



NEW H-2B REGS HOLD SOME HURDLES FOR SMALL BUSINESS

By Allissa Wickham
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The U.S. Department of Homeland Security and the U.S. Department of Labor released new H-2B visa regulations Tuesday after previous versions were struck down by a federal judge, and attorneys say small changes to the regulations could make the program less accessible to small businesses.

In a joint interim final rule, the DHS and DOL laid out the process through which employers can get a labor certification for the H-2B program. Through a separate rule, the departments outlined the methodology for calculating prevailing wages to be paid to H-2B workers, with both regulations set to go into effect on Wednesday.

The DHS and DOL's new interim final rule regulating the H-2B labor certification process is "virtually identical" to a similar 2012 rule, according to the departments, and attorneys said nothing in it really caught them off-guard.

Enrique Gonzalez of Fragomen Del Rey Bernsen & Loewy LLP said reading the rule was like "deja vu, back to 2012," although he noted that the agencies did highlight that the DHS is working in consultation with the DOL, since the labor department's regulatory authority was a key issue in the litigation that led to the new rules.

But while the new interim final rule is very similar to the 2012 final rule, it does include new recruitment requirements and mandates that a job remain available to U.S. workers until 21 days before the employer needs to fill the job.

The rule also adopts a registration process for employers that mandates they show their temporary labor need, reinstates a "compliance-based certification model" that was used before the 2008 rule, and adds "worker protections," like upping the number of hours needed for full-time employment status.

"Under the new process ... the employer will have to register," said Gonzalez. "Their registration will be good for three years, and at the same time, they will have to say, 'I need the following positions, I need the following number of people in those positions, and I need it for the following period of time' each year."

Daniel Kowalski of the Fowler Law Firm said that while larger employers may be able to use the rule, the added steps could make it difficult for smaller employers to follow the regulation. As a result, some small employers may fall back on using unauthorized workers, he said.

"An unintended consequence of this will be to fuel, or refuel, the shadow economy," Kowalski said.

He noted that these new regulations may prompt further litigation, since the regulated community was unhappy with the 2012 rule in the first place. The only way to achieve real H-2B relief is to force Congress to amend the statute to be more workable and specific, so the DOL and DHS have less to regulate, said Kowalski.

The two departments have been working feverishly to craft a joint rule since U.S. District Judge M. Casey Rodgers chucked the DOL's 2008 H-2B program rule in a decision last month, after finding the agency lacked the power to enact it. She also struck down a 2012 rule governing the program in December, which the DOL is appealing to the Eleventh Circuit.

Judge Rodgers' decision to vacate the 2008 rule prompted the DOL and U.S. Citizenship and Immigration Services to stop processing H-2B applications, just as employers were gearing up for the summer season, sparking an outcry from hotels and gardening associations.

Following this panic, the department asked for a stay on the 2008 regulation's demise until April 15 to allow the program to operate while the DOL and DHS worked up the joint rule. The judge agreed on March 18 and the program sprang back into action. She later extended the stay to May 15.

In the rule pertaining to wage methodology for the H-2B program, the departments said the prevailing wage will be the mean wage for the job in the relevant geographic area outlined by the Bureau of Labor Statistics Occupational Employment Statistics survey, unless a company fulfills requirements for seeking a prevailing wage based off of an "employer-provided survey."

Wendell Hall of the Hall Law Office PLLC, who is currently representing a group seeking to intervene in the case over the 2008 rule, worried that the new wage rule may actually increase costs, particularly in industries like forestry. He also agreed that as a practical matter, the degree of regulation is intended to make it harder for employers to use the program.

"I think these regulations are designed, frankly, to make it too expensive for all but the most wealthy and most sophisticated companies to use the H-2B program," Hall said.

Gonzalez added that one of the surprising things in the prevailing wage rule was the allowance of employer-provided salary surveys, which under a 2013 regulation on the issue would not have been accepted.

"This fine-tuned what the 2013 rule did, and it also provides for very limited exceptions for the use of employer salary surveys where data may not otherwise be available to an employer though the Department of Labor," he said.

U.S. Citizenship and Immigration Services said in a statement Tuesday that the rules are intended to quickly reinstate the H-2B program and bring it "certainty, stability and continuity."