



U.S. Department of Labor Publishes Final Rule Affecting Prevailing Wages

On January 14, 2021, the U.S. Department of Labor (“DOL”) published its final rule, entitled “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States”, which affects the prevailing wages of H-1B, H-1B1 and E-3 nonimmigrant visa classifications and permanent labor certifications (PERM applications) for employment-based 2nd preference (EB-2) and 3rd preference (EB-3) applications. The final rule will go into effect on March 15, 2021, but its implementation will occur in transitions beginning June 30, 2021. According to the DOL, such final rule is required to “allow the Department to more effectively ensure the employment of immigrant and nonimmigrant workers admitted or otherwise provided status through the above-referenced programs does not adversely affect the wages and job opportunities of U.S. workers.” 86 Fed. Reg. 3608 (January 14, 2021).

This rule was initially published as an Interim Final Rule (“IFR”) that was immediately effective on October 8, 2020, but was struck down on December 1, 2020 along with the Department of Homeland Security (“DHS”) IFR that amended the requirements for H-1B classification. The DOL IFR dramatically increased prevailing wage levels, where Level 1 wages increased from the 17th percentile to the 45th percentile; Level 2 wages increased from the 34th percentile to the 62nd percentile; Level 3 wages increased from the 50th percentile to the 78th percentile; and Level 4 wages increased from the 67th percentile to the 95th percentile. 85 Fed. Reg. 63872 (October 8, 2020).

On December 1, 2020, in Chamber of Commerce et al. v. DHS, et al., the U.S. District Court for the Northern District of California set aside the DOL and DHS IFRs, stating that they were issued in violation of the Administrative Procedure Act (“APA”). In addition, on December 14, 2020, in Purdue University, et al. v. Scalia, et al., the U.S. District Court for the District of Columbia ordered the DOL to reissue prevailing wage determinations using the prevailing wage levels that existed on October 7, 2020, finding that the IFR violated the APA. The DOL republished the pre-IFR prevailing wage rates on December 9, 2020.

In its January 14th final rule, the DOL made amendments to the IFR, which it claims now meets the requirements of the APA stating “The Department is satisfied that it meets the APA’s objective requirements necessary for the promulgation of a final rule in this case. Specifically, the Department’s IFR provided sufficient notice to the public by allowing for a 30 day comment period; “gave interested persons an opportunity to participate in the rule making through submission of written data, views or arguments”; the rule contained a “concise general statement of their basis and purpose”; and the rule will be published more than 30 days before it becomes effective.” 86 Fed. Reg. 3612 (January 14, 2021).

The table below best illustrates the differences between the prevailing wage rates as they currently exist, as proposed under the IFR and as proposed by the January 14th final rule:

	Current Percentiles	IFR Percentiles	Final Rule Percentiles
Level 1 Wage	17 th	45 th	35 th
Level 2 Wage	34 th	62 nd	53 rd
Level 3 Wage	50 th	78 th	72 nd
Level 4 Wage	67 th	95 th	90 th

In addition, the DOL final rule states “where the Department is unable to compute a Level [4] Wage for an occupation and geographic area due to wage values exceeding the uppermost interval of the OES wage interval

methodology, the Level [4] Wage will be the highest of: (1) The current hourly wage rate applicable to the highest OES wage interval for the specific occupation and geographic area (also known as the footnote wage), or (2) the mean of the wages of all workers for the most specific occupation and geographic area available.” 86 Fed. Reg. 3655 (January 14, 2021)

Furthermore, to address concerns that the immediate implementation of higher wages would negatively impact the economy, the DOL has scheduled transitions to provide a phased implementation of the new prevailing wage percentile. However, as written, these transitional phases are incredibly confusing, complex and challenging to decipher without referring back to earlier passages in the initial pages of the regulation.

For example, as written, the final regulation establishes the Phase 2 prevailing wage rates, from July 1, 2021 to June 30, 2022, as the following: “(1) The Level [1] Wage shall be 90 percent of the wage provided under paragraph (b)(2)(ii)(A) of this section, or the wage provided under paragraph (b)(2)(iii)(A)(1) of this section, whichever is higher. (2) The Level [4] Wage shall be 90 percent of the wage provided under paragraph (b)(2)(ii)(D) of this section, or the wage provided under paragraph (b)(2)(iii)(A)(2) of this section, whichever is higher. (3) The Level [2] Wage and Level [3] Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the wages established under paragraphs (b)(2)(iii)(B)(1) and (3) of this section.” 86 Fed. Reg. 3673 (January 14, 2021)

What does this mean in laymen’s terms? The table below summarizes the phases, dates of applicability and the changes in the prevailing wage percentiles.

	Phase 1	Phase 2*	Phase 3	Phase 4	Phase 5
Effective Dates	03/15/2021 – 06/30/2021	07/01/2021 – 06/30/2022	07/01/2022 – 06/30/2023	07/01/2023 – 06/30/2024	07/01/2024 – onward
Level 1	17 th percentile	90% of the wage value calculated at the 35 th percentile or the mean of the 17 th percentile, whichever is highest	90% of the wage value calculated at the 35 th percentile or the mean of the 17 th percentile, whichever is highest	95% of the wage value calculated at the 35 th percentile or the mean of the 17 th percentile, whichever is highest	35 th percentile
Level 2	34 th percentile	53 rd percentile	53 rd percentile	53 rd percentile	53 rd percentile
Level 3	50 th percentile	72 nd percentile	72 nd percentile	72 nd percentile	72 nd percentile
Level 4	67 th percentile	90% of the wage value calculated at the 90 th percentile or the mean of the 67 th percentile, whichever is highest	90% of the wage value calculated at the 90 th percentile or the mean of the 67 th percentile, whichever is highest	95% of the wage value calculated at the 90 th percentile or the mean of the 67 th percentile, whichever is highest	67 th percentile

* Where an H-1B nonimmigrant was, as of October 8, 2020, the beneficiary of an approved I-140 Petition or eligible for an extension of his or her H-1B visa status under AC21, and eligible to be granted immigrant status but for application of the per country visa limitations or remains eligible for an extension of his or her H-1B visa status at the time the LCA is filed, the Phase 2 (July 1, 2021 to June 30, 2022) wages will be:

- Level 1 Wage will be 85% of the wage value calculated at the 35th percentile or the mean of the 17th percentile, whichever is highest
- Level 2 Wage will be valued at the 53rd percentile
- Level 3 wage will be valued at the 72nd percentile

- Level 4 Wage will be either 85% of the wage value calculated at the 90th percentile or the mean of the 67th percentile, whichever is highest

86 Fed. Reg. 3655-3657 (January 14, 2021)

HR Tip

Determining the prevailing wage for an H-1B, H-1B, E-3 or PERM labor certification application has always been very complex and challenging as there are many issues that an employer must take into account, including uniformity across all similarly-employed workers. An employer's failure to pay the appropriate wage and properly complete the LCA process may result in harsh penalties, including but not limited to fines and debarment from filing future petitions for immigration benefits on behalf of its foreign national employees. If the DOL final rule is implemented, the proper determination of the prevailing wage will become an even more daunting task.

In this regard, we highly recommend that employees contact a qualified attorney for a consultation prior to initiating an E-3, H-1B, H-1B1 or PERM process for an employee. If you have any questions regarding the appropriate prevailing wage for your employees or prospective employees, please feel free to contact us.

For further information, please contact:

Anthony F. Siliato / Scott R. Malyk / Lin R. Walker / Stacey A. Simon / Kristen Sisko / Lisa Ryu
Meyner and Landis LLP
One Gateway Center, Suite 2500, Newark, New Jersey 07102
973-624-2800

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