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Washington, DC 20548

B-321491

February 8, 2011

The Honorable Tom Harkin
Chairman
The Honorable Michael B. Enzi
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable John Kline
Chairman
The Honorable George Miller
Ranking Member
Committee on Education and the Workforce
House of Representatives

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

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor (Department), Employment and Training Administration, entitled “Wage Methodology for the Temporary Non-agricultural Employment H-2B Program” (RIN: 1205-AB61). We received the rule on January 24, 2011. It was published in the *Federal Register* as a “final rule; request for comment on specific issues” on January 19, 2011. 76 Fed. Reg. 3452.

The final rule amends the Department’s regulations governing the certification for the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment. The final rule revises the methodology by which the Department calculates the prevailing wages to be paid to H-2B workers and United States workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status.

Enclosed is our assessment of the Department’s 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 Department 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 the Employment
and Training Administration
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION
ENTITLED
"WAGE METHODOLOGY FOR THE TEMPORARY
NON-AGRICULTURAL EMPLOYMENT H-2B PROGRAM"
(RIN: 1205-AB61)

(i) Cost-benefit analysis

The Department performed a cost-benefit analysis in conjunction with the final rule. To the extent that the higher wages imposed by the rule result in lower employment and lower output by firms who had employed those workers, the lost profits on the foregone output and the lost net wages to the foregone workers represent a deadweight loss. In economics, a deadweight loss is a loss of economic efficiency when equilibrium for a good or service is not optimal. The final rule could result in a 56 percent increase in wages which would result in a 16.8 percent decline in the number of H-2B workers requested by employers. The Department states that most years the demand has far exceeded the 66,000 maximum visas allowed under the program, and deadweight loss would only occur where the number of certified visas is less than the cap.

The Department also discusses the transfers that would occur under the final rule. To determine the total transfers to H-2B visa workers via the increased wages from the new wage determination method, the Department multiplied the total number of H-2B workers in the U.S. in a given year (115,500), which includes both new entrants and an assumed portion of those who entered in each of the two previous years, by the weighted average hourly wage increase (\$4.83), the number of hours worked per day (7), and the total number of days worked (217). The Department estimated that the total annual average transfer incurred due to the increase in wages at \$847.4 million.

The Department notes that the increase in the wage rates induces a transfer from participating employers not only to H-2B workers, but also to U.S. workers hired in response to the required H-2B recruitment. The higher wages are beneficial to U.S. workers because they enhance workers' ability to meet the cost of living and to spend money in their local communities, which has the secondary impact of increasing economic activity and, therefore, generates employment in the community. These are important concerns and a key aspect of the Department's mandate to ensure that wages of similarly employed U.S. workers are not adversely affected.

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

The Department states that it believes the final rule is not likely to impact a substantial number of small entities and therefore a final regulatory flexibility analysis is not required by the Regulatory Flexibility Act. However, in the interest of transparency, the Department prepared a final regulatory flexibility analysis to assess the impact of the final rule on small entities.

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

The Department determined that the final rule does not contain any federal mandate. The final rule does not impose an enforceable duty upon state, local, or tribal governments, or impose a duty on the private sector which is not voluntary.

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

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

On October 5, 2010, the Department published a notice of proposed rulemaking in the *Federal Register*. 75 Fed. Reg. 61,578. The Department received almost 300 comments on the proposed rule, which it determined included 251 completely unique comments, 8 duplicates, and 39 form letters or based on a form letter. The comments were from individual employers, worker advocacy groups, labor organizations, small business advocates, business associations, law firms, government agencies, including the Chief Counsel for the Office of Advocacy of the Small Business Administration, Members of Congress and congressional committees, and various interested members of the public. The Department discussed these comments in the final rule. 76 Fed. Reg. 3452.

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

The final rule imposes no new information collection requirements. The requirements for the current H-2B program are approved under OMB Control Number 1205-0466.

Statutory authorization for the rule

The final rule is authorized by the Immigration and Nationality Act, as codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(b) and 8 U.S.C. § 1184(c)(1).

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

The final rule was determined to be economically significant under the Order and has been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

The Department determined that the final rule does not have federalism implications because it will not have substantial direct effects on states, on the relationship between the states, or on the distribution of power and responsibilities among the various levels of government.