

BY BRANDON DAVIS

Keeping It Moving During the **GREAT RESIGNATION:**

Understanding the Potential Impact of the DOL's Proposed Final Rule for Guest Labor Wage Increase

THIS IS A WARNING CALL TO EMPLOYERS IN THE FORESTRY INDUSTRY.

The Department of Labor (DOL) recently proposed a rule that would apply higher H-2B wages to certain agricultural occupations like trucking, construction, and supervisory occupations. The DOL believes H-2A workers in those occupations are not adequately compensated using the current method for setting H-2A wages. Although the forestry industry traditionally relies on foreign laborers who are hired seasonally through the (non-agricultural) H-2B program, the proposed H-2A wage increase could still impact labor supply in the forestry industry. Changes to the H-2A wage methodology will likely affect the labor supply available to forestry stakeholders who rely on seasonal H-2B laborers.

Unlike the H-2B program, the H-2A program is not subject to a statutory cap on the number of foreign workers who may be admitted to work (currently 66,000 annually). Thus, H-2B workers in the forestry industry could look to switch jobs in the agricultural industry without fear of visa caps. If the DOL's proposed rule goes into effect, it could incentivize forestry workers to make this switch. For example, why would a worker drive

a truck for a forestry employer and worry each year about not being admitted because of the visa cap? Wouldn't a returning worker instead consider a broader range of higher-paying jobs that may become available if H-2B wages are made applicable to forestry-similar occupations like trucking?

In sum, if the DOL's proposed rule goes into effect, forestry employers should brace for increased labor supply constraints as certain H-2B laborers look elsewhere for higher wages. The proposed final rule

800 occupations. The industries with the highest levels of employment in the Heavy and Tractor-Trailer Truck Drivers [SOC 53-3032] category include Truck Transportation, Merchant Wholesalers, Nondurable Goods, Warehousing and Storage, Nonmetallic Mineral Product Manufacturing, and Merchant Wholesalers. The DOL proposes using H-2B wages when the agricultural occupational code, All Other Workers (SOC 45-2099), is at play in Applications

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cannot be understood in a vacuum limited to agricultural employers. It may have an impact across both guest labor programs, especially in the forestry industry that is so closely related to agriculture.

The U.S. Bureau of Labor Statistics' Occupational Employment and Wage Statistics (OEWS) program collects data on wage and salary workers in non-farm establishments in order to produce employment and wage estimates for about

for Temporary Labor Certification. Wages in that category would go from approximately \$12.00 per hour (in many states) in the agricultural context to approximately \$24.00 per hour (in many states) in the H-2B context. That massive increase in wages would impact ancillary agricultural occupations, like transportation, as well as the guest laborers who currently staff those jobs through the H-2B program.

Expanding the pool of seasonal employers who are required to pay H-2B wages, without also imposing cap limitations on those employers, likely means the seasonal labor supply will flow to the less restrictive points of entry for employment, i.e., to agriculture.

The May 2020 OEWS for Heavy and Tractor-Trailer Truck Drivers [SOC 53-3032] engaged in Sector 11 – Agriculture, Forestry, Fishing and Hunting Support Activities for Crop Production [115100] included 5,430 wage surveys – so the transportation concern in the forestry space is significant. By comparison, in a Driver Shortage Update published on October 25, 2021, the American Trucking Association pointed to historically high truck driver shortages of over 80,000 drivers. Various sectors within the trucking industry already are not able to identify sufficient truck drivers, and the forestry industry is no exception.

Although Heavy and Tractor-Trailer Truck Drivers only represent 0.2% of positions certified in the H-2A program, those occupations will receive expanded employment opportunity if the proposed final rule is enforced as planned in mid-2022. Finalizing the proposed rule would result in a scenario where truck drivers could be hired under both the H-2A and H-2B programs, which likely would result in labor competition among employers.

The bottom line is that the DOL's proposal would cause a very limited number of H-2A occupations to be paid wages akin to those that H-2B workers earn while performing broadly similar duties — and non-agricultural employers like forestry might shoulder the labor burden in a scenario where labor supply is already unbearably tight.

U.S. employers are already managing the Great Resignation that followed the onset and aftermath of COVID-19 in 2020. In addition, employers who rely on the H-2B guest labor program are facing a labor shortage that will only be compounded if H-2B wages are expanded to certain agricultural occupations. Forestry industry stakeholders should remain alert and take action to secure their labor supply in the event the proposed final rule takes effect. ■

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