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Federal Judge Tosses Dept. of Labor Wage Rate Calculation

A federal judge has ordered the U.S. Department of Labor to stop calculating the prevailing wage for guest workers using a method that another federal judge ruled to be invalid over two years ago.

In 2010, the late U.S. District Judge Louis Pollak of the Eastern District of Pennsylvania ruled that the department's introduction of skill levels into its methodology for calculating wages was a violation of the Administrative Procedure Act because the change wasn't subjected to notice and comment. However, the Department of Labor continues to operate under the rule.

"In its current posture, this case presents a narrow question: Whether the DOL's continued use of the 2008 wage rule - which has been found procedurally invalid by this court and substantively invalid by the DOL - justifies vacating the rule and barring the rule's continued use," said U.S. District Judge Legrome Davis of the Eastern District of Pennsylvania in Comité de Apoyo a los Trabajadores Agricolas v. Solis. "We answer this question affirmatively."

As part of the H-2B visa program, which allows employers to bring guest workers into the country and is administered by the U.S. Department of Homeland Security, the Department of Labor issues labor certificates if it determines that workers in the United States aren't available to fill the jobs at the "prevailing wages" offered to workers.

"Following Judge Pollak's August 30, 2010, opinion, the DOL initially engaged in efforts to validly promulgate a prevailing wage regulation," Davis said. "In doing so, the DOL issued a notice of proposed rulemaking. This notice stated that, following Judge Pollak's August 30, 2010, opinion, the DOL independently concluded that the 2008 wage rule's skill-level methodology did not comport with the DOL's regulatory and statutory mandate, because the methodology did not produce 'the appropriate wage necessary to ensure that U.S. workers are not adversely affected by the employment of H-2B workers.'"

The department's rule had had the effect of artificially lowering wages to the point that they weren't representative of market-based wages for the jobs, according to the opinion.

In 2011, the Department of Labor introduced a new rule for calculating the prevailing wage, but has been blocked by congressional appropriations riders.

"The DOL now continues to use the 2008 wage rule, nearly 30 months after Judge Pollak invalidated the rule, and two years after the DOL found that the rule violates the DOL's statutory and regulatory mandates," Davis said. "While the DOL anticipates continued barriers to funding the 2011 rule, the DOL has not engaged in any efforts to promulgate a new regulation or to otherwise validly grant H-2B labor certifications."

The court's order demands that the department come up with a valid procedure.

Vacating the Department of Labor's rule may disrupt the H-2B program's structure, Davis said, but he noted that when Congress passed the Immigration and Nationality Act, under which the H-2B program was created, it didn't grant "unfettered" authority to issue visas to foreign workers. Rather, it meant to allow the issuance of visas to a small group of foreign workers under the condition that there would be no negative impact on U.S. workers.

The current rule calculating the prevailing wage doesn't satisfy that condition.

"Despite clear constraints on the DHS and DOL's authority, the DOL explicitly finds that the 2008 wage rule creates cognizable adverse consequences for United States workers," Davis said. "Accordingly, our vacating the 2008 wage rule will only disrupt the H-2B program to the extent that the DHS and DOL use the program to issue H-2B visas that they are expressly prohibited from granting."

"This is a very important decision because it really does force the department to do what Congress mandated them to do," said Arthur Read, of Friends of Farmworkers in Philadelphia, who represented the plaintiffs. Most of the workers affected in the Philadelphia area are landscapers and construction workers, he said.

(Copies of the 23-page opinion in Comité de Apoyo a los Trabajadores Agricolas v. Solis, PICS No. 13-0686, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.)