

New H-1B Rules Struck Down

By Roy Maurer
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A federal district court in California invalidated two new regulations that raised prevailing wages and eligibility criteria for foreign workers to receive H-1B visas.

Judge Jeffrey White of the U.S. District Court for the Northern District of California ruled Dec. 1 that the Department of Homeland Security and the Department of Labor did not have good cause to bypass notice and comment rulemaking procedures in violation of the Administrative Procedures Act when the agencies fast-tracked the rules in early October (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/higher-standards-for-h-1b-visas-announced-.aspx).

The rules increased the required wages employers must pay their H-1B workers (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/dol-increases-h1b-wage-minimums.aspx) and would have redefined the degrees, occupations and employer-employee relationships eligible for the visas on Dec. 7.

"The new rules threatened to upend the H-1B and PERM labor certification [for employment-based green cards] programs by changing statutory definitions, targeting staffing and consulting firms with onerous requirements and hiking required wages by 35 percent to 200 percent," said Michael Neifach, an attorney in the Washington, D.C., regional office of Jackson Lewis.

Paul Hughes, an attorney with McDermott Will & Emery, represented the plaintiffs, made up of business groups and universities. "This decision ensures the continued viability of the H-1B program, which supplies work authorization to more than 580,000 individuals in the U.S.," he said.

The Trump administration is expected to appeal the decision.

The agencies argued the expedited move was necessary because of high unemployment in the U.S., caused by the coronavirus pandemic. But COVID-19's effect on domestic employment wasn't enough to justify regulatory shortcuts, White said, especially since the rules had already been in the planning stages for years.

"The rules had been on the administration's regulatory agenda since 2017," Neifach said. He added that White also pointed out that "the unemployment rate in the sectors that typically use H-1B visas [primarily technology] was only 4.8 percent, not the skyrocketing rates that have been seen in other sectors during the pandemic."

Shortly following the two rules in question, U.S. Citizenship and Immigration Services proposed a rule to replace the current random selection process for H-1B visas (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/uscis-proposes-replacing-h1b-lottery-salary-based-selection.aspx) with a new wage-based selection process that would prioritize petitions based on the highest offered wages.

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