



Labor Department Issues Final Rule On Calculations Used for H-2B Wage Rates

January 24, 2011

The Labor Department's Employment and Training Administration is revising the calculations used to set wage rates for foreign workers who enter the United States under the H-2B temporary nonagricultural worker program, according to a final rule published in the Jan. 19 Federal Register (76 Fed. Reg. 3451).

"This final rule improves protections for both U.S. and foreign workers by aligning wages with marketplace realities and ensuring that the H-2B program is used as it was intended," Labor Secretary Hilda Solis said in a Jan. 18 statement.

The H-2B program allows for the entry of 66,000 low-skilled guestworkers each year when "qualified U.S. workers are not available and when the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers," DOL said.

The 127-page final rule requires employers to pay H-2B and U.S. workers recruited in connection with an H-2B job application a "wage that meets or exceeds the highest of the following: the prevailing wage, the federal minimum wage, the state minimum wage or the local minimum wage."

The final rule outlines that the prevailing wage would be based on the highest of three measures: wages established under a collective bargaining agreement; a wage rate established under the Davis-Bacon Act or the Service Contract Act for the occupation in the area of intended employment; or the mean wage rate established by the Occupational Employment Statistics wage survey for that occupation in the area of intended employment. The new wage rates will apply to wages paid for work performed on or after Jan. 1, 2012. For 60 days after publication of the final rule, DOL will accept information from the public regarding the feasibility and implementation of phasing in the new prevailing wage, the department said.

In addition, DOL said it would likely issue future rulemaking to address other aspects of the H-2B visa program.

Lawsuit Prompted Rule

According to the Labor Department, the rule is in response to a lawsuit (*Comite de Apoyo a los Trabajadores Agricolas v. Solis*, E.D. Pa., No. 2:09-cv-00240-LP, 8/30/10). The U.S. District Court for the Eastern District of Pennsylvania ruled Aug. 30 that H-2B regulations regarding the calculations issued under the Bush administration in 2008 (3 WIR 27, 1/12/09) violated the Administrative Procedure Act and ordered DOL to promulgate new regulations that comply with the APA.

On Oct. 5, DOL issued a proposed H-2B wage methodology rule (4 WIR 593, 10/18/10). The final rule "addresses concerns that the calculation method enacted in the 2008 rulemaking did not adequately reflect the appropriate wages necessary to ensure U.S. workers are not adversely affected by the employment of H-2B workers," DOL said.

Rule Eliminates Four-Tiered Wage System

The final rule kept most of the changes proposed in October, including eliminating the use of employer-provided wage surveys and the current four-tier wage structure that differentiates wage rates by theoretical levels of experience, education, and supervision required to perform the job.

"This final rule improves protections for both U.S. and foreign workers by aligning wages with marketplace realities and ensuring that the H-2B program is used as it was intended," Labor Secretary Solis said.

DOL received almost 300 comments on the proposed rule, 251 of which were completely unique, the department said. Commenters included individual employers, worker advocacy groups, unions, business associations, and law firms.

The final rule provides an overview of the comments, both positive and negative, and includes DOL's responses.

Many commenters weighed in on elimination of the four-tier wage structure in favor of the mean OES wage for each occupational category, DOL said. "After thorough review of the comments, the Department has decided to finalize" the wage calculation changes in the proposed rule, the department said.

According to DOL, elimination of the four-tiered system in the H-2B context makes sense because the system is often not relevant to the unskilled positions generally involved in the H-2B program.

In addition, DOL defended the use of OES data, because DOL "continues to believe that the OES wage data is an appropriate wage data," and the OES wage survey is "among the largest continuous statistical survey programs of the federal government" with over 1 million establishments surveyed.

AFL-CIO Critical of Delayed Implementation

AFL-CIO President Richard Trumka Jan. 18 said he welcomes the change in policy, "which will mean more jobs for the jobless and an end to unfair competition for companies that hire U.S. workers rather than import a low-wage, temporary labor force."

However, Trumka expressed disappointment that the new wage rates will not apply until next year. The "administration's decision to delay implementation means the change won't come soon enough for unemployed workers who need jobs now," he said.

"The vast majority of jobs covered by this rule aren't glamorous—they're construction laborers, maids, dishwashers and groundskeepers," Trumka said. "But for jobless workers, including millions of young workers who can't find any job, such positions are the first rung on a ladder leading to a lifetime of steady employment."

He added: "We need to extend a lifeline to this generation of jobless young Americans and to the unemployed immediately. Delay is the wrong way to respond to our nation's job crisis."

Business Group Says Rule Unnecessary

In a Jan. 19 statement, Tamar Jacoby, president of ImmigrationWorks USA, a group that represents employers in favor of comprehensive immigration legislation, said in some sectors the rule will "raise H-2B wages by as much as 50 percent."

The rule will "only burden small business owners trying to comply with the law and keep their businesses open in a difficult economic climate," Jacoby said. "It will destroy jobs as many of the businesses that rely on H-2B workers have to downsize or close their doors," she predicted.

Jacoby pointed to a report issued in December by ImmigrationWorks USA and the U.S. Chamber of Commerce that found no evidence that the H-2B visa program depresses the wages of U.S. workers in similar occupations or takes jobs away from Americans (4 WIR 697, 12/13/10).

"The new rule should be of serious concern to any employer looking to Washington for immigration reform," Jacoby added.