

News Release

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US Labor Department issues final rule revising wage calculations for H-2B program

Revised methodology better protects US workers

WASHINGTON — The U.S. Department of Labor's Employment and Training Administration today announced the publication of a final rule that improves the H-2B temporary nonagricultural worker program and better protects U.S. workers. The final rule, to be published in the Jan. 19 edition of the *Federal Register*, addresses the calculations used to set wage rates for H-2B workers.

The H-2B program allows the entry of foreign workers into the U.S. 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. The H-2B program is limited by law to a program cap of 66,000 visas per year.

"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," said Secretary of Labor Hilda L. Solis.

Because the previous administration promulgated H-2B regulations and did not seek comment during the rulemaking process on the methodology used to set wage rates, on Aug. 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania ruled that the regulations issued by the department in 2008 had violated the Administrative Procedure Act. As a result, the court ordered the department to promulgate new rules that comply with the APA on the calculation of the prevailing wage rates in the H-2B program no later than 120 days from the date of the order. The department later requested additional time to extend the comment period and for drafting the rule, and the court extended the department's time by 21 days.

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. The wage methodology in the final rule achieves the department's goal of more fully protecting the job opportunities and wages of U.S. workers. The department anticipates issuing a future rulemaking that will address other aspects of the H-2B program.

The new wage rates will apply to wages paid for work performed on or after Jan. 1, 2012. In addition, for a period of 60 days after the publication of the final rule, the department will welcome information from the public in order to gather data regarding the feasibility and implementation of phasing in the new prevailing wages.

The 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 also permits the use of private wage surveys in very limited circumstances.

Under the final rule, the prevailing wage would be based on the highest of the following:

- Wages established under an agreed-upon collective bargaining agreement.
- A wage rate established under the Davis-Bacon Act or the Service Contract Act for an occupation in an area of intended employment, if the job opportunity is in an occupation for which such a wage rate has

been determined.

- The arithmetic mean wage rate established by the Occupational Employment Statistics wage survey for an occupation in an area of intended employment.

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