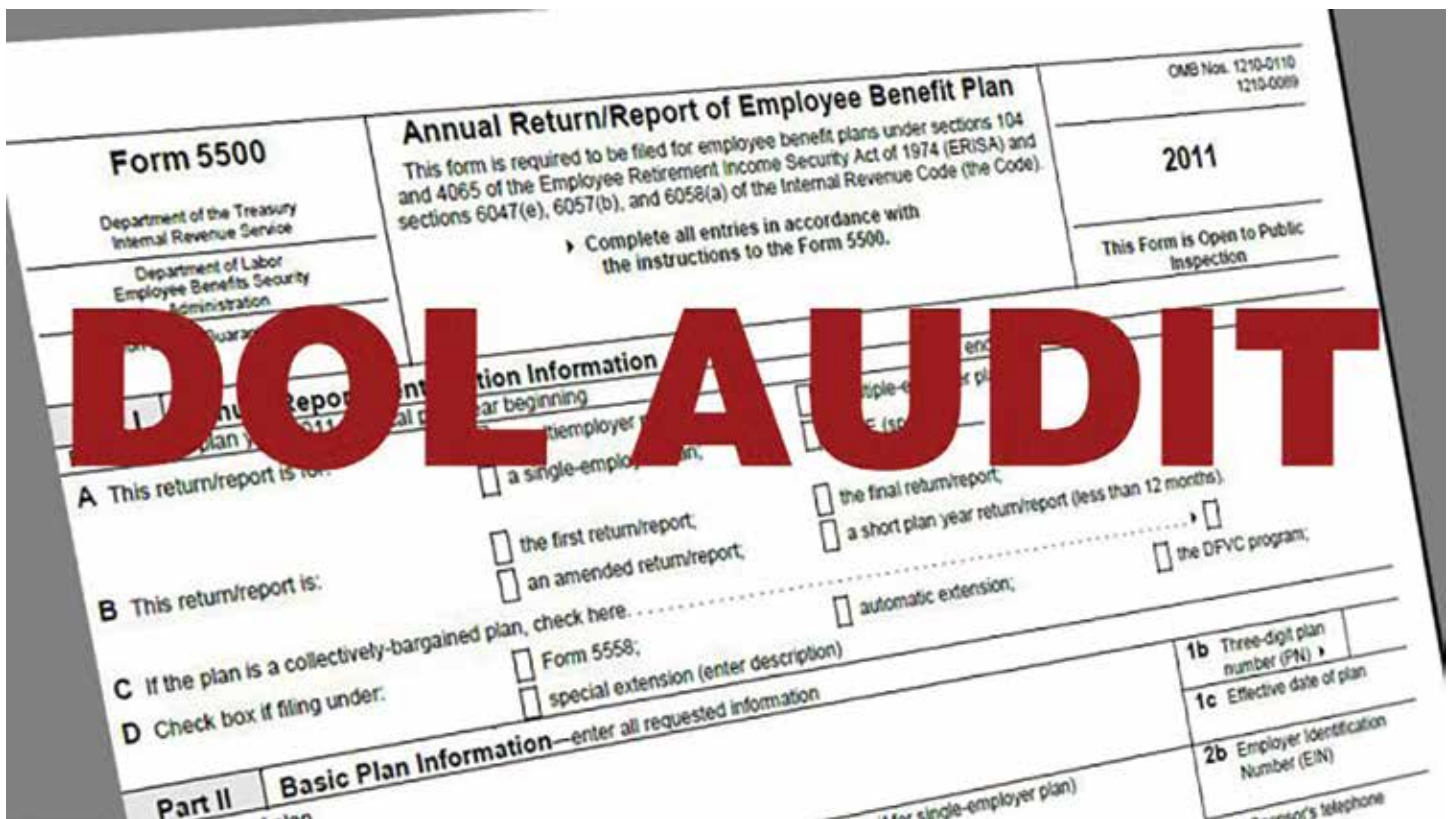
For many years we have been advised to expect a visit from the Federal Department of Labor (DOL). A DOL investigation can be prompted for basically two reasons: an employee complaint related to wage and hour issues or just randomly. Knowing it would one day come, I could have been better prepared. It's really hard to prepare for something that may never be an issue, but the haunting feeling may be more worrisome than doing the work.

The number of audits has been increasing in recent years and from what I hear, we should all expect an audit.

I cannot address the H2B scenario but imagine our H2A story is about the same. An investigator has the right to arrive at your place of business unannounced or with prior notice. Our audit was random.

I received the dreaded phone call on October 29, 2018 at about 4 PM from an investigator announcing he would be conducting an investigation of Waverly Farm. I had previously spoken to other business owners who were investigated so I had a vague sense of what was coming but was totally unprepared for what was ahead of me. Via email that same day I received the letter on the following page:

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**U.S. Department of Labor**

Wage and Hour Division  
2 Hopkins Plaza Suite 601  
Baltimore, MD 21201  
(443) 872-0124 Office and Fax



October 29, 2018

Jerry Faulring  
Waverly Farm, LLC  
1931 Greenfield Rd  
Adamstown, MD 21710

The Wage and Hour Division of the Department of Labor is responsible for the administration and enforcement of a number of Federal labor standards laws such as Fair Labor Standards Act of 1938 as Amended (FLSA). The FLSA contains recordkeeping, minimum wage, overtime requirements, and restricts the employment of minors under the age of 18. Under our authority are the various Visa programs we enforce such as H-2A, H-1B and H-2B.

**Section 11(a) of the FLSA authorizes representatives of the Department of Labor to investigate and gather data relevant to this law, enter and inspect an employer's premises and records (requested records within 72 hours), and question employees to determine whether any provisions of the law have been violated.**

A compliance review of Waverly Farm, LLC. is to be performed on a date TBD at your establishment. To ensure that this review is conducted efficiently with minimal interruptions to your business operation and inconvenience to you, please have the following documents available for my review and withdrawal.

**These records pertain only to the Non-H-2A employees for years 2016, 2017 and 2018. Please separate each year.**

Copies that I will review of payroll and corresponding time records for all **Non-H-2A** employees for the past 24 months, ending with the most current completed payroll.

A list of all current and former **Non-H-2A** employees, their addresses, social security numbers, occupation, telephone numbers, method of compensation (hourly rate/salary) and dates of hire and termination for the past 24 months.

Names of officers, directors and principal managing officials for your business.

Copies of documents that I will take with me which reflect the annual dollar volume of business done by your business for the past three years.(Ex.1st page of tax return)

A list of all employees under the age of 18 during the last 24 months including; name, date of birth, address, telephone number, occupation, date of hire, date of termination and name of school. Including copies of work permits.

The year your business started, date and state of incorporation, legal name of entity and your Federal Tax Identification number.

// The investigation is not a process to teach you how to do a better job, educate, and everyone goes home. The process is to find errors and mistakes that impact negatively on the workers. //



Company handbook, if any

What is the nature of your business?

Do you have any H-2B's, if so let me know before my visit.

List of wholesalers you use to buy horticultural products from such as plants, flowers, shrubs and small trees.

What is your 7 day work week for payroll purposes?

List of Non-H-2A employees you consider to be exempt from OT.

List of trade associations/affiliations involved in

**These records pertain only to H-2A workers for 2016, 2017 and 2018 seasons. Please separate by year.**

1. Copies that I will review of payroll and corresponding time records for each pay period ending with the most current completed payroll.
2. List of deductions besides taxes
3. Copy of Job Order-790
4. Copy of Work Contract-9142, to include all Appendices
5. Form I-129 and H supplement
6. Form I-797's
7. Form I-94's
8. SWA job order
9. Newspaper advertisements
10. Recruitment report
11. List of any US worker that was laid off
12. Evidence of payment for inbound transportation to nursery from point of recruitment
13. Evidence of payment for outbound transportation from nursery to point of recruitment
14. Evidence of daily subsistence payment for inbound and outbound

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15. Evidence of payment for all H-2A related expenses: visa fees, border crossing, etc
16. Documentation supporting the need for the temporary workers
17. Documentation regarding secondary employer/job contractor, if applicable
18. Copy of Agent contract, if applicable
19. Copy of recruiter contract, if applicable
20. Border crossing report
21. Arrival and departure dates of H2A workers for each year
22. Notification to ETA/USCIS for any H2A that did not stay to end of contract period.
23. List of H2A workers that did not stay until end of contract period as a result of abandonment or termination for cause
24. List of Non-H2A workers performing same duties as H2A workers. This includes newly employed and tenured.
25. Proof that a copy of the job order/contract was given to the H-2A worker.
26. List of charges or deposits borne by the H-2A worker during their employment
27. Address of H-2A housing
28. Owner of H-2A housing
29. Copies of visa and passports
30. Records reflecting the determination of the applicable AEWR
31. Copies of letters received from the ETA (certification, determination, etc)
32. Copy of housing permit where H-2A workers reside (WH-520)
33. Copy of housing terms and conditions (WH-521)
34. Copy of workman compensation insurance certificate
35. SWA inspection of H2A housing
36. Copy of insurance policy for vehicles used to transport any worker
37. Copy of vehicle registration for vehicles used to transport any worker
38. Drivers license copy of the person transporting the H-2A's
39. Evidence of any fees paid to a recruiter or agent by the H2A worker
40. Housing pre-occupancy inspection
41. Notice given to H2A worker of duty to leave US at end of contract period
42. Names of workers residing in employer provided housing. Note where each worker resides.
43. Names of seasonal workers formerly and currently employed
44. Show h2a poster
45. Excel listing h2a worker, arrival, departure dates, hourly rate, residing address in US on a per year basis.
46. Describe type of work H-2A's perform

Please do not hesitate to contact me at the number listed above or via email if you should have any questions or concerns regarding this company review.

**ADDITIONAL RECORDS MAY BE REQUESTED LATER.**

**EMPLOYER MUST HAVE RECORDS AVAILABLE WITHIN 72 HOURS OF REQUEST TO AVOID A RECORDKEEPING VIOLATION.**

**PROVIDING FALSE INFORMATION TO A FEDERAL OFFICIAL CARRIES A FINE OF UP TO \$10,000.**

Sincerely,



## When I read the letter, I said HOLY S#%\$!

If you read the above letter from DOL, you are correct, I was shocked by the volume of documents required going back three years. I responded immediately to tell the investigator I would not be able to comply with the 72-hour requirement. He said he was busy and to give him a call in a week to tell him how I was doing; that may not always happen.

The statement at the end of the letter **"ADDITIONAL RECORDS MAY BE REQUESTED LATER"** was correct. Requests kept coming. With only two people in the office at the time, Lindsey was on maternity leave, I set about to assemble the materials on my own; Tiffany had to run the business. I estimate I spent 40 hours to comply with the initial requirements of the letter. When it was all done, I estimate I spent 100 hours on the project. 176 emails and 3 boxes of paper did the job. As I proceeded through the project, I realized my records were okay but not complete and feared the worst related to citations and fines. I also came to understand an audit is primarily geared toward protecting the workers should an employer be unscrupulous. In other words, don't shoot the messenger; in this case the DOL investigator. For those of us who have great respect for our workers (I actually love my men and consider them family) we feel an audit is an intrusion and major pain in the .... Think about it this way; it's like a sales lead, if the auditor knew who the bad guys were, he could skip over the rest.

## Things you need know.

Surviving an audit relies on EXTREME organization of documents for the current year plus the previous two years. If you have to organize three year's worth of documents and they are scattered, you will have a real mess. All employee records should be well organized in a binder by person. As each year progresses additional documents may need to be prepared and organized. For example, emergency trips home, early departures, AWOL forms (we have had just one since 2003), and much more. We maintain payroll records and time cards separately; these will be looked at with a fine-tooth comb in an audit.

As you will note from the above record requirements, everyone on your staff will be looked at, not just H2A. Records should be readily available.

Maintain all documents for non-H2A staff: U.S. citizens, Alien Permanent Residents (often referred to as green card holders), and DACA staff. If they perform the same job as H2A staff, or their work overlaps with H2A, they must be treated exactly the same for pay rates, benefits, housing, etc.; collectively they are known as 'conforming' workers. It is interesting to note if the investigator determines one employs undocumented workers, DOL cannot take action against the employee. However, they can refer those employees to another agency.

The investigation is a not process to teach you how to do a better job, educate, and everyone goes home. The process is to find errors and mistakes that impact negatively on the workers. As a result of the audit, I do indeed feel it was an educational experience which will allow us to do a better job going forward. During 15 years in the H2A program I wondered how we were doing. Now I know and we were actually doing a pretty good job, but not perfect.

I would say there is no need to panic although the tone of the letter and investigator put my blood pressure meds to the test. The investigator was very knowledgeable, very thorough, and knew exactly what he was doing. You will not have much influence over the outcome so there is no need to lose a lot of sleep; easier said than done.

Be very professional and courteous. Nothing good will come from being antagonistic. Do not debate. I protested one item during the audit and lost. I supplied some of the same documents more than once but did not make a fuss.

Answer all questions truthfully but don't offer any details not requested. Like customs and border agents, DOL investigators are probably trained, or learn, to detect less than truthful responses.

The amount of detail and regulations we must know is awesome. We have used an agent to facilitate H2A since 2003 and there were issues I was unfamiliar with during the audit; not blaming the agent. Using H2A is a very valid cost of doing business.

There are a possible 45 citations that can be administered. We could have received five citations. The investigator said two of the five were inconsequential in our case. We did receive three citations and \$2,602.50 in fines. He told me I might not have known about the violations but "could not let

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// Surviving an audit relies on extreme organization of documents for the current year plus the previous two years. //



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them pass". I asked him on a scale of 1 to 10 how I did related to responsiveness and cooperation? He said I was a 10+ and said so in his report. We all like praise! People experienced in the audit process from the legal perspective will tell you to never agree to violations and appeal them. That may or may not always be the best solution. In our situation, I felt a \$2,602.50 fine was a win and could not justify additional time on my part nor legal fees to file and fight an appeal. Had my fines been a larger number, meaning a bad employer, it might have justified a legal response. The audit finished on February 1, 2019 when the citations were delivered; a long time to feel super anxious. And, I had planned on a low energy, peaceful winter.

### **The aftermath.**

Following the audit, I decided to become a little more educated related to H2A and farm workers in general. Do you know that documented H2A workers only comprise an estimated 3% of the American agricultural work force? The other 97% are a combination of migrant and seasonal workers of which 75% are undocumented. The knock on H2A is workers are required to work for only the employer who obtains the visas; this from National Farm Worker Ministry. I think that is unfair as we provide free housing, paid transportation from and to their homes, a guaranteed wage and mandated number of hours of work in a stable environment. Of course, there are bad H2A employers and thus the need to protect workers via DOL audits. 🍀

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To learn more about the history of farm labor beginning in the 1600's, visit:

<http://nfwm.org/farm-workers/farm-worker-issues/timeline-of-agricultural-labor/>

I know the spring rush has begun. If you have not had an audit, I suggest you take time sooner than later to prepare for an audit. It will come.

References for your further understanding of H2A rules and regulations:

<http://umaglaw.org/publications-library/> Go to website, click publications and scroll down to find farm labor law. There are several very useful publications.

[https://www.fels.net/Data/Documents/DOL-Audits-What%20to%20Expect-and-Prepare-NCAE\\_6-30-10.pdf](https://www.fels.net/Data/Documents/DOL-Audits-What%20to%20Expect-and-Prepare-NCAE_6-30-10.pdf)

[https://www.foreignlaborcert.doleta.gov/pdf/H-2A\\_Employer\\_Handbook.pdf](https://www.foreignlaborcert.doleta.gov/pdf/H-2A_Employer_Handbook.pdf)