
REMAPPING DEBATE

Asking "Why" and "Why Not"

New labor regs for non-agricultural guest workers around the corner

Story Repair | By Margaret Moslander | Labor, Regulation

Oct. 12, 2011 — New regulations from the Department of Labor, some nearing adoption and others already adopted and awaiting implementation, will raise living standards for H-2B workers — the tens of thousands of guest workers, largely from Mexico, who are legally brought into the United States each year for temporary, non-agricultural employment. Employers are crying foul, but it appears that some of their fears are exaggerated, while others are effectively premised on the idea that drastically underpaying workers is necessary to the health of the industry. The DOL and some worker advocates hope that the new rules will encourage more U.S. workers to seek and perform these jobs.

WHAT IS STORY REPAIR?

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For repair this week: "[La. Business Owners Sue Over New Rules for Guest Workers](#)" (New York Times, Sept. 11).

The article described how Mexican guest workers, performing seasonal labor for which it was said to be difficult to find American labor, were in "fine spirits" and were "content with the rhythm of working for six months or so and then returning to Mexico."

— *Editor*

Living wages?

The new rules for determining wages are currently scheduled to go into effect on Nov. 30. They replace rules that, as a practical matter, kept H-2B workers, whose work typically does not require the acquisition of new skills, on the lowest rung of a four-tiered pay scale originally designed for

use in skilled industries. According to the analysis by the DOL, the H-2B wage was lower than average industry wage "in about 96 percent of cases," often significantly so.

A federal lawsuit brought in Sept. 2011 by several Louisiana industry groups, including the American Shrimp Processors Association and the Crawfish Processors Association, alleges that the impact of the new rules will be "catastrophic." In actuality, the new prevailing wage would only be equivalent to average wages for the occupation in the industry within which the H-2B worker is employed, and the impact will vary from industry to industry.

The allegations in the federal complaint claim that shrimp processors would be facing wage increases ranging from 51 to 83 percent. Put another way, H-2B wages in that industry (if the shrimp processors' allegations are correct), are currently 51 to 83 percent below the average for workers doing equivalent jobs.

Members of worker advocacy groups confirmed that H-2B wages in the sector are in fact severely depressed, and asserted that a business model that depends on such low wages is not sustainable. Nelson Carrasquillo, general coordinator of the Farmworker Support Committee asserted that the "situation of workers is desperate," and that workers need to be paid enough to "live adequately in terms of housing, education, health, food and other basic human needs.

Haeyoung Yoon, an attorney at the National Employment Law Project, had little sympathy for employer complaints about the new rules, stating, "Paying prevailing wage is part of the cost of doing business."

For other types of employers, the impact appears as though it will be smaller. One group facing the new rules is the crawfish processing sector. While the complaint alleges that the impact on crawfish processors will be substantial, Dexter Guillory, who owns a plant that employs fish cutters, trimmers, and crawfish processors, noted that his workers, who are paid on a piece-work basis, currently earn the equivalent of \$10 to \$15 per hour (under the new regulations, piecework continues to be permitted as long as the earnings are not less than what they would have paid as calculated on an hourly wage basis).

According to data from the Foreign Labor Certification Data Center Online Wage Library, the prevailing level one wage paid to fish cutters and trimmers under the existing regulations is \$7.55 per hour. Under the new regulations, the mean wage used to determine the prevailing wage in that industry will be \$8.31 per hour, a 10 percent increase in the required minimum. Because Guillory already pays his workers more than that, he told Remapping Debate, he does not anticipate any "negative impact" to his business because of the mandated wage increases.

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Guaranteeing the work that has been promised

Another element of the Labor Department's proposed changes, this one not yet finalized, does appear to have generated alarm in employers in the crawfish and shrimp processing industries. The proposed regulation requires that employers issue a "guaranteed offer of employment for a total number of work hours equal to at least three-fourths of the workdays of each four week period" for which guest workers are contracted.

Guest worker advocacy organizations expressed support for the three-quarter guarantee, citing the exploitation that occurs under the current system. Daniel Angel Castellanos Contreras, of the National Guestworker Alliance, stated in testimony to the DOL that, under the current regulatory scheme, an employer’s “guarantee of 60 hours per week became an average of only 20 to 30 hours per week, sometimes less. With so little work, it was impossible to even cover our expenses in [the United States] let alone pay off the debt we incurred to come to work and save money to spend home.”

David Veal, director of the American Shrimp Processors Association, confirmed that, that under the current rules, if a season starts late or ends early, employers are under no obligation to honor any sort of minimum time requirement.

Jacob Horwitz, lead organizer for the National Guestworker Alliance, took issue with this claim. “If those jobs were actually living wage jobs that could support families, I’m sure there are [Americans] who would want to apply for them.”

The three-quarter guarantee has already been in effect for more than 20 years in the H-2A program. That program provides temporary visas to foreign agricultural workers who work for U.S. employers. In seeking comments on its proposed rule, DOL explained that, “Recent experience in enforcing the H-2B regulations demonstrates that workers are often provided much less work than that promised in the job order.”

Veal, however, stated that often lost hours are made up during the peak of the season, when “workers are given long hours, typically starting at 4am and going until 3pm in the afternoon, conceivably 7 days a week.” When asked whether workers are paid overtime for the long hours they work at the middle of the season, Veal replied that while it varies from business to business, H-2B workers who work for him as farm hands are paid on straight time, not time and a half.

Art Read, an attorney with the Friends of Farmworkers organization and lead counsel in the lawsuit that resulted in an Aug. 2010 court decision forcing DOL to establish new regulations, did not dispute Veal’s claim that workers were often given extra hours during the peak of the season, but stated that the problem under the current regulatory scheme is that workers have no way of anticipating when their peak hours might be, and consequently often find themselves stranded in the United States without any income.

Read added, “I don’t think there is anything in the Department of Labor regulations that would forbid an employer from accurately describing that during peak times they’ll offer more hours, as long as they accurately describe what they intend the work schedule to be and that they offer full time work. In the past the work schedule has not been accurately described, and workers find themselves sitting around with very little work.”

Captive workforce?

A key element of the H-2B program is that workers are prohibited from working for anyone except the sponsoring employer, leaving them with no legal means of finding work during those periods in which the sponsoring employer has little to offer them. The National Guestworker Alliance characterizes the arrangement as one that turns guest workers into a “captive workforce.”

Was the existing arrangement fair, Remapping Debate asked. “No employer brings a guest worker here feeling that they have an obligation to give him a full time job,” Veal replied. “They’re serving their own employment needs. Bringing them here is not a benevolent act. If that’s the view, then everybody’s really on a different page here.”

DOL’s position is that that “few legal options exist for H-2B workers who feel their work contracts have been violated...A guaranteed number of hours may well be the only protection H-2B workers have if employers misrepresent the amount of work the workers will actually be provided.”

Paying to get here

An additional element of the proposed rules would require that employers “provide, pay for, or reimburse the worker in the first work week for the cost of transportation and subsistence from the place from which the worker has come to the place of employment.” Furthermore, employers “would also be required to pay or reimburse the worker for the H-2B worker’s visa, visa processing, border crossing, and other related fees.”

Nelson Carrasquillo of the Farmworker Support Committee identified this new rule as an important change for the quality of life of guest workers, stating, “The H2-B program has a long history of abuse in particular payment of transportation and visa.” The National Guestworker Alliance echoed this sentiment, stating in a press release that the proposed regulation “prevents employers from creating conditions of debt servitude: guest workers routinely take on crushing debt in order to get a visa.”

Neither Guillory, the crawfish processor, nor Veal of the American Shrimp Processors Association thought this requirement would impose significant costs on employers.

“No employer brings a guest worker here feeling that they have an obligation to give him a full time job,” said the industry representative. “They’re serving their own employment needs. Bringing them here is not a benevolent act. If that’s the view, then everybody’s really on a different page here.”

What about U.S. workers?

The H-2B program ostensibly is designed to permit employment of guest workers in circumstances where American workers are not available to perform the jobs and where the additional workers will not otherwise have a negative impact on the wages of American workers, and DOL hopes that the new rules will both bring the H-2B program closer to this stated goal and increase interest among unemployed Americans in jobs now being filled by H-2B workers.

“With so little work, it was impossible to even cover our expenses in [the United States] let alone pay off the debt we incurred to come to work and save money to spend home,” said Daniel Angel Castellanos Contreras of the National Guestworker Alliance

Many employers are dismissive of the possibility that U.S. workers would be interested in the jobs, complaining that H-2B employers “will not be able to find interested U.S workers...regardless of the changes to wage methodology.”

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DOL, in its description on the new wage rule, does not believe that past difficulties in attracting American workers to these jobs is necessarily a useful guide to what they will do in the future: “By proposing a prevailing wage methodology that will pay wages that more closely reflect the average of wages paid in any occupation, the Department creates conditions under which unemployed U.S. workers will have access to job opportunities that they would in fact seek out, rather than those in which the pay is too low.”

When Remapping Debate asked Veal whether U.S. workers might be interested in the jobs once the prevailing wage was raised and a minimum time guarantee instituted, he stated, “I don’t know. To be honest I do not.”

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