Federal Judge Blocks New H-1B Pay Rules

Insights
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In a major blow to the Trump administration, a federal court recently struck down two immigration rules that would limit the ability of skilled foreign workers to obtain H-1B visas. In a December 1 ruling, the U.S. District Court for the Northern District of California set aside interim final rules from the Department of Homeland Security and the Department of Labor that aimed to limit foreign workers' employment and raise the minimum salaries that employers would need to pay them in order to qualify for the popular visa program. The court found that both rules violated the Administration Procedure Act's comment and notice period, finding that defendants "failed to show there was good cause to dispense with the rational and thoughtful discourse that is provided by the APA's notice and comment requirements." What do employers need to know about this development?

Background
In October 2020, DHS issued the *Strengthening the H-1B Nonimmigrant Visa Classification Program* Interim Final Rule revising the definitions of a specialty occupation and employer-employee relationship to make them more restrictive, and limiting H-1B approvals to one year for work at third-party worksites. The DOL also issued the *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States* Interim Final Rule, amending the regulations governing permanent labor certifications and Labor Condition Applications to incorporate changes to the computation of prevailing wage levels.

Both rules are "Interim Final Rules," however, because the federal agencies bypassed the normal rulemaking process and took effect without the required notice-and-comment period. The rules went into effect the same day they were announced, dramatically changing the H-1B program and sharply increasing the required wages for temporary positions and others seeking employment-based green card sponsorship.

Before filing a petition for a temporary foreign worker in the categories H-1B, H-1B1 (for citizens of Chile and Singapore), or E-3 (for citizens of Australia), employers are required to file a Labor Condition Application (LCA) with the DOL to certify that the wage offered to the foreign worker meets or exceeds the "prevailing wage" in the area of intended employment. This new rule increased the prevailing wage levels by almost 40% across the board.

Many believe that that the new rules were aimed at discouraging U.S. employers from hiring and continuing to employ foreign workers. They certainly served as a deterrent to H-1B employers by making it more difficult to show that foreign workers qualify for the program while significantly raising the minimum wage required to employ foreign workers.

A collection of higher ed institutions, businesses, and research organizations joined together to bring a lawsuit challenging the rules on that grounds that they were put into effect without following the notice and comment rulemaking procedures required under the Administrative Procedure Act. The court agreed with their arguments and struck down the rules with immediate effect.

What This Means For Employers

On December 4, the DOL issued guidance with respect to timeframe for complying with the court's order. Employers will be able to submit new LCA — needed for H-1B, H-1B1 and E-3 petitions — as of December 9 using the wage levels that were in effect on October 7, 2020. Additionally, on December 15, the DOL will continue processing all pending and new Prevailing Wage Requests (PRW) — needed for green card applications — and will use wage levels that were in effect on October 7, 2020.

As for next steps, it is unclear whether the Trump administration will take additional steps in an effort to salvage these rules in the waning days of their control over the federal government. We could see an appeal to the 9th Circuit Court of Appeals, or an attempt to reissue the rules. In any event, we are likely to see the Biden administration revisit the federal government's approach to the H-1B program specifically and immigration law generally shortly after January 20, 2021.

During this period of uncertainty, we recommend employers proactively file LCAs and PWRs needed for their employees.

We will continue to monitor further developments and provide updates in the coming months, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Immigration Practice Group.

Related People

Angelica M. Ochoa
Partner
303.218.3669
Email

Service Focus

Immigration