

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED FARM WORKERS, et al.,
Plaintiffs,

v.

THE UNITED STATES DEPARTMENT
OF LABOR, et al.,
Defendants.

No. 1:20-cv-01690-DAD-JLT

ORDER GRANTING PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION

(Doc. No. 5)

This matter came before the court on December 14, 2020 for hearing on the motion for a preliminary injunction on behalf of plaintiffs United Farm Workers and UFW Foundation (collectively, "plaintiffs"). (Doc. No. 5.) Attorneys Mark Selwyn, Derek Woodman, Nicholas Werle, Bruce Goldstein, Trent Taylor, and Gabriela Hybel appeared by video for plaintiffs, and United States Department of Justice Trial Attorney Michael Gaffney appeared by video for defendants the United States Department of Labor ("DOL") and Eugene Scalia, the Secretary of Labor (collectively, "defendants"). For the reasons explained below, the court will grant plaintiffs' motion for a preliminary injunction.

BACKGROUND

In their complaint, plaintiffs allege the following. Of the two to three million farmworkers currently in the United States, over 200,000 are H-2A foreign guestworkers. (Doc.

1 No. 1 (“Compl.”) at ¶ 24.) The H-2A agricultural guestworker program permits agricultural
2 employers to hire foreign workers on a temporary basis under certain circumstances. (*Id.* at ¶ 17.)
3 The H-2A program is rooted in the Immigration and Nationality Act of 1952 (“INA”), which
4 created a broad class of non-immigrant “H” visas for temporary admission of foreign workers to
5 provide temporary or seasonal labor in sectors of the economy where there are shortages of U.S.
6 workers. (*Id.* at ¶ 32.) The INA was later amended to establish the separate H-2A visa
7 classification for agricultural labor. (*Id.*) As amended, the INA prohibits the United States
8 Department of Homeland Security from issuing an H-2A visa unless the employer seeking to hire
9 foreign guestworkers has applied for and received a certification from the DOL that: (a) “there
10 are not sufficient workers who are able, willing, and qualified” and available to perform the
11 sought for services, and (b) the foreign workers’ temporary employment “will not adversely
12 affect the wages and working conditions of workers in the United States similarly employed.”
13 (*Id.* at ¶ 32.) This certification requirement furthers the INA’s purpose of protecting U.S. workers
14 from the potential adverse effects of an influx of guestworkers in that certification prohibits
15 agricultural employers from hiring foreign guestworkers unless they have shown that the U.S.
16 labor market cannot supply the required workers, and then requires that this supplemental, foreign
17 labor supply not harm U.S. farmworkers’ wages and working conditions. (*Id.* at ¶ 33.)

18 To prevent adverse effects on U.S. workers, the DOL’s regulations require that employers
19 utilizing the H-2A program pay a wage that is the highest of either: (1) the Adverse Effect Wage
20 Rate (“AEWR”), (2) the prevailing wage rate, (3) an agreed-upon collective bargaining wage, or
21 (4) the federal or state minimum wage. (*Id.* at ¶ 35.) Under those regulations, the DOL relies
22 primarily on a two-pronged approach based on the AEWR and prevailing wage rate to guard
23 against wage depression that would otherwise result from the hiring of high numbers of foreign
24 agricultural workers. (*Id.*) The prevailing wage rate protects local wages paid, while the AEWR
25 sets a state-wide wage floor to prevent wage disparities over larger geographic areas. (*Id.* at
26 ¶ 36.) The AEWR, however, is the primary wage rate under the H-2A program because it is
27 higher than the other wages in most circumstances. (*Id.*) As a result, the AEWR determines the

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1 wages of approximately 92 percent of the farmworkers working for H-2A program employers.
2 (*Id.*)

3 Prior to December 21, 2020, the DOL’s regulations required the DOL to use the United
4 States Department of Agriculture’s (“USDA”) Agricultural Labor Survey, commonly referred to
5 as the Farm Labor Survey (“FLS”), in order to calculate the AEWR. (*Id.* at ¶ 37.) The USDA
6 has conducted the FLS since 1910. (*Id.* at ¶ 52.) The FLS collects information from farm
7 employers to obtain data on farm employment, hours worked, wages paid, and other statistics.
8 (*Id.*) The National Agricultural Statistics Service (“NASS”)—the USDA’s statistical branch—
9 publishes FLS data semiannually in May and November in the Farm Labor Report (“FLR”). The
10 May report includes employment and wage estimates based on January and April reference
11 weeks, and the November report includes estimates based on July and October reference weeks.
12 (*Id.* at ¶ 53.) The November report also provides annual data based on quarterly estimates. (*Id.*)

13 Aside from a brief two-year period starting in 2008, the DOL’s regulations required it to
14 use the FLS to calculate the AEWR for the H-2A program since the program’s inception in 1986.
15 (*Id.* at ¶ 37.) The DOL had also used FLS data for the H-2A’s predecessor program since 1953.
16 (*Id.*) Because of the DOL’s longstanding reliance on the FLS, the USDA has conducted the FLS
17 in cooperation with the DOL, and the DOL has funded the FLS since July 2011 pursuant to a
18 memorandum of understanding between the two agencies. (*Id.*) Indeed, in a December 2019
19 memorandum of understanding between the DOL and the USDA, the DOL agreed to continue
20 funding the FLS through December 31, 2022. (*Id.* at ¶ 56.)

21 Under the DOL’s prior regulations, which were adopted in 2010, the DOL sets an AEWR
22 for each state or multi-state region using “[t]he annual weighted average hourly wage for field
23 and livestock workers (combined) . . . as published annually by the U.S. Department of
24 Agriculture . . . based on its quarterly wage survey,” the FLS. (*Id.* at ¶ 38); *see also Temporary*
25 *Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6,884 (Feb. 12, 2010)
26 (“the 2010 Rule”). That 2010 Rule explained that the AEWR seeks to approximate the market
27 wages that would exist absent an influx of foreign workers, thus “put[ting] incumbent farm
28 workers in the position they would have been in but for the H-2A program.” (Compl. at ¶ 39.)

1 The DOL elucidated that the AEWR was premised on the idea that “an increase of workers under
2 the H-2A program” would prevent wages from “increas[ing] by an amount sufficient to attract
3 more [U.S.] workers until supply and demand were met in equilibrium.” (*Id.*) In other words,
4 “the AEWR avoids adverse effects on currently employed workers by preventing wages from
5 stagnating at the local prevailing wage rate when they would have otherwise risen to a higher
6 equilibrium level over time.” (*Id.*) The DOL has recognized that without the protections afforded
7 by AEWRs set at regional or state-wide market rates, farmworkers “would be adversely affected
8 by lowered wages as a result of an influx of temporary foreign farm workers.” (*Id.*)

9 In adopting the 2010 Rule, the DOL also concluded that the FLS was the best available
10 data source for establishing AEWRs. (*Id.* at ¶ 40.) The DOL explained at that time that “[t]he
11 FLS is the only annually available data source that actually uses information sourced directly
12 from [farm employers],” which “is a strong advantage of the FLS as the AEWR data source
13 compared to all other alternatives.” (*Id.*) Additionally, the FLS’s “broader geographic scope
14 makes the FLS more consistent with both the nature of agricultural employment and the statutory
15 intent of the H-2A program.” (*Id.*) In short, FLS data was best suited to protect against adverse
16 effects because it allowed the DOL to establish AEWRs at regional market rates. (*Id.*)
17 Conversely, the DOL recognized that using data other than the FLS to calculate AEWRs—in that
18 case, the DOL’s Occupational Employment Statistics (“OES”) survey data—“entails a significant
19 risk that U.S. workers may in the future experience wage depression as a result of unchecked
20 expansion of the demand for foreign workers.” (*Id.*)

21 On July 26, 2019, the DOL published a Notice of Proposed Rulemaking (“NPRM”)
22 proposing to continue its reliance on FLS data to establish AEWRs under the H-2A program. (*Id.*
23 at ¶ 43); *see also Temporary Agricultural Employment of H-2A Nonimmigrants in the United*
24 *States*, 84 Fed. Reg. 36,168 (July 26, 2019) (“the NPRM”). Specifically, the NPRM proposed to
25 establish separate AEWRs for distinct agricultural occupations within each state or region relying
26 on FLS data. (*Id.* at ¶ 44.) If the FLS did not report a wage for a specific occupation in a given
27 state or region, the AEWR would instead be based on OES data. (*Id.*) Further, if OES data did
28 not include a statewide annual average hourly wage for a standard occupational classification,

1 then the AEWR would be based on the national wage for that occupational classification as
2 determined by the FLS or OES. (*Id.*)

3 However, on September 30, 2020, the USDA abruptly announced that it had suspended
4 data collection for the October 2020 FLS and canceled the November 2020 publication of the
5 biannual FLR. (*Id.* at ¶ 55); *see also Notice of Revision to the Agricultural Labor Survey and*
6 *Farm Labor Reports by Suspending Data Collection for October 2020*, 85 Fed. Reg. 61,719
7 (Sept. 30, 2020) (“FLS Suspension Notice”). On October 13, 2020, plaintiffs sued the USDA
8 seeking a temporary restraining order and preliminary injunction preventing the USDA from
9 implementing the FLS Suspension Notice. (Compl. at ¶ 57); *see also United Farm Workers v.*
10 *Perdue*, No. 1:20-cv-1452-DAD-JLT, 2020 WL 6318432 (E.D. Cal. Oct. 28, 2020). In that case,
11 plaintiffs argued that the USDA’s decision was arbitrary and capricious—largely because it failed
12 to consider the DOL’s reliance on the FLS data—and that it failed to comply with the APA’s
13 notice-and-comment requirements. (Compl. at ¶ 57.) Plaintiffs also argued that H-2A foreign
14 guestworkers and U.S. farmworkers would be irreparably harmed if FLS data from 2020 and the
15 November 2020 FLR were not available for the DOL to use in establishing the 2021 AEWRs.
16 (*Id.*) On October 28, 2020, this court granted plaintiffs’ motion and enjoined the USDA from
17 canceling the October 2020 FLS and ceasing publication of the November 2020 FLR. (*Id.* at
18 ¶ 58); *see also Perdue*, 2020 WL 6318432.

19 On November 5, 2020, the DOL published a final rule in the Federal Register announcing
20 changes to its methodology for setting AEWRs under the H-2A program. (Compl. at ¶ 4); *see*
21 *also Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A*
22 *Nonimmigrants in Non-Range Occupations in the United States*, 85 Fed. Reg. 70,445 (Nov. 5,
23 2020) (“the Final Rule”). The Final Rule became effective on December 21, 2020. (Compl. at
24 ¶ 4.) In that Final Rule, the DOL elected to freeze the current 2020 AEWRs for two years. (*Id.* at
25 ¶ 61.) The 2020 AEWRs are based on FLS data reflecting what farmworkers were paid in 2019.
26 (*Id.*) The Final Rule maintains these 2019 wage rates as the AEWRs for most agricultural jobs in
27 2021 and 2022. (*Id.*) Then, beginning in 2023, the DOL would adjust the AEWRs annually
28 using the Employment Cost Index (“ECI”)—an index that measures the change in the cost of



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