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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RAMON TORRES HERNANDEZ
and FAMILIAS UNIDAS POR LA
JUSTICIA, AFL-CIO, a labor
organization,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF LABOR, MARTIN J. WALSH, in
his official capacity as United States
Secretary of Labor; WASHINGTON
STATE EMPLOYMENT
SECURITY DEPARTMENT, and
CAMI FEEK, in her official capacity
as Commissioner,

Defendants.

NO. 1:20-CV-3241-TOR

ORDER GRANTING IN PART
MOTION TO DISMISS AND
DENYING MOTION FOR
PRELIMINARY INJUNCTION

BEFORE THE COURT are Plaintiffs’ Motion to Supplement and Amend
Complaint (ECF No. 168), Defendants’ Motions to Dismiss (ECF Nos. 159, 166),
and Plaintiffs’ Third Motion for Preliminary Injunction (ECF No. 172). These

1 motions were submitted for consideration without oral argument. The Court has
2 reviewed the files and record herein, and is fully informed.

3 **BACKGROUND**

4 This case concerns the method in which the United States Department of
5 Labor (DOL) set prevailing wage rates for farmworkers in the H-2A temporary
6 agricultural visa system. ECF No. 86. On December 17, 2020, Plaintiffs filed the
7 Complaint against Defendants. ECF No. 1. On January 4, 2021, Plaintiffs filed a
8 First Amended Complaint. ECF No. 14.

9 On March 1, 2021, the Court granted in part and denied in part Plaintiffs'
10 Revised Motion for Preliminary Injunction. ECF No. 57. Specifically, the Court
11 ordered: “Defendants must **CHANGE** the prevailing wage rate for *all* Washington
12 State harvest activities to the previous prevailing wage rate certified from the 2018
13 prevailing wage survey” and “Defendants must **CONDUCT** a prevailing wage
14 survey, within a reasonable time, that is not arbitrary and capricious, in order to
15 certify new – current—prevailing wage rates.” ECF No. 57 at 33-34, ¶¶ 3-4.

16 On October 8, 2021, Plaintiffs filed the operative Second Amended
17 Complaint. ECF No. 86.

18 On December 1, 2021, the Court granted the parties’ Joint Motion for Stay
19 of Proceedings, staying all proceedings except for the parties’ sealed Joint Motion
20 for Modified Order until June 2022. ECF No. 101.

1 On December 7, 2021, the Court granted the parties' Joint Motion for Entry
2 of Modified Order, which ordered: (1) "Defendant ESD shall administer the 2021
3 survey with the language and procedures as outlined above. ESD shall include a
4 definition for the term 'hourly guarantee' with the survey in the future if doing so
5 is supported by survey best practices and USDOL guidance" and (2) "Defendant
6 USDOL will evaluate the 2020 prevailing wage survey results using its normal
7 validation process and will publish any validated PWRs promptly." ECF No. 103
8 at 6-7, ¶¶ 2-3.

9 On June 3, 2022, the Court granted the parties' extension of the stay until
10 November 30, 2022. ECF No. 106.

11 On October 12, 2022, DOL published a final rule on its prevailing
12 wage finding methodologies. *Temporary Agricultural Employment of H-2A*
13 *Nonimmigrants in the United States*, 87 Fed. Reg. 61660 (Oct. 12, 2022)
14 (2022 Final Rule). The 2022 Final Rule went into effect November 14,
15 2022. *Id.*

16 On November 3, 2022, the Court denied Plaintiffs' Second Motion for
17 Preliminary Injunction on Plaintiffs' survey validation process, employer survey
18 methodology, and prevailing wage policies claims regarding the 2021 employer
19 survey. *See* ECF No. 137.

1 On November 13, 2022, Plaintiffs lodged a notice of interlocutory appeal.
2 ECF No. 138. On December 9, 2022, the Ninth Circuit stayed the appeal. ECF
3 Nos. 150, 154. The appeal remains pending.

4 On December 2, 2022, Washington’s Employment Security Department
5 (ESD) withdrew its prevailing wage findings from the 2021 Employer Survey
6 under the Handbook 385 methodology and stated it would resubmit findings using
7 the 2022 Final Rule. ECF No. 151. The parties agreed to an extension of case
8 deadlines as the 2022 Final Rule “changed the prevailing wage finding process
9 significantly” and “could change the landscape of the case significantly, including
10 by resolving existing claims and by obviating Plaintiffs’ need to supplement or
11 amend the complaint.” *Id.* at 3.

12 On March 27, 2022, ESD published preliminary revised wage findings from
13 the 2021 Employer Survey. ECF No. 160-2. ESD decided not to resubmit the
14 findings on the 2021 Employer Survey, citing the impending publication of the 2022
15 Employer Survey results. ECF No. 160-3.

16 DISCUSSION

17 I. Motion to Amend Complaint

18 Rule 15(a)(2) instructs courts to “freely give leave [to amend] when justice
19 so requires.” “This policy is to be applied with extreme liberality.” *Eminence*
20 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (internal citation

1 and quotation marks omitted). However, a court may deny leave to amend due to
2 undue delay, the movant's bad faith or dilatory motive, repeated failures to cure
3 deficiencies by previous amendments, undue prejudice to the nonmoving party,
4 and futility of amendment." *Zucco Partners, LLC v. Digimarc Ltd.*, 552 F.3d 981,
5 1007 (9th Cir. 2009). A court's discretion is "particularly broad where [the]
6 plaintiff has previously amended the complaint." *Allen v. City of Beverly Hills*,
7 911 F.2d 367, 373 (9th Cir. 1990) (internal citation omitted). A defendant is
8 prejudiced by amendments with new theories and/or a fundamental shift in strategy
9 at a late stage of litigation. *See Morongo Bande of Mission Indians v. Rose*, 893
10 F.2d 1074, 1079 (9th Cir. 1990); *Acri v. Int'l Assoc. of Machinist & Aerospace*
11 *Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986).

12 DOL contends that the original case focused on a narrowly-tailored, as-
13 applied challenge to the 2019 prevailing wage survey whereas the proposed Third
14 Amended Complaint is a broad, facial challenge to the H-2A prevailing wage
15 methodology that raises new theories of liability. ECF No. 177 at 7. In particular,
16 DOL contends the most significant changes are Plaintiffs' new challenges to (1)
17 DOL's failure to take steps to verify the accuracy of employer survey responses,
18 (2) DOL's failure to check for no-response bias or otherwise ensure that the
19 responses are representative and statistically significant, and (3) DOL's policy of
20 defaulting to the Adverse Effect Wage Rate (AEWR) if the prevailing wage

1 finding methodology fails to find a prevailing wage for a crop activity. *Id.* at 7–9.
2 DOL does not object to challenges to discrete aspects of the new prevailing wage
3 finding methodology set forth in the 2022 Final Rule under 20 C.F.R. §§
4 655.120(c)(1)(vii), (viii), and (ix). *See* ECF No. 168-1 at 49–53, ¶¶ 185–97, at 58,
5 ¶ 212.

6 Plaintiffs contend Defendants are not prejudiced by the proposed Third
7 Amended Complaint where the facts are well known to Defendants, the
8 administrative record has not yet been defined, no discovery has occurred, and the
9 Court has made no dispositive ruling. ECF No. 168 at 11. Plaintiffs and DOL
10 oppose the dismissal of ESD. ECF No. 177 at 10–11.

11 The Court agrees with Defendants that this case has evolved (and continues
12 to evolve) from an as-applied challenge to the 2019 Employer Survey to facial
13 challenges that purportedly survive superseding rules and the Court’s mandatory
14 injunction and modified order. This case is almost three years old, with little to no
15 momentum in moving forward. The Court grants Plaintiffs’ motion in part,
16 allowing leave to amend for unresolved claims affected by the 2022 Final Rule.
17 Finally, the Court notes while there are no claims against ESD, it remains joined as
18 a necessary party to this action. *See Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337,
19 1344 (9th Cir. 1995).

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1 **II. Motions to Dismiss**

2 Federal Rule of Civil Procedure 12(b)(1) authorizes a party to file a motion
3 to dismiss for lack of subject matter jurisdiction. Article III of the Constitution
4 limits the jurisdiction of federal courts to “cases” and “controversies”, which limits
5 federal courts to resolving “the legal rights of litigants in actual controversies.”
6 *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (internal citation and
7 quotations omitted). “A case is moot when it has lost its character as a present,
8 live controversy of the kind that must exist if we are to avoid advisory opinions on
9 abstract propositions of law.” *Oregon v. FERC*, 636 F.3d 1203, 1206 (9th Cir.
10 2011) (internal quotation marks omitted). “[T]he repeal, amendment, or expiration
11 of challenged legislation is generally enough to render a case moot and appropriate
12 for dismissal.” *Bd. of Trustees of Glazing Health and Welfare Trust v. Chambers*,
13 941 F.3d 1195, 1198 (9th Cir. 2019). The same principle applies when a
14 regulation or ordinance is repealed or amended. *Rosebrock v. Mathis*, 745 F.3d
15 963, 971–72 (9th Cir. 2014).

16 As relevant here, the 2022 Final Rule states:

17 This final rule does not formally rescind ETA Handbook 385, but
18 SWAs and other surveyors must follow the methodological
19 requirements in § 655.120(c) when conducting wage surveys. In this
20 way, the survey standards in § 655.120(c) replace the standards in
ETA Handbook 385 for H-2A prevailing wage surveys. This final
rule clarifies, however, that SWAs and other surveyors may refer to
the Handbook and other applicable authorities for additional guidance
on issues related to the prevailing wage survey methodology not

1 explicitly addressed in the Department’s regulations at 20 CFR part
2 655, subpart B, and 29 CFR part 501.

3 *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*,
4 87 Fed. Reg. 61660-01 at 61700.

5 The claims that rely on Handbook 385’s provisions that were replaced by
6 § 655.120(c) are moot. The Court addresses Plaintiffs’ claims below.

7 **A. Failure to Validate Survey Responses**

8 Plaintiffs contend that Judge Mendoza’s mandatory injunction requires some
9 action as to the worker survey, and as a result the claim is not moot. Plaintiffs
10 argue that the mandatory injunction either required Defendants to use the worker
11 survey to validate the results of the employer survey or otherwise change the
12 worker survey or use it in a different manner since the injunction. ECF No. 189 at
13 13. Plaintiffs request a merits determination on this claim. *Id.* at 16 (citing *Univ.*
14 *Texas v. Camenisch*, 451 U.S. 390, 394–96 (1981)).

15 The mandatory injunction required Defendants (1) to change the prevailing
16 wage rate for all Washington State harvest activities to the previous prevailing
17 wage rate certified from the 2018 prevailing wage survey and (2) to conduct a
18 prevailing wage survey within a reasonable time that is not arbitrary and capricious
19 in order to certify the current prevailing wage rates. *See* ECF No. 57 at 33–34.

20 While Judge Mendoza noted “Defendants acted arbitrarily and capriciously by not

1 conducting a reliable worker survey to validate the results of the employer survey”,
2 the statement is dicta considering the Court concluded that a “worker survey or
3 *otherwise*” “would help” Defendants consider employer surveys. *Id.* at 25–26
4 (emphasis added); *see also* ECF No. 103. The Court affirmed that the mandatory
5 injunction did not require DOL to validate employer surveys with worker surveys
6 moving forward. ECF No. 137 at 7. On the merits, the mandatory injunction does
7 not provide a basis for Plaintiffs to pursue the worker survey validation claim.

8 **B. Hourly Guarantee**

9 Plaintiffs contend the “hourly guarantee” wage claim is not moot because it
10 is not addressed in 20 C.F.R. § 655.120(c) nor any other regulation. ECF No. 189
11 at 11–12. DOL argues that Plaintiffs are attempting to pivot from an as-applied
12 challenge to the 2019 survey results to a facial challenge to “hourly guarantees” to
13 survive dismissal.

14 The pivot to a facial challenge following this Court’s modified mandatory
15 injunction are the kind of evolving claims that the Court will not grant leave for
16 amendment. This claim is moot following this Court’s injunction and modified
17 order that resolved the “hourly guarantee” claim. *See* ECF Nos. 57, 103.

18 **C. AEWB Only**

19 Plaintiffs contend that the AEWB only claim, the subject of the pending
20 motion for preliminary injunction below, is not moot because it is not addressed in

1 20 C.F.R. § 655.120(c) nor any other regulation. ECF No. 189 at 17. Defendants
2 argue the claim is moot to the extent it relies on Handbook 385. ECF No. 193 at 9.
3 The Court finds this claim is moot to the extent that it relies on outdated authority
4 set out in Handbook 385. *See id.* (citing ECF Nos. 184-1–184-3). However, as
5 Defendants acknowledge, the AEWB only claim is only based in part on
6 Handbook 385. The Court will address the remaining claim below.

7 **D. General Prevailing Wage**

8 Plaintiffs contend the “general prevailing wage” claim is not moot because it
9 is not addressed in 20 C.F.R. § 655.120(c) nor any other regulation. ECF No. 189
10 at 19. DOL argues that the modified mandatory injunction renders this claim
11 moot. ECF No. 193 at 9–10.

12 Under the modified terms, the Court ordered that ESD will not approve and
13 DOL will not certify:

14 H-2A applications for temporary employment certification that
15 involve H-2A agricultural clearance orders listing or including a
16 specific variety unless the employer offers at least the applicable valid
17 PWR for the specific variety (if such rate is the highest of the
18 available wage rates under 20 CFR § 655.120(a)) or, if there is not a
19 PWR for the specific variety, the applicable valid PWR for the
20 corresponding agricultural or crop activity, if one exists and is the
highest of the available wage rates under 20 CFR § 655.120(a).

19 ECF No. 103 at 7, ¶ 4. The Court agrees with Defendants that there is nothing to
20 litigate on this claim following this order. This claim is now moot.

1 **III. Motion for Preliminary Injunction**

2 The legal standard for mandatory injunctions is detailed in the Court’s prior
3 Order and is hereby incorporated. ECF No. 57 at 8-11.

4 **A. Likelihood of Success on the Merits**

5 Plaintiffs assert they are likely to succeed on the merits of their claims on the
6 grounds that DOL’s approval of job orders offering the AEWL only is unlawful
7 when there is a published prevailing piece rate. ECF No. 172 at 12–15.

8 As relevant here, employers must offer, advertise in its recruitment, and pay
9 a wage that is at least the highest of the AEWL or the applicable prevailing wage
10 rate. 20 C.F.R. §§ 655.120(a), 122(l). The methodologies for determining the
11 AEWL are set out in 20 C.F.R. § 655.120(b). The Court notes Plaintiffs removed
12 all reference to Handbook 385 in their Motion. *See* ECF No. 172.

13 Plaintiffs argue DOL must ascertain “whether the AEWL is higher than the
14 applicable piece-rate prevailing wage” before certifying an employer at the hourly
15 AEWL. ECF No. 172 at 13. In failing to do so, Plaintiffs contend DOL approved
16 over 160 H-2A job orders for 2023 harvest activities at the AEWL despite the fact
17 that higher, prevailing piece rates were available. ECF No. 200 at 2.

18 Nothing in 20 C.F.R. § 655.120 nor § 122(l) requires DOL to check the
19 AEWL against the prevailing wage rate before certification. This Court has
20 already recognized an employer’s reasons for offering hourly wages, as opposed to

1 piece-rate wages, such as quality control and ease of administration. ECF No. 57
2 at 22, n. 5. Plaintiffs have not made a clear showing that they are likely to succeed
3 on the merits of this claim.

4 **B. Irreparable Harm**

5 Plaintiffs assert Washington workers will suffer irreparable injury in the
6 form of wage loss, based in part on the Court’s prior order which found reduced
7 wages will have a profound and immediate impact on the livelihood of Washington
8 farmworkers. ECF No. 172 at 17.

9 A plaintiff seeking injunctive relief must “demonstrate that irreparable injury
10 is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22 (emphasis in
11 original). “Issuing a preliminary injunction based only on a possibility of
12 irreparable harm is inconsistent with [the Supreme Court’s] characterization of
13 injunctive relief as an extraordinary remedy that may only be awarded upon a clear
14 showing that the plaintiff is entitled to such relief.” *Id.* “Irreparable harm is
15 traditionally defined as harm for which there is no adequate legal remedy, such as
16 an award of damages.” *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053,
17 1068 (9th Cir. 2014).

18 Plaintiffs amended their complaint in October 2021 to include the AEW
19 only claim, which it now moves for emergency relief in June 2023. ECF Nos. 86,
20 172. DOL contends that its practice of accepting AEW only clearances orders

1 has been in effect for over a decade. ECF No. 183 at 2. This lack of speedy action
2 cuts heavily against irreparable harm. *Lydo Enterprises, Inc. v. City of Las Vegas*,
3 745 F.2d 1211, 1213 (9th Cir. 1984). Therefore, Plaintiffs have not made a clear
4 showing of irreparable harm. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir.
5 2015).

6 **C. Balancing of Equities and Public Interest**

7 As the record does not support a finding that Plaintiffs are likely to succeed
8 on the merits of this claim nor are they likely to suffer irreparable harm, the Court
9 need not address the balancing of equities or public interest. *Herb Reed*
10 *Enterprises, LLC v. Florida Entertainment Management, Inc.*, 736 F.3d 1239, 1251
11 (9th Cir. 2013).

12 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 13 1. Plaintiffs' Motion to Supplement and Amend Complaint (ECF No. 168)
14 is **GRANTED in part** and **DENIED in part**. Plaintiffs are granted
15 leave to file a Third Amended Complaint within 10-days as outlined
16 above.
- 17 2. Defendants' Julie A. Su and United States Department of Labor's Motion
18 to Dismiss (ECF No. 159) is **GRANTED in part**. Plaintiffs' survey
19 validation, hourly guarantee, and general prevailing wage claims are
20 **DISMISSED**.

1 3. Defendants' Washington State Department of Employment Security and
2 Cami Feek's Motion to Dismiss (ECF No. 166) is **DENIED as moot.**

3 4. Plaintiffs' Third Motion for Preliminary Injunction (ECF No. 172) is
4 **DENIED.**

5 The District Court Executive is directed to enter this Order and furnish
6 copies to counsel.

7 DATED July 27, 2023.



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Thomas O. Rice
THOMAS O. RICE
United States District Judge