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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 UNITED FARM WORKERS, et al.,
12 Plaintiffs,
13 v.
14 THE UNITED STATES DEPARTMENT
15 OF LABOR, et al.,
16 Defendants.
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No. 1:20-cv-01690-DAD-JLT

ORDER AMENDING THE COURT'S MAY 14, 2021 ORDER GRANTING PLAINTIFFS' MOTION SEEKING AN EXTENSION OF THE COURT'S PREVIOUSLY GRANTED PRELIMINARY INJUNCTIVE RELIEF IN THE FORM OF EQUITABLE RESTITUTION AND TEMPORARY STAY OF THIS ORDER

(Doc. Nos. 44, 58, 64)

19
20 On December 23, 2020, the court granted plaintiffs United Farm Workers and UFW
21 Foundation's (collectively, "plaintiffs") motion for a preliminary injunction in this action. (Doc.
22 No. 37.) Therein, the court prohibited defendants United States Department of Labor ("DOL")
23 and the Secretary of Labor (collectively, "defendants") from implementing the final rule
24 published on November 5, 2020, and required defendants to publish 2021 Adverse Effect Wage
25 Rates ("AEWRs") in accordance with the existing regulations. (*Id.* at 39); *see also Adverse Effect*
26 *Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range*
27 *Occupations in the United States*, 85 Fed. Reg. 70,445 (Nov. 5, 2020). On January 12, 2021, the
28 court issued a supplemental order that, among other things, directed defendants "to provide notice

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to all H-2A employers who submit job orders and applications for H-2A labor certification between December 21, 2020 and the publication of the final 2021 AEWRs" and inform them of the potential of backpay claims. (*Id.* at 4.)

On February 23, 2021, the DOL's Employment and Training Administration issued a notice in the Federal Register announcing the 2021 AEWRs applicable to H-2A workers and workers in corresponding employment performing agricultural labor or services other than the herding or production of livestock on the range. *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2021 Adverse Effect Wage Rates for Non-Range Occupations*, 86 Fed. Reg. 10,996 (Feb. 23, 2021). The AEWRs set forth in that notice were effective immediately. *Id.*

On March 11, 2021, plaintiffs filed a motion seeking wage adjustment payments for qualifying farmworkers. (Doc. No. 44 at 9.) Following two hearings, on May 14, 2021, the court granted plaintiffs' motion, which it construed as a motion seeking an extension of the court's previously granted preliminary injunctive relief in the form of equitable restitution. (Doc. No. 58.) The court directed defendants to notify state workforce agencies, employers, and the public within seven days of the court's order that H-2A employers who submitted job orders and applications for H-2A labor certification between December 21, 2020 and February 23, 2021 were required to make wage adjustment payments to qualifying H-2A workers and U.S. farmworkers in corresponding employment who worked during the period from January 15, 2021 to February 23, 2021 ("the Interim Period") and received an hourly wage below the geographically applicable 2021 AEWR. (*Id.* at 13.) The court also directed defendants to require that any H-2A employer with H-2A workers or U.S. farmworkers in corresponding employment during the Interim Period be required to certify compliance with the wage adjustment requirement either as part of its next H-2A application or by other valid and enforceable means. (*Id.* at 14.)

On June 3, 2021, following three weeks of conferring, the parties filed a joint status report in this action which included two requests for modifications of the court's May 14, 2021 order. (Doc. No. 64.) On June 8, 2021, the court directed the parties to submit supplemental briefing providing clarification as to a statement made by plaintiffs' counsel in the status report with

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1 regard to one of the requested modifications of the court's order. (Doc. No. 66.) On June 10,
2 2021, plaintiffs and defendants each submitted a supplemental brief addressing that matter. (Doc.
3 Nos. 67, 68.)

4 At the outset, the court will adopt defendants' unopposed proposal to amend the May 14,
5 2021 order with regards to the administrable and enforceable means of ensuring compliance with
6 the required wage adjustment. (*See* Doc. No. 64 at 3.) The proposed amendment directs
7 defendants to notify covered employers "that they (1) are responsible for maintaining accurate
8 and adequate earnings records, consistent with 20 CFR 655.122(j), to establish compliance with
9 the equitable restitution obligation specified in the court's order, and (2) must certify compliance
10 with the wage adjustment requirement in a manner determined by the Department." (*Id.* at 14.)
11 The court finds this modification to be appropriate and will amend its May 14, 2021 order
12 accordingly.

13 However, the court has not been persuaded to adopt plaintiffs' proposal to remove from
14 the May 14, 2021 order's clause the limiting language "who submitted job orders and applications
15 for H-2A labor certification between December 21, 2020 and February 23, 2021." (*See id.* at 3–
16 4.) Plaintiffs argue that the order as currently worded in this regard is unnecessarily restrictive,
17 because only 1,404 farmworkers will receive wage adjustment payments under the terms of the
18 current order. (*Id.* at 4; *see also* Doc. No. 64-1 at ¶ 9.) They assert that their proposed
19 amendment eliminating that limiting language would instead allow 94,223 farmworkers to
20 receive wage adjustment payments and is therefore necessary to effectuate the equitable relief
21 reflected in the court's May 14, 2021 order and discussed during the hearing on plaintiffs' motion
22 seeking that relief. (Doc. No. 64 at 4–5) (citing Doc. No. 64-1 at ¶ 10.) Plaintiffs note that the
23 court previously referenced their estimate in moving for such relief that more than 73,200 H-2A
24 workers would receive wage adjustments. (*Id.* at 5) (citing Doc. No. 58 at 11).

25 Upon reflection, the court acknowledges an ambiguity within its May 14, 2021 order with
26 regards to which farmworkers would receive backpay under the 2021 AEWR for work they
27 performed during the Interim Period. The court's order intentionally highlighted the importance
28 of reasonable reliance and notice, and it was always the court's intent to strike a balance by

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compensating farmworkers at the correct rate where growers had timely notice of that possibility while not imposing an unfair hardship on growers who had no such notice at the time they applied or contracted for H-2A farmworkers. (*See* Doc. No. 58 at 8–9, 11–12.) It was always the court's view that the latter group could not fairly be required to pay backpay with respect to the Interim Period. However, upon reviewing its order, the court acknowledges that this intention was unfortunately only spelled out in the order clause and not in the body of the order. Moreover, sections of the order could be fairly read as suggesting the appropriateness of a broader backpay order. The undersigned apologizes for the confusion caused by that inartful drafting and the uncertainty that has followed.

That being said, the court reaffirms its findings in the May 14, 2021 order. Although some of the order's language can be construed as granting relief to *all* farmworkers after January 15, 2021 on the basis of public notice, this was never the court's intent. Plaintiffs argue that even if the May 14, 2021 order were amended, all employers were notified that the wage freeze was unlawful and that wage adjustment payments may be required. (Doc. No. 64 at 8.) The court disagrees. In keeping with the court's January 12, 2021 order, the DOL's January 15, 2021 notice stated the following:

> Accordingly, the court ordered the Department to provide notice to *all employers who submit job orders and applications under the H-2A program between December 21, 2020, and the publication of 2021 AEWRs in the Federal Register*, that affected H-2A workers may have a potential claim for backpay. Accordingly, and as part of their regulatory obligations to maintain accurate and adequate earnings records (see 20 CFR 655.122(j)), the Department *reminds employers* to record the names and permanent home addresses of all H-2A workers who may later be entitled to backpay, and make reasonable efforts to ensure that such information for each worker remains current.

See U.S. Dep't of Labor, *Employment and Training Administration—Announcements* (Jan. 15, 2021), https://www.dol.gov/agencies/eta/foreign-labor/news (last visited June 4, 2021). The notice that the court ordered be provided was directed specifically to employers who submitted job orders and applications within a specific period of time. Defendants correctly assert that plaintiffs' proposed amendment would result in imposing a backpay requirement on over 3,500 additional employers who were not on notice that any backpay order that might issue could apply

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to them. (Doc. No. 64 at 11) (citing Doc. No. 64-1 at ¶¶ 9–10).

The court is sympathetic to the concern expressed by plaintiffs' counsel and acknowledges, as it did in its May 14, 2021 order, that every dollar counts for families living at subsistence level. (*See* Doc. No. 58 at 12) (citing *Paxton v. Sec'y of Health & Human Servs.*, 856 F.2d 1352, 1354 (9th Cir. 1988)). But the court must also take into consideration the hardships that plaintiffs' proposed amendment would cause growers who were never placed on notice of the potential for a backpay award when they made operating decisions, since those growers cannot now make adjustments to reflect the true cost of labor. If an employer submitted a job order or H-2A application from December 21, 2021 onward, they knew that the rule had been enjoined. As the court noted in its May 14, 2021 order, growers before that point had no reason to believe the rule was invalid, even if they knew litigation challenging it had been commenced. (*See id.* at 8–9.) In the court's view, the May 14, 2021 order strikes an equitable balance between both these hardships to the best of the court's ability.

However, the court will make a slight modification to the May 14, 2021 order's wording. Plaintiffs contend that "even if the order were to apply more broadly to all employers that submitted applications during the December 21, 2020, to February 23, 2021 period, recent data published by DOL suggests that 6,464 farmworkers would potentially receive wage adjustment payments" because they worked for an employer that submitted an H-2A application between December 21, 2020, and February 23, 2021, and sought workers for the Interim Period.[1] (Doc. No. 64 at 5.) In their supplemental briefing on the issue, plaintiffs clarify that "by simply removing the requirement that employers must have submitted a job order during the relevant period (*in addition* to an H-2A application), the order would still apply to a broader group of farmworkers . . .." (Doc. No. 67 at 3.)

The court apologizes for this confusion stemming from the language employed in that order as well. Nonetheless, here again, it was always the court's intention to impose this backpay requirement on employers who submitted *either* job orders *or* H-2A applications under the H-2A

[1] In their supplemental briefing, defendants note the DOL estimates that expanding the order would likely cover approximately 6,568 certified worker positions. (Doc. No.68 at 2 n.2.)

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