

THE
NATIONAL LAW REVIEW

Federal Court Upholds Validity of 2011 H-2B Prevailing Wage

Tuesday, February 25, 2014

The Temporary **Non-agricultural Employment 2011 H-2B Wage Rule** for calculating the prevailing wage rates (“Rule”) has cleared one of the last hurdles to implementation by the U.S. Department of Labor, with a ruling by a federal appeals court in Philadelphia upholding the regulation. The U.S. Court of Appeals for the Third Circuit held on February 5 that the DOL has authority to make rules regulating the H-2B program, that the Rule was lawfully promulgated and that it did not violate the Administrative Procedure Act or the Immigration and Naturalization Act. The lawsuit was brought by employer associations that recruit H-2B workers and stand to face higher labor costs as a result of the Rule. The case is *La. Forestry Ass’n v. Sec’y United States DOL*, 2014 U.S. App. LEXIS 2167 (3d Cir. Feb. 5, 2014).

The Rule (76 Fed. Reg. 3,452 (Jan. 19, 2011) (codified at 20 C.F.R. § 655.10)) eliminated the “four-tier wage methodology” in favor of the mean Occupational Employment Statistics (OES) wage for each occupational category, and established a wage calculation regime wherein the prevailing wage is the highest of the applicable collective bargaining agreement(s), the rate established under the DBA[??] or Service Contract Act, or the OES mean. It also barred use of employer-submitted surveys if the prevailing wage can be determined based on OES data or the rates established under the DBA or SCA. According to DOL’s estimates, “the change in the method ... will result in a \$4.83 increase in the weighted average hourly wage for H-2B workers and similarly employed U.S. workers[,]” and a total annual transfer cost of \$847.4 million.

This Third Circuit decision is welcomed by DOL, which has faced numerous court challenges in its efforts to promulgate new H-2B rules since 2008. The 2011 H-2B Wage Rule was published in response to an August 2010 court order enjoining the agency from implementing its 2008 H-2B wage rule on the ground that it violated the APA, promulgated without seeking public comment. The court ordered the DOL to promulgate new, APA-compliant rules.

Even though DOL published the 2011 Rule within the time ordered, its implementation has been held up by court action and by Congressional “appropriations concerns” denying DOL funding. DOL continued to use its 2008 rule. This was challenged and in March 2013, a federal district court vacated the 2008 wage rule and permanently enjoined the agency from implementing it (see www.globalimmigrationblog.com/2013/03). The court gave the DOL 30 days to comply. As a result, DOL and USCIS published a joint interim final rule in April 2013 that established a new methodology for calculating H-2B prevailing wages (see www.globalimmigrationblog.com/2013/04), which DOL indicated would be effective only until the 2011 H-2B Wage Rule took effect.

Since Congress lifted the appropriations ban on the Rule when it enacted the DOL Appropriations Act, 2014 (see Pub. L. 113-76, Div. H, Title I (2014)), we anticipate DOL will now apprise the public of the status of H-2B prevailing wages and the effective date of the Rule by publishing a notice in the Federal Register.

The Third Circuit recognized its decision may lead to a rift in the courts of appeals. In *Bayou Lawn & Landscape Servs. v. Sec. of Labor*, 713 F.3d 1080 (11th Cir. 2013), the Atlanta court affirmed an injunction barring implementation of the interim rule preliminarily, finding DOL had no rulemaking authority over the program. The Third Circuit cautioned, however, that *Bayou* may not be the last word on the subject from its sister circuit: “The three-member panel in *Bayou* opined only on whether the District Court abused its discretion..., not on whether the

jackson lewis.

Article By [Jackson Lewis P.C.](#)
[Otieno B. Ombok](#) Immigration Blog

[Immigration](#)
[Labor & Employment](#)
[Litigation / Trial Practice](#)
[Administrative & Regulatory](#)
[3rd Circuit \(incl. bankruptcy\)](#)

DOL actually has that authority or not....”

Jackson Lewis P.C. © 2019

Source URL: <https://www.natlawreview.com/article/federal-court-upholds-validity-2011-h-2b-prevailing-wage>