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Legal Sidebar

DOL Final Rule Addressing H-2A Worker Protections and Pending Litigation

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On April 29, 2024, the U.S. Department of Labor (DOL) published the final rule "Improving Protections for Workers in Temporary Agricultural Employment in the United States" (the "Farmworker Protection Rule"). This rule affects the H-2A visa program, which allows U.S. employers to hire foreign workers to perform temporary or seasonal agricultural labor or services. The rule revises existing regulations and, according to DOL, "strengthen[s] protections for agricultural workers and enhance[s] the Department's capabilities to monitor H-2A program compliance." Although the rule became effective on June 28, 2024, the rule's provisions that are the center of pending litigation (i.e., various protections that must be incorporated into job orders seeking H-2A workers) were not going to go into effect until August 29, 2024. Seventeen states, an association of growers, and a farm filed a lawsuit in the U.S. District Court for the Southern District of Georgia challenging the rule and seeking a stay, a preliminary injunction, or a temporary restraining order to halt the rule's August effective date. On August 26, 2024, a federal district court judge granted the plaintiffs' motion for a preliminary injunction, but the injunction is limited in scope and will not be applied nationwide. This means that DOL cannot enforce the rule in the states that filed the lawsuit or against the plaintiff farm and plaintiff association of growers. This Legal Sidebar provides a brief summary of the H-2A visa program and background on the rule, including a summary of one of the provisions. The Sidebar also discusses the pending litigation and identifies several considerations for Congress.

The H-2A Visa Program

The Immigration and Nationality Act (INA) authorizes the issuance of H-2A visas to nonimmigrant aliens to perform temporary or seasonal agricultural labor or services for a U.S. employer. An employer can seek to classify a worker under this visa program if certain statutory requirements set forth in 8 U.S.C. § 1188 are met. Although the main authority for the H-2A visa program lies in the INA, the detailed specifics for how the program is to be implemented are found in federal regulations issued by the Department of Homeland Security (DHS) and DOL. To qualify to bring H-2A workers, a U.S. employer must first apply to DOL for a temporary labor certification and then submit the certification along with an H-2A petition to DHS's U.S. Citizenship and Immigration Services (USCIS). As part of the certification process, the employer must agree to abide by certain obligations found in 20 C.F.R. § 655.135 and 29 C.F.R. § 501.

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Among other things, these obligations include non-discriminatory hiring practices; compliance with applicable federal, state, and local laws; and the prohibition of unfair treatment by employers. USCIS will not approve the H-2A petition unless the employer has applied for and received the temporary labor certification from DOL that shows there are not enough qualified U.S. workers who can fill the employer's job openings and that "the employment of the [foreign worker] ... will not adversely affect the wages and working conditions of workers in the United States similarly employed."

If USCIS approves the petition, in general, the foreign worker can then apply for an H-2A visa with the Department of State. If the visa is granted, the foreign worker may seek admission to the United States to perform the temporary agricultural or labor services. For a more detailed discussion on the administration of the H-2A visa program, see this CRS report.

Background on the 2024 Farmworker Protection Rule

DOL indicates that the purpose of the Farmworker Protection Rule is to strengthen "protections for agricultural workers," enhance the agency's "capabilities to monitor H-2A program compliance and take necessary enforcement actions against program violators," and ensure that "hiring H-2A workers does not adversely affect the wages and working conditions of similarly employed workers" in the United States. The rule amends existing regulations and includes provisions that encompass six areas: (1) "protections for worker voice and empowerment," (2) "clarification of termination for cause," (3) "immediate effective date for updated adverse effect wage rate," (4) "enhanced transparency for job opportunity and foreign labor recruitment," (5) "enhanced transparency and protections for agricultural workers," and (6) "enhanced integrity and enforcement capabilities."

In the pending litigation, the first set of provisions, i.e., "protections for worker voice and empowerment" is most relevant. This set revises 20 C.F.R. § 655.135(h) and adds two new subsections, (m) and (n). DOL has stated that these provisions aim to protect H-2A workers by "explicitly protecting certain activities all workers must be able to engage in without fear of intimidation, threats, and other forms of retaliation"; safeguarding "collective action and concerted activity for mutual aid and protection"; allowing workers to decline to listen to "employer speech regarding protected activities without fear of retaliation"; permitting workers to "designate a representative of their choosing in certain interviews"; and authorizing workers to "invite or accept guests to worker housing." The rule states that it "does not require employers to recognize labor organizations or to engage in any collective bargaining activities such as those that may be required by the [National Labor Relations Act]." The National Labor Relations Act (NLRA) is a law that gives collective bargaining rights to workers who qualify as "employees" under the definition in the statute. The NLRA explicitly excludes agricultural workers from the definition of "employee."

Kansas v. U.S. Department of Labor

On June 10, 2024, Kansas and 16 other states, a trade association of growers, and a private farm filed a complaint against DOL in the U.S. District Court for the Southern District of Georgia, arguing, among other things, that the Farmworker Protection Rule violates the NLRA because it gives H-2A agricultural workers collective bargaining rights when the NLRA explicitly excludes agricultural workers from having those rights. The plaintiffs subsequently filed a motion for a preliminary injunction and temporary restraining order seeking a stay of the effective date of the Farmworker Protection Rule or, in the alternative, a temporary restraining order until the court grants an injunction. The court held a hearing on the motion on August 2, 2024, and on August 26, 2024, the federal district court judge granted the plaintiffs' motion for a preliminary injunction.

Plaintiffs' Arguments

The arguments below were raised in the plaintiffs' motion for preliminary injunction. This Sidebar does not cover every argument the plaintiffs advanced.

The Rule Violates the NLRA

The plaintiffs argued that the rule is not in accordance with existing law and that DOL is providing collective bargaining protection to H-2A workers. According to the plaintiffs, parts of the rule are almost a direct copy of certain provisions in the NLRA, such as those regarding unfair labor practices and representatives and elections. The plaintiffs acknowledged that the rule does not expressly declare that H-2A workers have a right to unionize and collectively bargain, but they claim that the protections conferred by the rule effectively confer such rights in contravention of the NLRA.

The Rule Exceeds DOL's Authority Under the INA

The plaintiffs also argued that DOL has very limited authority to issue regulations under 8 U.S.C. § 1188. Specifically, the plaintiffs state that Section 1188(a), which is the part of the statute DOL relied on to promulgate the rule, is being misinterpreted by the agency. According to the plaintiffs, DOL is supposed to neutralize any adverse effects from an influx of H-2A workers and not necessarily take affirmative steps to improve the working conditions for H-2A workers. In addition, according to the plaintiffs, Section 1188(a) does not explicitly give DOL rulemaking authority.

The plaintiffs filed this lawsuit before the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which overturned the *Chevron* doctrine. The *Chevron* doctrine directed courts to defer to an agency's reasonable interpretation of ambiguous statutes the agency administers. The plaintiffs argued that because Congress's intent was clear in 8 U.S.C. § 1188, DOL was not entitled to *Chevron* deference. Relatedly, the plaintiffs pointed out that DOL relies on caselaw that existed before the Supreme Court overruled the *Chevron* doctrine rather than on the statute itself.

DOL's Arguments

The arguments below were raised in DOL's response to the plaintiffs' motion for preliminary injunction. This Sidebar does not cover every argument DOL advanced.

The Rule Does Not Violate the NLRA

In summary, DOL argued that the rule does not require employers to recognize unions or engage in collective bargaining and is therefore not in violation of the NLRA. According to DOL, the rule expands on existing H-2A anti-discrimination provisions, and individuals who fall outside the NLRA's definition of "employee" can still be protected by other statutes and regulations. DOL states that the rule does just that by granting protections to those not covered by the NLRA. Finally, DOL argues that the rule and the NLRA do not conflict with one another.

The Rule Is a Proper Exercise of DOL's Statutory Obligation

DOL responded to the plaintiffs' argument that the rule exceeded its authority by stating that the INA grants it rulemaking authority. DOL pointed out that provisions in 8 U.S.C. § 1188 expressly reference DOL regulations and that Congress authorized it to implement the mission of the statute through regulation. Further, DOL argued that H-2A workers will become more attractive to U.S. employers if they receive fewer protections than U.S. workers and that this in turn will "adversely affect" U.S. workers. The goal of the rule, according to DOL, is to place H-2A workers on similar footing as U.S. workers to

prevent an adverse effect in the long run. Lastly, DOL maintained that it has historically understood the "adverse effect" requirement "as requiring parity between the terms and conditions of employment provided to H-2A workers ... and as establishing a baseline 'acceptable' standard for working conditions below which [U.S. workers] would be adversely affected."

DOL filed its response after the Supreme Court announced the overruling of *Chevron* in *Loper Bright Enterprises*. Citing *Loper Bright Enterprises* in a footnote, DOL argued that the best reading of Section 1188 was that Congress had delegated to DOL broad, discretionary authority to take action to prevent adverse effects to workers in the United States. The agency claimed that the rule is an appropriate exercise of this discretionary authority, including because the rule "ensures that agricultural employers cannot use the H-2A workforce to undermine workers in the United States who seek better wages and working conditions."

The Court's Order on the Motion for Preliminary Injunction

On August 26, 2024, a federal district court judge granted the plaintiffs' motion for preliminary injunction. The judge found that the plaintiffs met their burden to show that they were entitled to preliminary relief. First, the judge held that the plaintiffs were likely to succeed on the merits of their case. The judge initially determined that the rule falls within DOL's rulemaking authority under 8 U.S.C. § 1188 but found that the rule conflicts with the NLRA. Specifically, the judge stated that DOL had "not shown a consequential difference between the rights protected by the [rule] and those given to nonagricultural workers by the NLRA," that the rule "creates a right not previously bestowed by Congress," and that DOL failed to show that Congress intended to give agricultural workers a right to participate in collective bargaining. The judge further found that just because DOL has rulemaking authority does not mean it can "create law or protect newly-created rights of agricultural workers." Therefore, the court held that the plaintiffs were likely to succeed on the merits of their claim. The judge further held that the plaintiffs met their burden with regard to the other factors needed to support a preliminary injunction.

The judge also found that, although the plaintiffs were entitled to preliminary relief, that relief should be narrowly tailored and party-specific. According to the court, nationwide relief is generally disfavored, as "national uniformity is not a proper consideration," and a nationwide injunction in this case is unwarranted. The judge determined that the court is able to provide a tailored preliminary injunction that addresses the plaintiffs' harms and can offer relief "without issuing a nationwide injunction." DOL filed a motion for reconsideration of the scope of the judge's order, but the motion was denied.

Considerations for Congress

Members of Congress have taken differing views on the Farmworker Protection Rule. Before the rule was finalized, several Members of Congress wrote a letter in November 2023 to Acting DOL Secretary Su and DHS Secretary Mayorkas in support of the rule, stating that the rule represents an opportunity to improve working conditions for H-2A workers and "improve enforcement capabilities of agencies against abusive employers." Following the rule's publication in April 2024, Representative Scott Franklin introduced a resolution of disapproval under the Congressional Review Act to rescind the rule, H.J. Res. 135. This resolution would prohibit DOL from any future similar rulemaking. He and the co-sponsors maintain that the rule will increase costs for agricultural producers and allow H-2A workers to unionize.

There are other options if Congress chooses to respond to DOL's Farmworker Protection Rule. First, Congress may consider amending the NLRA's definition of "employee" to include agricultural workers, thereby allowing H-2A agricultural workers to receive collective bargaining rights. Alternatively, Congress could amend the NLRA and other laws to authorize or prohibit different labor requirements

contained in the Farmworker Protection Rule that are not expressly addressed under existing statutes. Congress could also consider making changes to the H-2A visa program itself. For example, the Affordable and Secure Food Act (S. 4069) in the 118th Congress would, among other things, reform the H-2A visa program by adding worker protections and by providing visas for year-round jobs. A similar bill, the Farm Workforce Modernization Act of 2023 (H.R. 4319), has been introduced in the House during this Congress. Earlier versions of this bill introduced in the 116th and 117th Congresses passed the House.

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