H-2B Program and Wage Rule

Introduction

On April 29, 2015, the Department Homeland Security (DHS) and Department Labor (DOL) issued a final interim H-2B temporary guest worker program rule and a final wage rule. This final interim H-2B rule is almost identical to a 2012 H-2B program rule that has been blocked by a federal court since its release and was opposed by the American Horse Council and other industries that rely on the H-2B program. Both rules are effective immediately.

The H-2B program is used by members of the horse industry, principally horse trainers and owners who cannot find American workers to fill semi-skilled jobs at racetracks, horse shows, fairs and in similar non-agricultural activities.

Background

Previously, in January 2009 the Bush Administration issued a new rule governing the H-2B program. That rule made major changes to the H-2B program by implementing an "attestation-based" labor process in place of the previous "labor certification" process. This change among others was intended to make the H-2B program more usable and efficient while still providing protections for American and foreign workers.

However, the Obama Administration did not believe the 2009 rule provided adequate protections for American or foreign workers and has been trying to enact new rules governing the H-2B program temporary guest worker program since 2012.

Final Interim Rule

The final rule will make significant changes to how the H-2B program currently functions including:

- Require an employer to pay for inbound travel, including daily subsistence expenses, for workers who complete 50% of the job order, and outbound travel, including daily subsistence expenses, for workers who work until the end of the job order or are dismissed early.
- Require American "corresponding workers" employed alongside H-2B workers receive the same wages as H-2B workers as well as benefits such as reimbursement of certain transportation costs and other benefits. (Corresponding workers are defined as American non-H-2B workers employed by an employer that has a certified application who performs either substantially the same work included in the job order or substantially the same work performed by the H-2B workers.)

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- Require employers to provide documentation that they have taken appropriate steps to recruit U.S. workers, rather than permitting employers to attest to such compliance.
- Increase the amount of time employers must try to recruit U.S. workers.
- Require a job offer remain open to U.S. workers until 21 days before the employer's start date of need.
- Require that employers guarantee employment for a total number of work hours equal to at least three-fourths of the workdays in specific periods for both H-2B workers and workers in corresponding employment.
- Require employers to disclose their use of foreign labor recruiters in the solicitation of workers; provide workers with earnings statements, with hours worked and offered and deductions clearly specified; to provide workers with copies of the job order; and to display a poster describing employee rights and protections.
- Require employers to pay visa and related fees of H-2B workers
- Define temporary need as 9 months. Previously it was 10 months.
- Define full time employment as 35 hours a week. Previously it was 30 hours.

The complete rule can be viewed at:
https://www.federalregister.gov/articles/2015/04/29/2015-09694/temporary-non-agricultural-employment-of-h-2b-aliens-in-the-united-states

Although the rule is currently in effect there is a 60 day comment period that is open until June 29th.

Wage Rule

The final wage rule sets the methodology for determining wages for H-2B workers and is similar to a 2013 interim final H-2B wage rule, with new restrictions on the use of private wage surveys. The final wage rule will continue to use the mean wage rate established by the Occupational Employment Statistics (OES) wage survey for an occupation in the area of intended employment. Such a methodology artificially increases H-2B hourly wages and is opposed by the AHC and other H-2B visa users. For many years a four-tier wage structure based on skill level was used to determine the prevailing wage in most circumstances.

Additionally, the final wage rule will restrict when an employer-provided survey can be used instead of the OES wage survey for establishing a prevailing wage. Employer-provided wage surveys may now only be used if they meet the following criteria:

- The survey was independently conducted and issued by a state, including any state agency, state college, or state university;
- The survey is submitted for a geographic area where the OES does not collect data, or in a geographic area where the OES provides an arithmetic mean only at a national level for workers employed in the Standard Occupational Classification (SOC);

- The job opportunity is not included within an occupational classification of the SOC system; or
- The job opportunity is within an occupational classification of the SOC system designated as an "all other" classification.

The complete rule can be viewed at:
https://www.federalregister.gov/articles/2015/04/29/2015-09692/wage-methodology-for-the-temporary-non-agricultural-employment-h-2b-program

Status

Both the final interim rule and the finial wage rule are in effect as of April 29, 2015.

AHC Position

The AHC is opposed to the final interim rule and the finial wage rule.