Federal Appeals Court Rules Employers Need Not Reimburse H-2B Workers' Immigration-Related Expenses

By Sean G. Hanagan and William J. Manning

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The full federal appeals court in New Orleans has ruled, in an 8-6 decision, that the Fair Labor Standards Act (FLSA) does not require employers to reimburse H-2B workers for their employment-related visa, travel, and recruitment expenses. *Castellanos-Contreras v. Decatur Hotels LLC,* No. 07-30942 (5th Cir. Oct. 1, 2010). In doing so, the Court rejected the position advocated by the U.S. Department of Labor (DOL) and declined to give retroactive effect to recent amendments to the H-2B regulations. The H-2B non-agricultural temporary worker program allows U.S. employers to bring foreign nationals to the United States to fill temporary non-agricultural jobs.

"Tools of the Trade"

In August 2005, Hurricane Katrina hit a number of states that bordered the Gulf of Mexico. In the aftermath, Decatur Hotels worked with a foreign recruitment company to fill open positions with foreign workers who came to New Orleans on H-2B visas for employment at its hotels. As part of this arrangement, the workers paid their own visa-application fees, transportation costs for relocation to the U.S., and placement fees charged by recruiters. Decatur, too, had to pay its share of the workers' visa applications and recruitment fees.

The workers later brought an FLSA collective action against Decatur, alleging that the visa, travel, and recruitment expenses were "tools of the trade" pursuant to FLSA regulations for which they should have been reimbursed during their first week of work. According to the workers, they were "specifically required for performance of the employer's particular work" and were "primarily for the benefit and convenience of the employer."

Under the plaintiffs' theory, because Decatur did not provide reimbursement, such expenses should have been deducted from their first week's pay before calculating whether the company paid the minimum wage, as required by the FLSA. After taking these expenses into account, the plaintiffs alleged, the company paid them below the minimum wage.

The company contended that it was not required under the FLSA (or any other applicable law) to reimburse such expenses.

Ruling for the workers, the district court held that FLSA applies to H-2B workers, but did not decide whether the company was required to reimburse the plaintiffs' expenses. It held that "the only remaining issues were the strictly mathematical calculations of wages actually paid and, should that yield a finding of liability, the amount of damages due."

On appeal, the Fifth Circuit court entered summary judgment in favor of the company. While deciding the FLSA applies to H-2B workers, the Court ruled that employers are not required to reimburse the workers' visa, travel, and recruitment expenses. The plaintiffs sought rehearing and, ultimately, the case was reviewed by the full appeals court.

Not Required to Reimburse Visa, Travel, and Recruitment Fees

Declining to follow the DOL's recommendation in its friend-of-the-court brief in support of the workers, as well as a recent DOL interpretation of the applicable FLSA regulations, the full Court held that the employer was not required to reimburse the plaintiffs for their visa, travel, and recruitment

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expenses.

According to the majority consisting of eight judges, the plaintiffs' argument "stretches the concept of 'tools of the trade' too far." The Court held that "[a] visa and physical presence at the job site are not 'tools' particular to this 'trade' within the meaning of the applicable regulations" (which do not specifically reference such expenses).

With regard to the recruitment fees, the Court concluded that new DOL regulations that "provide protection for guest workers from unscrupulous recruiters by requiring employers to contractually obligate those with whom they work not to charge employees recruiting fees" suggest that such expenses were not previously reimbursable.

Moreover, the majority declined to follow the Department's 2009 interpretation calling for reimbursement for visa, travel, and recruitment expenses. "[C]hanges in the law will not be applied retroactively when the result would be that 'new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard,'" the Court said.

The majority also drew a distinction between this and a similar Eleventh Circuit case that held that visa and travel expenses must be reimbursed for H-2A workers. (H-2A workers temporarily relocate to the U.S. to perform "agricultural labor and services," while H-2B workers perform "other non-agricultural labor or services.") According to the Court, the Eleventh Circuit case is distinguishable because DOL regulations specifically require some reimbursement for travel expenses in connection with H-2A visas.

Dissent Sides with DOL Interpretations

Six judges dissented. They contended the majority erroneously disregarded the DOL's long-standing interpretation of the "tools of the trade" regulations. "For nearly fifty years," the dissent said, "the DOL has interpreted its regulations pertinent to this case to mean that employers must bear the visa, transportation and recruitment costs incidental to their hiring of temporary foreign guest workers, and they must reimburse these costs to workers whenever the employer's failure to do so would effectively reduce the employee's wage below the statutory minimum in the first pay period."

The dissent also criticized the majority for not following the Eleventh Circuit's decision regarding visa and travel expenses, finding the distinction between H-2A and H-2B workers spurious.

Finally, the dissent asserted that the Court only had authority to review the district court's ruling that the FLSA applies to H-2B workers.

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Although this decision is binding precedent in the Fifth Circuit (which has jurisdiction over Louisiana, Mississippi, and Texas), insofar as the decision may conflict with both the Eleventh Circuit (having jurisdiction over Alabama, Florida, and Georgia) and the DOL's recent interpretation, employers outside the Fifth Circuit should tread carefully with respect to reimbursing H-2B workers for visa, travel, and recruitment expenses where their failure to do so would effectively bring employees' wage below the federal minimum.

Jackson Lewis attorneys are available to assist employers with this and other workplace requirements.

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