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District Court Vacates Final Rule on Non-Range H-2A Adverse Effect Wage Rate Methodology

Legal Update

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By Immigration Group

This article was prepared with the assistance of ABIL, the Alliance of Business Immigration Lawyers, of which Loan Huynh, Fredrikson Immigration Department Chair, is a member.

In *United Farm Workers v. DOL*, on April 4, 2022, a federal district court vacated a 2020 final rule, "Adverse Effect Wage Rate [AEWR] Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," remanding it to the Department of Labor for further rulemaking consistent with the court's order.

The court noted that DOL said it considers actual, current wage data to be the best source of information for determining prevailing wages, when an appropriate source is available, and that using another methodology "increases the likelihood of permitting employers to pay wages that are not reflective of market wages, which undermines the Department's mandate to prevent an adverse effect on the wages of workers in the United States similarly employed." Consistent with those statements, a 2021 proposed rule would use the FLS to establish AEWRs for most H-2A jobs, while using Occupational Employment and Wage Statistics data for occupations where FLS data is unavailable. The 2021 proposed rule also recognizes that employers must pay the wage for the highest-paid occupation performed by an H-2A worker when their role covers multiple occupation classifications, the court noted.

Among other things, the court concluded that the final rule was arbitrary and capricious because it failed to protect U.S. workers against adverse effects to their wages and working conditions.