The Daily Dish

Regulatory Mischief and H-1Bs

DOUGLAS HOLTZ-EAKIN | NOVEMBER 10, 2020

Eakinomics: Regulatory Mischief and H-1Bs

While all eyes have been on the election, ballot counting, re-counts, and potential legal challenges, the Trump Administration has continued to stay busy. In particular, it issued an interim final rule (IFR) – meaning no comment, immediately in effect – regarding the wages paid under the H-1B program. AAF's Isabel Soto and Tom Lee have all the details; here's the short version.

There are three interesting aspects to the rule: its timing, the process, and the substance. On timing, there seems little doubt that this executive action was intended to appeal to the anti-immigrant sentiment in the president's base. The fact that it would impact most heavily the unpopular tech sector was just a bonus.

On the process, an IFR is associated with those circumstances in which quick regulatory action is needed to avert some harm that is so apparent no comment is needed. What crisis has suddenly emerged in the H-1B program? The only plausible difference between 2020 and the years prior (when no action was taken) is the COVID-19 recession. But there is literally no evidence that high-skilled immigrants have been advantaged by the pandemic and economic fallout. (Their unemployment rates, for example, are higher than native-born workers with similar educations and skills.) The IFR looks like a convenient way to move fast and nothing more.

Finally, on the substance, the rule is, charitably, a mess. The background for the administration's change is that H-1B workers should be paid a "prevailing wage" – the wage that would be commanded by a similarly situated (same skills, same occupation, etc.) native-born worker – or the same wage as native-born workers in the same position in the firm. The rule identifies this prevailing wage by specific percentiles of the wage distribution.

Let's stop just for a second and think about that. The Department of Labor is fixing the wage

using a formula. As a general rule, that is called price-fixing, is divorced from market realities, and never works out well. It won't work out well here either. For the most junior of the H-1B hires, the rule raises the prevailing wage from the 17th percentile to the 45th percentile. The table below (reproduced from Soto and Lee) spells out the implications for weekly wages.

Occupations	Old Prevailing Wage (17th percentile)	New Prevailing Wage (45th percentile)	Percent Change
Computer and Information Systems Managers	$1,038	$1,904	83%
Software Developers	$1,153	$1,846	60%
Computer Systems Analysts	$1,154	$1,817	58%
Business Intelligence Analysts and Other Computer Occupations	$692	$1,200	73%
Computer Programmer	$769	$1,923	150%

In short, these are dramatic increases (the ones for higher levels of experience are significant as well) that will likely roil the H-1B process. Firms will likely attempt to substitute native-born workers, which runs into the issue that the H-1B program exists because of a paucity of native-born skilled workers in the first place. Otherwise, firms will have to eat the cost increase, which is a hard prospect for the startups and non-profits that hire a significant number of these workers.

It is hard to accept this rulemaking as a good-faith effort to implement a long-standing program, and it is disappointing that the Trump Administration will likely depart with the program in such disorder.