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## Growers Sue DOL, DHS Over H-2A Visa Reform

By **Julie Zeveloff**

Law360, New York (June 10, 2009) -- A slew of growers' associations have filed suit against the U.S. Department of Labor and the U.S. Department of Homeland Security, claiming they could be unfairly prosecuted for labor law violations under a new rule relating to foreign agricultural workers hired under H-2A visas.

The North Carolina Growers' Association, National Christmas Tree Association, Florida Fruit and Vegetable Association and over a dozen other groups lodged a complaint against the government agencies that oversee the H-2A visa program on Tuesday in the U.S. District Court for the Middle District of North Carolina.

The complaint claims Hilda L. Solis, the Obama-appointed secretary of labor, violated the Administrative Procedure Act when she withdrew an H-2A rule implemented by her predecessor and replaced it with "an entirely different set of regulatory standards" that adversely affect farmers.

According to the agricultural groups, Solis' rule leaves them vulnerable to lawsuits claiming they violated the federal Fair Labor Standards Act by failing to reimburse workers hired on H-2A visas for relocation expenses in their first paychecks.

The associations seek a declaratory judgment that H-2A contracts signed between Jan. 17, 2009, when former Secretary of Labor Elaine Chao's H-2A rule went into effect, and March 26, 2009, when Solis withdrew that rule, are in compliance with the FLSA.

The H-2A program, implemented in 1987, provides farmers with legally authorized, nonimmigrant agricultural workers. Chao's overhaul of the program in 2008 streamlined the application process and clarified issues related to wage-and-expense calculations and worker protections, according to the complaint.

After Chao proposed the updated rule but before it went into effect, several class and collective actions were filed accusing farmers of violating minimum wage requirements by failing to reimburse H-2A workers for relocation costs and related travel expenses with their first week's pay, the suit said.

Chao purported to clear the issue in a preamble to the updated H-2A rule, saying that relocation expenses do not have to be repaid within the first workweek because "they are not primarily for the benefit of the employer." Between January and March, the DOL approved many H-2A visas stating relocation costs need not be immediately reimbursed, the suit said.

But in March, shortly after taking office, Solis withdrew Chao's interpretation of the reimbursement provision, a move that "presumably put farmers who applied for H-2A workers between Jan. 17, 2009 and March 26, 2009, and whose workers have begun work, in potential violation of the Section 6 minimum wage provisions of the FLSA and in breach of applicable state wage payment laws," the suit contends.

Solis also promulgated a new rule that, in effect, nullified Chao's rule and resurrected the original 1987 H-2A rule, the complaint said, adding that the public was given "an inadequate" 10 days to comment on Solis' proposal.

"The DOL did not adequately consider the impact on farmers of a substantial rule change to take effect in the middle of a growing season, including but not limited to the impact of a midseason rule change on the farmers' pre-existing contractual and other obligations," the complaint said.

Solis' rule also adversely limits the number of H-2A workers that can be hired for the forest products industry and revokes "agricultural" status for workers in the Christmas tree farming industry, according to the growers' associations.

The suit seeks a judgment nullifying Solis' rule, an injunction barring the government from enforcing Solis' rule, or the withdrawal of Chao's rule or, in the alternative, a judgment that contracts signed between Jan. 17, 2009 and March 26, 2009 are in compliance with the FLSA.

Neither the DOL nor the DHS had a comment on the suit Wednesday.

The plaintiffs are represented in the matter by Constangy Brooks & Smith LLP.

The case is North Carolina Growers' Association Inc. V. Solis et al., case number 09-cv-00411, in the U.S. District Court for the Middle District of North Carolina.

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