



# THE CHANGING FACE OF H-2B

Rapidly changing rules and regulations make it difficult for landscape contractors using temporary workers to plan for the future work force. BY JANET AIRD

Landscape contractors who hire workers with H-2B visas need to be aware of changes being made to the H-2B visa program. The program provides American employers in non-agricultural fields, such as the landscape industry, the seafood industry and forestry product manufacturers, a source of legal, low-skilled, seasonal foreign labor when they can't find local labor, says Craig J. Regelbrugge, vice president of government relations with the American Nursery & Landscape Association (ANLA).

"This program exists as one of only two options for employers to access legal labor," he says. "The reality is that even in times of high unemployment, it's difficult to attract American workers to seasonal jobs. Most Americans are seeking full-time, year-round jobs."

Employers want to expand the program because these industries will need additional workers when the economy improves, and it's a way to standardize and control the flow of labor

across the border.

Instead, changes that have already been made, and changes that might be made in the next few months, could contract the program.

"This administration has dramatically changed the rules," Regelbrugge says. "They're so extreme and hostile to employers attempting to hire legal workers."

Until Sept. 30 of this year, the U.S. Department of Labor (DOL) based H-2B prevailing wages on the federal Occupational Employment Statistics (OES) database. This database produces employment and wage estimates for more than 800 occupations and wage data in four levels, based on workers' experience. Most H-2B workers were assigned prevailing wages in the lower levels, Levels I and II, he says.

On Sept. 30, the DOL was to have begun requiring employers to pay their H-2B employees the higher of the OES Level III wage, or the Davis-Bacon Act or Service Contract Act wage, if applicable. (The DOL has since pushed the implementation date to Nov. 30, and in a related case, Judge M. Casey Rodgers of the U.S. District Court Northern District of Florida Pensacola Division had issued a temporary restraining order for 14 days against both the Wage Rule and Expediting Rule. A hearing on a permanent injunction was set for October 3, 2011). These acts require contractors and subcontractors working on federal, District of Columbia and federally assisted construction contracts in excess of \$2,000 to pay their laborers at least the prevailing wages and fringe benefits as corresponding classes of laborers working on similar projects in the area (DOL.gov/compliance/guide/dbra.htm). The intended effect of the new rule was to increase the wages of H-2B workers by between 30% and 70%.

"The DOL is arbitrarily saying that the Level III wage is what applies at a minimum," Regelbrugge says. "It essentially elevated wages to those typically paid to much more highly skilled or unionized workers."

According to the DOL, the goal is to improve the standard of living of H-2B workers. That could happen, he says — as long as their employers stay in business.

"A lot of landscape work is done under contract, and there's no mechanism to adjust it," he says, so landscapers have to absorb the increase. Landscapers who are able to increase their prices also find themselves in a bind. Because a large amount of

landscape installation and service work is a discretionary investment, a dramatic increase could price the average customer out of the market altogether.

At press time, one federal lawsuit already has been filed by an alliance of Louisiana industries against the DOL and Homeland Security to postpone or permanently halt the changes. A second lawsuit, being handled by the law firms Greenberg Traurig and CJ-Lake, applies more to the landscape industry. At press time, ANLA is supporting the lawsuit but is not a plaintiff.

Regelbrugge says he believes that DOL lacks the authority to proceed as it is. "There was careful researching of H-2B history," he says. "There were a number of times that the labor department could have changed the program structure, but they didn't. That's tantamount to Congress not authorizing the DOL changes. The DOL is acting in direct conflict with Congressional intent."

## ON THE HORIZON

The next few months might hold more bad news.

While the H-2B program applies to non-agricultural workers, the H-2A program applies to agricultural workers only. Until March 2010, H-2A wages also were based on the OES database, which tended to require the prevailing wages of foreign workers not undercut those of American workers, he says.

In March 2010, the DOL returned to a rule it had used previously to determine H-2A wages for agricultural workers. According to the Georgia Fruit and Vegetable Association ([GFVGA.org/2010/02/gfpga-statement-on-new-h2a-regulations](http://GFVGA.org/2010/02/gfpga-statement-on-new-h2a-regulations)), this rule increased wages to an average of about \$2 above the federal minimum wage in most states. The DOL also required H-2A employers to pay their American workers who perform the same agricultural work as the employers' H-2A workers at least the H-2A wages and benefits for that work, which the DOL defines as "corresponding employment."





“At this point, it appears that the DOL will do (to the H-2B visa program) what it did with the H-2A program,” Regelbrugge says. “All of a sudden, everyone will have to be paid at the corresponding rate.”

The Georgia Fruit and Vegetable Association reports the new rule also increased the difficulty in job advertising and record keeping, the potential for litigation, and the program’s costs.

Regelbrugge expects that at the end of this year, the DOL could make the

## THE E-VERIFY ISSUE



The E-Verify system, which checks authorization documents electronically, is yet another troublesome issue for landscapers.

It’s currently voluntary for most businesses, but if the “Legal Workforce Act” bill proposed by House Judiciary Committee Chairman Lamar Smith (R-TX) passes, most employers across the country will be required to use it within three years. According to the American Nursery & Landscape Association, this could lead to a severe shortage of seasonal workers.

On Sept. 21, the House Judiciary Committee approved the bill by a 22 to 13 vote. At press time, the bill was being sent to the full House.

“If it passes and works, it will have the practical effect of making seasonal workers less employable — and at the same time make H-2B impossible to use,” says Craig J. Regelbrugge, ANLA’s vice president of government relations. “If the program gets trashed, more people will be left with the choice to either downsize or hire workers whose documents might be questionable off the open labor market.”

same changes to the H-2B program. He speculates that the DOL is bowing to union pressure. If they’re trying to protect workers or increase the employment of Americans in temporary, seasonal work in the landscape industry, the changes could well have the opposite effect, he says.

“Landscape operators around the country maintain good, year-round jobs, but must be able to get the seasonal work done,” he says. “American workers will not take all the seasonal jobs and stick with them. We’ve seen in the past that if the wage floor is raised too much, the reaction is the decision not to expand or hire more people. LM

*The author is based in Altadena, CA.*

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