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DOL Nullifies Use of Employer-Provided Wage Surveys in H-2B Program

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Calling the **Department of Labor regulations authorizing employers** to use employer-provided wage surveys for prevailing wage determinations (PWDs) for **H-2B workers arbitrary and capricious, and finding that they violate of the Administrative Procedure Act**, the U.S. court of appeals in Philadelphia has **vacated the DOL regulations at 20 CFR §655.10(f)** and the Department's 2009 H-2B Wage Guidance. *Comite de Apoyo a los Trabajadores Agricolas et al v. Solis*, No. 14-3557 (3d Cir. Dec. 5, 2014).

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Responding to this decision, DOL announced that, effective December 8, 2014, it will no longer issue H-2B PWDs based on employer-provided wage surveys. DOL advised that pending PWDs seeking to utilize employer-provided surveys will be given the appropriate Occupational Employment Statistics wage for the requested occupation. Further, employers whose prevailing wage determination was based an employer-provided wage survey, but whose H-2B Applications for Temporary Employment Certification have not yet resulted in a final determination by the Chicago National Processing Center, will be notified of their new wage obligation along with their certification letters.

The DOL announcement is devastating news to employers that utilize H-2B temporary foreign workers to meet their seasonal labor shortage needs, as DOL's default OES-based wage determinations set the mandatory minimum wage prohibitively high – as much as $4-$5/hour higher than the market wages reflected in private wage surveys. Because the DOL's wages do not appear to reflect accurately the actual industry/market wage, H-2B employers particularly in the landscaping and seafarming industries have been relying on private surveys to establish a fair prevailing wage for their seasonal workers. This decision essentially nullifies this practice, creating a significant wage differential that ultimately will make many contract bids unprofitable.

The administration of the H-2B program, particularly the determination of H-2B prevailing wages, has been much litigated. Although previous litigation had caused DOL to abandon the four skill-level provisions of the regulation and Guidance for setting OES prevailing wages for the H-2B program in favor of the a mean-OES prevailing wage, the agency continued to evaluate and approve private wage surveys using the skill-level definition of prevailing wage, which continued use was challenged in this case.

The Third Circuit found DOL's "continued approval of skill-level wages submitted based on employer wage surveys is not only adversely affecting the wages of similarly employed United States workers, but the H-2B program as now administered is leading to unjustified disparities between employers who submit private wage surveys and otherwise similarly situated employers who do not submit surveys and who therefore must pay the OES prevailing wage." It added that the DOL practice "creates a system that permits employers who can afford private surveys to bring H-2B workers into the country for employment at lower wages than employers who cannot afford such surveys and who therefore must offer the higher OES prevailing wage." The Court also found that "when evaluating wage surveys based on skill levels pursuant to the 2009 Wage Guidance, DOL directly contradicts the current prevailing wage definition in 20 C.F.R. § 655.10(b)(2) (2013), … which rejects skill-level considerations."

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