



United States Government Accountability Office
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May 6, 2013

The Honorable Tom Harkin
Chairman
The Honorable Lamar Alexander
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Bob Goodlatte
Chairman
The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
House of Representatives

Subject: *Department of Homeland Security and Department of Labor, Employment and Training Administration: Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated jointly by the Department of Homeland Security (DHS) and Department of Labor (DOL), Employment and Training Administration (the Departments), entitled "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2" (RINs: 1615-AC02; 1205-AB69). We received the rule on April 22, 2013. It was published in the *Federal Register* as an interim final rule; request for comments on April 24, 2013. 78 Fed. Reg. 24,047.

The interim final rule amends regulations governing certification for the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment. This interim final rule revises how DOL provides the consultation that DHS has determined is necessary to adjudicate H-2B petitions by revising the methodology by which DOL calculates the prevailing wages to be paid to H-2B workers and U.S. workers recruited in connection with the application for certification; the prevailing wage is then used in petitioning DHS to employ nonimmigrant workers in H-2B status. DOL and DHS are jointly issuing this rule in response to the court's order in *Comite ´ de Apoyo a los Trabajadores Agricolas v. Solis*, which vacated portions of DOL's current prevailing wage rate regulation, and to ensure that there is no question that the rule is in effect nationwide in light of other outstanding litigation.

This rule also contains certain revisions to DHS's H-2B rule to clarify that DHS is the executive branch agency charged with making determinations regarding eligibility for H-2B classification, after consulting with DOL for its advice about matters with which DOL has expertise, particularly, in this case, questions about the methodology for setting the prevailing wage in the H-2B program.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). This interim rule was received by Congress on April 23, 2013, and published on April 24, 2013. 159 Cong. Rec. H2390 (Apr. 26, 2013); 159 Cong. Rec. S3027 (Apr. 25, 2013); 78 Fed. Reg. 24,047. The stated effective date for this interim rule is April 24, 2013. Therefore, this notice does not have the required 60-day delay. However, notwithstanding the 60-day delay requirement, any rule that an agency for good cause finds that notice and comment are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. 5 U.S.C. §§ 553(d)(3), 808(2). The Departments found that there was good cause to conclude that notice, the opportunity for public participation, and a delay in the effective date were impractical and contrary to the public interest. Therefore the 60-day delay in effective date is not required.

Enclosed is our assessment of the Departments' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that the Departments complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Jane Oates
Assistant Secretary for
Employment and Training
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HOMELAND SECURITY AND
DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION
ENTITLED
"WAGE METHODOLOGY FOR THE TEMPORARY
NON-AGRICULTURAL EMPLOYMENT H-2B PROGRAM, PART 2"
(RINs: 1615-AC02; 1205-AB69)

(i) Cost-benefit analysis

The Departments were unable to estimate the economic effects of this interim final rule, but they did quantify the economic significance of the rule's change in the prevailing wage provisions when compared to the wage provisions under the previous wage rule. Using sample data, the Departments estimated that this interim final rule's change in the method of determining wages will result in, at most, a \$2.12 increase in the weighted average hourly wage for H-2B workers and similarly employed U.S. workers hired in response to the recruitment required as part of the H-2B application. The Departments estimated a total impact per year of \$371.82 million by multiplying the \$2.12 wage increase by 7 working hours per day by 217 total number of days worked by 115,500 total number of H-2B workers. The Department also concluded that there would be no appreciable decline in the total employment under the program.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

The Departments determined that this interim final rule is exempt from the requirements of the Act because the Departments found for good cause that a general notice of proposed rulemaking was impractical and contrary to the public interest.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The Departments determined that this interim final rule does not include any federal mandate that may result in increased expenditures by state, local, or tribal governments, in the aggregate or by the private sector of \$100 million because participation in the H-2B program is voluntary.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The Departments determined that there was good cause to dispense with the Act's notice and public comment and 30-day effective date requirements. The Departments are issuing this rule, in part, to comply with a court order compelling the Departments to comply within 30 days. In addition, the Departments concluded that they must forgo full notice and comment rulemaking to provide immediate regulatory guidance for the operation of the H-2B program. The Departments also note that the regulated public already had significant opportunity to comment on the substantive prevailing wage regime adopted in this interim final rule. 75 Fed. Reg. 61,578 (Oct. 5, 2010); 76 Fed. Reg. 3452 (Jan. 19, 2011).

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The Department determined that this interim final rule contains no new information collection requirements under the Act.

Statutory authorization for the rule

The Departments promulgated this interim final rule under the authority of sections 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1188, 1221, 1281, 1282, 1288, 1301–1305 and 1372 of title 8 and sections 1806, 1901 note, and 1931 note of title 48, United States Code.

Section 654 of the Treasury and General Government Appropriations Act, 1999, 5 U.S.C. § 601 note

The Departments determined that this interim final rule will not have a negative effect on families.

Executive Order No. 12,866 and 13,563 (Regulatory Planning and Review)

The Departments determined that this interim final rule is an economically significant action under the Order.

Executive Order No. 12,988 (Civil Justice)

The Departments determined that this interim final rule will not unduly burden the federal court system.

Executive Order No. 13,132 (Federalism)

The Departments determined that this interim final rule does not have substantial direct effects on states, on the relationship between the states, or on the distribution of power and responsibilities among various levels of government.

Executive Order No. 13,175 (Indian Tribal Governments)

The Departments determined that this interim final rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.