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DOL Announces Changes To H-2B Prevailing Wage Calculation Rules

The methodology used to calculates the prevailing wages the Labor Department requires employer to pay H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2B status will change effective January 1, 2012. Comments on the Final Regulation published **here** (Final Regulations) in the January 19, 2011 Federal Register are due March 21, 2011. Employers using or contemplating using H-2B workers should take into account these new rules when budgeting and projecting workforce costs and assessing the cost-effectiveness and compliance requirements associated with these contemplated relationships.

To comply with its H-2B program obligations, an employer must pay H-2B workers hired in connection with an H-2B application a wage that will not adversely affect the wages of U.S. workers similarly employed. The Labor Department's H-2B procedures have always provided that adverse effect is prevented by requiring H-2B employers to offer and pay at least the prevailing wage to the H-2B workers and those U.S. workers recruited in connection with the job opportunity.

The Final Regulations are issued largely in response to an August 30, 2010 court order that set aside portions of regulations governing the H-2B temporary worker program issued on December 19, 2009 at 73 Fed. Reg. 78020 ("2008 Final Rule"). On August 30, 2010, a Federal Court found that the Labor Department violated the Administrative Procedures Act when it issued the 2008 Final Regulations. See C*omit[eacute] de Apoyo a los Trabajadores Agricolas (CATA) v. Solis*, Civil No. 2:09-cv- 240-LP, 2010 WL 3431761 (E.D. Pa.). In that decision, the Federal District Court ordered the Labor Department to "promulgate new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act. The Final Regulation is issued in response to this order.

Under the Final Regulation, Labor Regulation § 655.10 generally will provide that for temporary labor certification purposes, the prevailing wage is the highest of the following:

- The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between the union and the employer;
- The wage rate established under the DBA or SCA for the occupation in the area of intended employment if the job opportunity is in an occupation for which such a wage rate has been determined; or
- The arithmetic mean of the wages of workers similarly employed in the occupation in the area of intended employment as determined by the OES. This computation will be based on the arithmetic mean wage of all workers in the occupation.

The NPC now only will consider employer provided wage surveys for purposes of determining the prevailing wage in a very limited number of circumstances where the employer is permitted to and makes a request for a prevailing wage determination in accordance with the Final Regulations.

For More Information Or Assistance

If you need assistance in responding to these new rules or auditing or assessing, updating or defending other labor and employment, employee benefit or compensation practices, please contact the author of this update, attorney Cynthia Marcotte Stamer **here** or at (469)767-8872.

Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization, management attorney and consultant Ms. Stamer is nationally and internationally recognized for more than 23 years of work helping employers; employee benefit plans and their sponsors, administrators, fiduciaries; employee leasing, recruiting,

staffing and other professional employment organizations; and others design, administer and defend innovative workforce, compensation, employee benefit and management policies and practices. The Chair of the American Bar Association (ABA) RPTE Employee Benefits & Other Compensation Committee, a Council Representative on the ABA Joint Committee on Employee Benefits, Government Affairs Committee Legislative Chair for the Dallas Human Resources Management Association, and past Chair of the ABA Health Law Section Managed Care & Insurance Interest Group, Ms. Stamer works, publishes and speaks extensively on wage and hour, worker classification and other human resources and workforce, employee benefits, compensation, internal controls and related matters. She also is recognized for her publications, industry leadership, workshops and presentations on these and other human resources concerns and regularly speaks and conducts training on these matters. Her insights on these and other matters appear in the Bureau of National Affairs, Spencer Publications, the Wall Street Journal, the Dallas Business Journal, the Houston Business Journal, and many other national and local publications. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see **here** or contact Ms. Stamer directly.

Other Helpful Resources & Information

If you found this article of interest, you also may be interested in reviewing other Breaking News, articles and other resources available **here** including:

- **Minimum Wage, Overtime Risks Highlighted By Labor Department Strike Force Targeting Residential Care & Group Homes**
- **Supreme Court Medical Resident Stipend Ruling Highlights Advisability of Worker Classification & Payroll Practice Review Advisable For Health Care, Other Employers**
- **Avoiding Post-Holiday Celebration Sexual Harassment & Discrimination Liability**
- **Small Employers Should Weigh If Health Premium Tax Credit Justifies Changing Employee Leasing Arrangements**
- **Avoiding Post-Holiday Season HR Liability Hangover**
- **2011 Standard Mileage Rates Announced**
- **Update Employment Practices To Manage Genetic Info Discrimination Risks Under New EEOC Final GINA Regulations**
- **EEOC Attacks Medical Leave Denials As Prohibited Disability Discrimination**
- **Affordable Care Act Grandfathered Plan Rules Loosened To Allow Insured Plans Making Some Insurance Changes To Qualify**
- **New Insured Group Health Plan Non-Discrimination Rules Create Significant Liability For Employers & Insurers; Prompt IRS Also To Review Self-Insured Group Health Plan Rules**
- **Affordable Care Act's Health Plan External & Internal Review Safe Harbor & Other Regulations Require Health Plan Updates**
- **DOL Proposes To Expand Investment Related Services Giving Rise to ERISA EEOC Charges Employers With Violating ADA By Denying Medical Leave New Rule Requires Federal Government Contractors To Post New "Employee Rights Under The National Labor" Poster**
- **Employers Concerned About New Union Powers As NLRB Orders Union Elections In 31 California Health Care Facilities To Proceed**
- **Congress & Labor Department Considering Tightening Retirement Plan Regulations**
- **Review Of Worker Classifications Needed As Classification Scrutiny Rises**
- **Businesses Employing Children Should Review & Tighten Practices in Light of Tightened Rules & Increased Penalties**
- **Labor Department FMLA Guidance Adopts Broad Interpretation, Employer Care Needed Determining Who Qualifies As Child**
- **Agencies Release Regulations Implementing Affordable Care Act Health Plan Preventative Care Mandates**

If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile **here**. For important information concerning this communication click **here.** If you do not wish to receive these updates in the future, unsubscribe by updating your profile **here.**