UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FLORIDA GROWERS ASSOCIATION, INC., et al.,
Plaintiffs,

v. Case No. 8:23-cv-889-CEH-CPT

JULIE A. SU, Acting Secretary of Labor, in her official capacity, et al.,
Defendants.
_____/

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW

As directed by the Court [Doc. 32], Plaintiffs respectfully submit this Supplemental Memorandum of Law to address certain issues raised during the hearing on Plaintiffs' Time-Sensitive Motion for Preliminary Injunction [Doc. 16].

I. Corresponding Employment

Counsel for Defendants raised the idea (raised more extensively in the *amici*'s brief) that H-2A employers could mitigate the harm from the new AEWR rule by splitting their job order into multiple job orders based on the tasks that the Department of Labor considers to fall within or without the "Big 6" categories reported by USDA's Farm Labor Survey ("FLS"). This approach has some obvious practical problems (9 harvest workers on one contract plus 1 harvest worker who is also authorized to drive the van to get them to work; if that 1 worker falls ill, the entire farm shuts down). The issue on which the Court sought supplemental briefing was

the "corresponding employment" issue raised at pages 46-47 of the hearing transcript.

The scenario raised is this: a strawberry farm needs 30 workers to harvest its berries on a full-time basis. Once the berries have been picked, the farm would need another worker to drive a truck loaded with berries to be cooled and packed for shipment to supermarkets. As discussed at the hearing, that work only requires about 30 minutes per day, so the driver would also need to help with the hand-harvesting when not driving. The farm files 2 job orders: (#1) harvest-only for $14.33/hour in Florida; and (#2) truck-driving and harvest for $23.89/hour in Florida under the new AEWR rule. If the farm employs one or more U.S. workers who would only perform hand-harvesting duties and never drive trucks, cannot drive trucks, would the Department say that the U.S. workers must be paid $14.33/hour or $23.89/hour?

After the hearing, in attempting to coordinate a joint statement of agreed-upon facts with counsel for Defendants, undersigned counsel reiterated the scenario and inquired as to the Department's position on multiple occasions. During the 30-minute call on Friday afternoon that counsel for Defendants eventually agreed to, they finally stated that the Department's position was that **the $23.89 wage would apply to the U.S. worker**, regardless of never driving a truck or being able to ever drive a truck. Thus, the Department of Labor is admitting that it is ignoring the worker's actual abilities and job duties when setting their wage and simply applying wages based on which is highest. For how could a U.S. strawberry picker who cannot drive a truck

possibly "adversely affect" the wages of U.S. truck drivers or be himself or herself injured by not being paid for *someone else's* job?

Moreover, this position significantly undercuts the Department's claim that employers can mitigate the harm of paying illegally high wages simply by filing more job orders with the Department. Since the U.S. workers must be hired if they apply (20 C.F.R. § 655.135(d)), all workers covered by a contract must be offered at least three-fourths of the hours on a contract (20 C.F.R. § 655.122(i)), and the job opportunity must be for at least 35 hours per workweek (20 C.F.R. § 655.135(f)), the Department has left no way out of paying workers illegally high wages for work they will never perform. That violates the "similarly employed" requirement and is also quintessentially arbitrary and capricious.

In any event, mitigation of harm is a distraction here. If, as Plaintiffs assert, the Department's wage rule exceeds the authority that Congress provided in 1986 or is arbitrary and capricious, then it makes no difference at all that employers might be able to partially mitigate the harm from the illegal rule.

II. Use of OEWS Data

Another issue raised during the hearing that could benefit from clarification here involves the Department's use of OEWS data to set H-2A wages at all. The core concern of "adverse effect" undergirding the entire H-2A wage-setting process is that the availability of employing H-2A workers might reduce the wage rates earned by

"similarly employed" U.S. workers because a farm could pay less for a foreign worker to perform "such duties" certified by the Secretary of Labor. That makes sense.

The Department will only certify work that it considers to be "agricultural," under the FLSA and Internal Revenue Code definitions of that term. The shorthand used by the Department is that such work is limited to activities "by a farmer or on a farm." H-2A workers may only perform truck-driving duties, for example, if they are employed by a farm; farm labor contractors are not permitted to employ H-2A workers for such work, according to the Department. *See, Everglades Harvesting and Hauling, Inc. v. Scalia*, 427 F.Supp.3d 101 (D.D.C. 2019); 20 C.F.R. § 655.103(c).

Thus, the Department's use of wages from ***non-farm*** employers to set H-2A truck-driving wages can only be described as arbitrary and capricious or beyond the authority conveyed by Congress. The Department is looking to the wages paid to these non-farm drivers to protect them from a harm that could never possibly occur. Paying H-2A drivers $14.33/hour is less than paying them $23.89/hour; but none of the employers surveyed to obtain the $23.89/hour figure could ever hire an H-2A worker to perform that work, let alone at the FLS-based AEWR.[1] Thus, the asserted wage-eroding danger that the Department uses to justify the new rule is a complete impossibility. This rule is a solution in search of a problem.

[1] As a reminder, as designed and implemented by USDA and DOL, the FLS only surveys farm employers; the OEWS only surveys non-farm employers.

Using OEWS to set H-2B non-agricultural wages makes some sense. And like the U.S. workers whose wages are surveyed for OEWS, H-2B workers do not receive free housing or local transportation from their employers. But H-2A workers do. So a $23.89/hour wage paid to U.S. or H-2B workers is really closer to a $30 wage if paid to an H-2A worker, in light of the additional non-cash compensation required by the H-2A program. Requiring farms to pay $23.89 for any truck drivers – U.S. or H-2A – and also provide free housing and local transportation goes far beyond the Department's mandate from Congress to avoid "adverse effect." This is not a mere policy dispute but a violation of law by the agency that must be set aside.

III. Regulatory Flexibility Act

Defendants argue that Plaintiffs' claim under the Regulatory Flexibility Act (RFA) is not applicable. The Court should reject Defendants' arguments.

First, Defendants argue the Court lacks jurisdiction under the statute. Doc. 22 at 16. Plaintiffs' Complaint styles Count IV, the RFA claim, as being under 5 U.S.C. § 601, *et seq. See* Doc. 1 at 30. While Defendants are correct that § 611 does not provide for an independent cause of action under § 603 (which requires an agency to make an *initial* regulatory flexibility analysis), Plaintiffs' arguments fit squarely under the requirements of § 604 (which requires an agency to make a *final* regulatory flexibility analysis). Section 604 is reviewable under § 611(a)(1) and (2), making Plaintiffs' claim viable. *See Allied Loc. & Reg'l Mfrs. Caucus v. U.S. E.P.A.*, 215 F.3d 61, 79 n.18 (D.C. Cir. 2000) ("[C]hallenges to compliance with RFA section 604 (concerning final

regulatory flexibility analyses) are included in the jurisdictional list of section 611."). Under § 604, an agency is required to explain why the agency chose the final version of the promulgated rule as compared to "other significant alternatives[.]" 5 U.S.C. § 604(a)(6). Thus, Plaintiffs' claim (and by extension, the arguments) related to the Rule "waving away [alternative] options … without explanation or proof," Doc. 16 at 20, are properly before the Court.

Second, Defendants argue that "these Plaintiffs are not small businesses and thus, cannot even bring an RFA claim." Doc. 22 at 16. Defendants argument and citation are misplaced. In the only case cited by Defendants to support the substance of the argument, the district court discarded the claims because the state of Alabama did not fall under the definition of "small governmental organization" as contemplated by the RFA, ignoring analysis under the definitions applicable here. *Alabama v. Ctrs. For Medicare & Medicaid Servs.*, No. 08-cv-881, 2010 WL 12680, at *7 (M.D. Ala. Mar. 30, 2010) ("The definitions for 'small business' and 'small organization' clearly exclude Alabama[.]"). A "small business" under the RFA is defined as an enterprise that "is independently owned and operated and which is not dominant in its field of operation[.]" 5 U.S.C. § 601(3) (citing the Small Business Act's definition of "small business concern"). A "small entity" or "small organization" under the RFA is defined as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field[.]" 5 U.S.C. § 601(4).

The Complaint includes allegations sufficient to find that the Plaintiffs are either small businesses, small entities, or small organizations. Doc. 1 ¶¶ 17–22 (describing the Plaintiffs as "family-owned strawberry farms[,]" "a Florida not-for-profit corporation," "a national association … focusing exclusively on agricultural labor issues from the agricultural employer's viewpoint," "Florida's grower-shipper community[,]" and "Florida's largest citrus grower organization").[2] Moreover, this Court has previously granted summary judgment on two counts under the RFA in favor of a "coalition of shark fishermen and shark fishing organizations." *See S. Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1434–437 (M.D. Fla. 1998).[3] Accordingly, and for similar reasons as discussed in Plaintiffs' associational standing arguments, *see* Doc. 16 at 12–13, the Court should reject Defendants' arguments.

Assuming *arguendo* that Plaintiffs' *claims* under § 601 *et seq.* are not viable as independent causes of action, *arguments* about the agency's compliance with the RFA are still certainly applicable to the APA challenge. Defendants' own cases support reviewing RFA arguments as contributing to the agency's arbitrary and capricious action. The Court may review compliance with the RFA's requirements "in determining whether [the agency] complied with the overall requirement that an

[2] Individual Plaintiffs, G&F Farms, LLC and Franberry Farms, LLC, are strawberry farms with gross annual receipts under the $5.5 million level to qualify as a "small business" as defined by the Small Business Administration and the Office of Management and Budget. https://tinyurl.com/SBA-SizeStandards

[3] As stated in ¶ 18 of the Complaint, NCAE represents an estimated 80% of all U.S. agricultural employers, who employ roughly 85% of all H-2A workers in the U.S.

agency's decisionmaking be neither arbitrary nor capricious." *Allied L. & Reg'l Mfrs. Caucus*, *supra*, 215 F.3d at 79.

Certainly, the poor discussion regarding alternative options advanced by multiple parties, and the blatant ignoring of the warnings from the Small Business Administration, an agency within the same administration, all provide ample evidence of the agency's arbitrary and capricious actions in promulgating the Rule. Thus, the agency failed to meet the RFA's requirements, and the Rule should be remanded to the Department to conduct a proper analysis of the Rule's costs and alternatives.

IV. Additional Issues

Briefly, the Court asked if a "peppercorn" increase in wages would support a finding of irreparable harm. The pre-split Fifth Circuit addressed that issue in 1974, "Assuming that the threatened harm is more than *de minimis*, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 575 (5th Cir. 1974). As pleaded in this case and discussed in the declarations, the harm here is in the millions of dollars and is absolutely irreparable. Thus, Plaintiffs meet their burden.

With respect to the standing argument referenced by Defendants at the hearing (but not in their brief), the issue of association standing was discussed at some length in Plaintiffs' brief and no specific arguments were raised as to G&F or Franberry. To the extent that Defendants are attempting to claim that no one will be hurt by the

wage increases scheduled to take effect as soon as this past Wednesday and on a rolling basis going forward, the irreparability of harm of paying illegal wages without remedy has also been explained. If Defendants find fault with the proposed injunction applying to the Department's enforcement of the illegal rule on a nationwide basis, Defendants have failed to articulate how it might apply an injunction that only applied to the less than 20% of H-2A employers not already represented by NCAE, or how that is consistent with general notions of fairness. The vaccine-mandate case cited by Defendants is inapposite – medical care is inherently individual, whereas DOL has issued a rule of consistent nationwide application. This is not an as-applied challenge to particular employers seeking relief; this is an as-written challenge to the Department's entire rule and the Department's authority to implement it at all. *See Bayou Lawn & Landscape Servs. v. Sec'y of Lab.*, 713 F.3d 1080 (11th Cir. 2013) (upholding nationwide injunction, vacating H-2 rule promulgated by Department of Labor).

For all the reasons in Plaintiffs' brief, as discussed during the Court's hearing on Plaintiffs' motion, and as set forth above, Plaintiffs respectfully ask the Court to preliminarily enjoin the Defendants' rule and its enforcement.

Dated: June 2, 2023

FLORIDA GROWERS ASSOCIATION, INC.; NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS; FLORIDA CITRUS MUTUAL; FLORIDA FRUIT AND VEGETABLE ASSOCIATION; G&F FARMS, LLC, AND FRANBERRY FARMS, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2023, I filed the foregoing Supplemental Memorandum of Law ("Memo") via CMECF which will serve all attorneys of record.

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Attorney