



# TERMINATION FOR CAUSE QUICK REFERENCE GUIDE

For many years, the Department's H-2A regulations have explained that if workers are terminated without cause, they are owed the three-fourths guarantee, housing and meals until the worker leaves, and outbound transportation. Additionally, in the case of a U.S. worker who is terminated without cause, the employer must contact them for employment the next year. The Farmworker Protection Rule clarifies that a worker is not "terminated for cause" unless the worker is terminated for failure to comply with your policies or rules or for failure to satisfactorily perform job duties in accordance with reasonable expectations based on criteria listed in the job offer. **The Farmworker Protection Rule also identifies five conditions that must be satisfied to ensure that disciplinary and/or termination processes are justified and reasonable.** These five conditions are listed below.

The Farmworker Protection Rule also outlines some procedural steps that must be followed in the employer's progressive discipline system, and records that must be maintained.

## TERMINATION FOR CAUSE IN GENERAL

**Am I required to use a productivity standard to evaluate workers?** No, the H-2A program does not require you to use a productivity standard to evaluate worker performance. However, if you do use a productivity standard as a condition of job retention, you must disclose it in the job offer. A productivity standard quantifies the expected output per worker in a static and objective manner. For example, "a worker must pick at least 3 crates of fruit per hour" is a productivity standard.

**Can a worker be terminated for cause based on the quality of their work?** A reason for termination for cause may exist if a worker fails to satisfactorily perform job duties in accordance with reasonable expectations based on criteria listed in the job offer (so long as all other regulatory conditions for a "for cause" termination are satisfied). You must be able to identify the specific criteria described in the job offer upon which you are basing the termination. The term "criteria" is broad and encompasses all the components of a job offer, including job qualifications and requirements, and job duties. If a job duty is not included in the job offer, failure to satisfactorily perform that job duty is not a valid reason for termination for cause.

**Can a worker be terminated for cause for failure to comply with policies or rules?** Yes, you may terminate a worker for cause for failure to comply with policies or rules (so long as all other regulatory conditions for a "for cause" termination are satisfied).

## CONDITION 1

**The worker has been informed, in a language understood by the worker, of the policy, rule, or performance expectation.**

**How do I ensure that the worker has been informed of the policy, rule, or performance expectation?**

Criteria for performance expectations (including productivity standards and qualitative criteria) must be disclosed in writing in a language the worker understands to the worker in the job offer. Policies and rules need not be listed in the job offer but must be clearly communicated to and understood by the workers. You may communicate policies and rules to workers through avenues such as employee handbooks, posters, trainings, staff meetings, and verbal instruction. The communication should be a language the worker understands.

**How do I disclose a productivity standard to workers?**

You must disclose in the job offer any productivity standards that are a condition of job retention. The work contract, which must be provided in writing no later than when an H-2A worker applies for the visa or the first day that a corresponding worker begins work, discloses the terms of the job offer.

## CONDITION 2

**Compliance with the policy, rule, or performance expectation is within the worker's control.**

**When is compliance not within the worker's control?**

Compliance is not within the worker's control in the following examples:

- The appropriate tools or equipment are broken, faulty, or not provided.
- The crop is immature and not fully ready for harvest, but the worker is held to a productivity standard for a fully mature crop.
- Workers are unable to meet productivity standards because of waiting time, for example, for fields to dry or for the product to be weighed and measured.
- Performance is evaluated on a per-crew basis instead of a per-worker basis, and a worker has no control over their coworkers' performances.
- All residents of a housing unit are held responsible for housing policy violations committed by one worker.

## CONDITION 3

**The policy, rule, or performance expectation is reasonable and applied consistently to the your H-2A workers and workers in corresponding employment.**

- What is a reasonable policy, rule, or performance expectation? A policy, rule, or performance expectation is reasonable where it clearly represents your permissible interests because it has a clear relationship to your legitimate business needs. Also, compliance must be possible within the context of the specific circumstances.
- Rules relating to housing are reasonable only if related to safety, health, legal, or your other legitimate interests. For example, it is not reasonable to limit the number of cars at a labor camp unless it affects your legitimate business interests.
- Policies or rules are not reasonable where they violate the law. For example, policies and rules will generally not be considered reasonable where they unduly restrict workers' movement or communication in off-work time or are discriminatory. For example, you cannot prohibit cell phones in the housing or prohibit a worker from leaving the housing unless escorted by a supervisor. Additionally, you cannot require that women—but not men—residing in housing must ensure that the residence is maintained in a clean and tidy manner.

- **How do I apply policies, rules, and performance expectations consistently?** If you hold some workers to a standard or rule, consistent application means holding other workers to that same standard or rule. For example, two workers who are equally tardy and have equal disciplinary records should be subject to the same discipline, or no discipline, depending on your procedures. However, as long as any disciplinary actions are undertaken under a system of progressive discipline, a worker who is tardy every day may face different consequences than a worker who is tardy for the first time.

- **Among which workers do I need to apply policies, rules, and performance expectations consistently?** The "for cause" termination standard requires consistent application of policies, rules, and performance expectations among your H-2A and corresponding workers performing work listed in the same job order associated with the H-2A certification because these workers will be engaged in the same job duties at the same time. Note that the consistent application requirement does not require that workers under different, unique job orders be held to the same policies or performance expectations.

## CONDITION 4

**You undertake a fair and objective investigation into the job performance or misconduct.**

**What is a fair and objective investigation?** A fair and objective investigation means that you evaluate the job performance or misconduct impartially and without favoritism, and that you do not assume that the worker engaged in misconduct or failed to meet performance expectations before reviewing relevant facts. Often, but not always, a fair and objective investigation will involve an investigatory interview. You must permit a worker engaged in agriculture as defined by the FLSA to invite a representative to attend any investigatory interview that the worker reasonably believes might result in disciplinary action.

## CONDITION 5

**You correct the worker's performance or behavior using progressive discipline.**

**What is progressive discipline?** Progressive discipline is a system of graduated and reasonable responses to an employee's failure to satisfactorily perform job duties or comply with employer policies or rules. Disciplinary measures should be proportional to the misconduct or failure to meet performance expectations but may increase in severity if misconduct or failure to meet performance expectations is repeated, and may include immediate termination for egregious misconduct.

## CONDITION 5 CONTINUE

A simple progressive discipline system could involve a verbal warning for the first offense, written warnings for the next two offenses, and termination for the fourth offense. However, a progressive discipline system also takes into account severity of the infraction when determining the appropriate consequences. For example, a worker who is 45 minutes late may face different consequences than a worker who is 3 minutes late, and a worker with a legitimate excuse for being late may face different consequences than a worker without an excuse.

- **What does a progressive discipline system look like?**

Employers should develop and implement the systems that work best for their businesses so long as these systems meet the definition of progressive discipline and comply with the procedural steps required by the Farmworker Protection Rule.

- **What procedural steps must I take if disciplining a worker to satisfy the “for cause” standard?**

You must take the following steps to satisfy the “for cause” standard if disciplining a worker:

- Notify the worker of the infraction and allow them to present evidence in their defense. Following each disciplinary measure (except where the appropriate disciplinary measure is termination), provide relevant and adequate instruction to the worker and allow the worker reasonable time to correct the behavior or meet the performance standard following instruction.
- Document each infraction and corresponding disciplinary measure, evidence the worker presented in their defense, and resulting instruction.
- Provide a copy of this documentation to the worker, in a language understood by the worker, within one week of the implementation of the disciplinary measure.

- **What is egregious misconduct?**

Egregious misconduct is intentional or reckless conduct that:

- **Is plainly illegal**, such as battery or sexual assault;
- **Poses imminent danger to physical safety** to the worker or to others if not immediately stopped, such as operating heavy machinery while drunk; or that

- **A reasonable person would understand as being outrageous**, meaning conduct that a reasonable person would understand as going beyond all possible bounds of decency to be regarded as atrocious and utterly intolerable, such as severe sexual harassment or racial harassment, or intentional destruction of property.
- The termination of a worker for egregious misconduct may be considered “for cause” even without any previous progressive discipline. However, even if terminating a worker for egregious misconduct, a worker will only have been terminated “for cause” if conditions one through four have been met, specifically: (1) the worker has been informed or reasonably should have known of the policy, rule, or performance expectation; (2) compliance is within the worker’s control; (3) the policy, rule, or performance expectation is reasonable and applied consistently; and (4) you undertake a fair and objective investigation.

## RECORDKEEPING OBLIGATIONS

**Who must I tell if I fire a worker for cause or if they abandon employment?**

You must notify the OFLC National Processing Center (NPC) in writing not later than 2 working days after such termination for cause or abandonment occurs. Further information on notifying the NPC is found in this FAQ. In the case of an H-2A worker, you also must notify the Department of Homeland Security (DHS) in writing not later than 2 working days after the termination for cause or abandonment. Further information on DHS notification requirements are available on this website. A failure to properly notify OFLC and DHS of the “for cause” termination or abandonment of employment may result in you being held responsible for the three-quarters guarantee and outbound transportation. Additionally, if the worker is a U.S. worker, you may be required to contact that worker for employment the next year.

**What records must I keep?** You must keep records for at least three years from the date your Application for Temporary Employment Certification is approved. These records include:

- Records of notification to the NPC, and to DHS in the case of an H-2A worker, of termination “for cause” or abandonment.
- Disciplinary records, including the infraction and each step of progressive discipline, any evidence the worker presented in their defense, any investigation related to the termination, and any subsequent instruction afforded the worker.
- Records indicating the reason(s) for termination of any worker, including disciplinary records.