

H-2A Workers: IRS Advises on W-2/1099 Reporting and Mandates Backup Withholding When SSN is Missing

By Jewell Lim Esposito on January 26, 2012



BACKGROUND

With 2011 W-2s due *right about now*, the IRS is committing manpower and enforcement on compliance relating to 2011 compensation that a grower paid to its foreign agricultural workers admitted into the US on H-2A visas. See most [recent IRS guidance](#). The IRS now mandates W-2 reporting of such compensation (and the grower must obtain the worker's SSN or ITIN when reporting) and possible 28% backup withholding (where the worker fails to provide an SSN or ITIN).

ISSUES

Federal Tax Issues.

- What happens to the grower who filed 1099s for years prior to 2011?
- What happens to the grower who filed a W-2 or 1099 for prior years, but did not enter a worker's SSN or ITIN?
- What happens to the grower who filed neither a 1099 nor a W-2 for prior years?

- How real is the IRS-threatened penalty on the grower who *failed* to backup withhold and remit that 28% (that is, the grower overlooked withholding or wanted to withhold but did not obtain an SSN or ITIN)?
- What happens to the (Mexican, Jamaican, for example) worker who was required, but never filed, a US tax return for prior years?
- What happens especially where that H-2A worker would have had enough exemptions such that the worker would not have owed any federal income tax?

Other Issues: State Tax; Immigration; Agricultural Production in the US.

In addition to this federal tax exposure, both grower and worker have exposure with respect to possible state tax issues and immigration concerns. Visas might be affected; farming operations across the US will suffer.

AN ODD, BUT UNIQUE, SHARED INTEREST?

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Challenges; Logistical Hurdles. The natural stakeholders affected by this enhanced IRS compliance effort are the H-2 worker, the H-2A worker advocates, growers, grower associations, and their agents. Given the above interwoven risks/issues/exposures, these various stakeholders – typically on differing sides on H-2A matters – might find themselves aligned. That is, there is uncertainty with respect to past federal tax issues that threaten the immigration program, staffing operations, and ultimately agricultural production; there are also logistical challenges where contact between grower and H-2A is typically limited to when the worker has entered the country.

IRS Coordination? Perhaps there is a need to coordinate at the national level (with IRS officials who drafted the recent H-2A guidance and exam agents), regional level (the regional IRS office that controls operations within each state), and the Taxpayer Advocate professionals.

Perhaps there's room for latitude for both grower and worker for the 2011 (after all, the IRS guidance came out in late 2011) and prior tax years? It seems like any coordinated program might well involve politicians, the Department of Labor, the Department of Agriculture, the Mexican Consulate, Mexican Employment Agencies, Jamaican Employment Agencies, etc.

In any case, the new guidance is causing growers and their accountants huge consternation as W-2s are being issued for 2011, and perhaps the IRS or Treasury just needs to be apprised in the difficulty of immediate compliance when SSNs and ITINs still have not been obtained or confirmed.

It's an invitation to the various stakeholders of the H-2A program to weigh in regarding the enhanced focus on federal tax reporting of and mandatory withholding on H-2A worker compensation (where there is no SSN or ITIN).

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