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New Regulations to Explode Required Wages and Choke H-1B Visas

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New rules published by the Department of Labor (DOL) and the Department of Homeland Security (specifically, USCIS) are intended to severely restrict the use of the H-1B and related H-1B1 and E-3 visa classifications for workers in a "specialty occupation" and permanent sponsorship of foreign workers. The DOL rule has taken effect immediately and requires radically higher wages for workers sponsored for H-1B visa classification and for permanent residence based on a labor certification. The USCIS rule affects H-1B petitions filed starting December 7, 2020, requiring a more direct necessary relationship between the worker's bachelor's degree and the sponsored job and narrowing the nature and duration of third-party placements that can be sponsored. Both rules will be challenged in court and might be enjoined, as have numerous other rules. Employers facing deadlines for extensions may wish to make more aggressive filings than the rules allow in anticipation of possible success in court actions.

DOL Rule: Increasing Prevailing Wages

The DOL regulation took effect immediately, in essence re-mapping the four "prevailing wage" levels used by the DOL to higher percentiles in wage survey data in the DOL's system. Employers must pay foreign workers at least the prevailing wage when sponsoring them for H-1B, H-1B1 (for Singapore and Chile), and E-3 (for Australia) visas or for permanent labor certifications toward permanent residence in the EB-2 or EB-3 preference categories. The revised mapping and consequent higher wage amounts will be used by the DOL in any new or pending request for a prevailing wage determination made to DOL's National Prevailing Wage Center (NPWC), and any new Labor Condition Application (LCA) filing using the DOL published data must use the newly published data that now contain the higher wages. The new rule and resulting data do not affect any wage determination already issued by NPWC (for voluntary use in filing a LCA or for mandatory use in a PERM application) during its period of validity or any LCA already filed or approved.

Structurally, the new percentiles used for the four levels have changed as follows:

DOL Prevailing Wage Level	Prior Wage Percentile	New Percentile
1 (entry level)	17%	45%
2 (qualified)	34%	62%
3 (experienced)	50%	78%
4 (competent)	67%	95%

More practically, some examples of recently issued prevailing wage amounts and the newly applicable amounts include the following, which show the extraordinary and prohibitive increases in prevailing wage amounts under the new rule.

Occupation	Location	Level	Prior PW	New PW
Computer Network Architect	Memphis, TN	1	$57,408	$92,706
Software Developer	Birmingham, AL	2	$72,405	$121,451
Software Developer	Portland, OR	3	$106,101	$145,517
Art, Drama, and Music Teacher, Postsecondary	Savannah, GA	3	$75,383	$105,620
Software Developer	Jacksonville, FL	4	$100,651	$204,776

The new DOL rule does not address the use of private wage surveys, which do not use the new DOL percentile regime. In LCA filings for H-1Bs, the employer can use a private survey and just report that to the DOL, which historically has approved the LCAs without scrutinizing the surveys on the front end. The DOL might perform follow up audits on cases involving private surveys and challenge them, pursuing backpay claims on behalf of workers while seeking to revoke the LCAs. Existing rules require employers in PERM filings to submit any private survey data to the NPWC for active review, which often results in rejection for failure of the private survey to fit the narrow DOL parameters. Significant attention will turn to private surveys for both purposes. Employers who file PERMs for workers for whom it continues to file H-1B extensions may be forced to use the higher PERM-based wage from the DOL data and percentiles under complex rules.

USCIS Rule: What Qualifies for H-1B

The USCIS rule will take effect on December 7, 2020 for H-1B petitions filed on or after that date. The regulation states it will not be applied to adjudication of H-1B petitions filed before that date.

The USCIS rule does two essential things:

1. Requires a "direct relationship" between the duties to be performed and the specific field of the bachelors or higher degree (or equivalent experience) possessed by the worker. The USCIS seeks to entrench its increasingly narrow interpretation of what constitutes a "specialty occupation" so that jobs that do not clearly and necessarily require the knowledge obtained in a four-year degree in a

particular field cannot be filled with H-1B workers. Employers sponsoring H-1B workers will need to agonize to articulate and substantiate these connections even as to the most obvious occupations such as engineer. Positions such as general managers, analysts, and certain computer occupations will be particularly targeted by USCIS scrutiny.

2. Restricts employers from using H-1B workers at customer sites, even for part of the time. The sponsoring employer must show not only that it has the right to control the work but also that it actually exercises that right in numerous ways under the "totality of the circumstances." H-1B employers must submit contracts, work orders, and "end client letters" to show that the off-site work is real and requires a specific degree (see issue #1 above) and to show the employer-employee relationship with the sponsor. Even where remote assignments can qualify, USCIS will limit approval to one-year validity. This will require a massive paper chase and uncertainty every year with significant H-1B filing fees often amounting to $4,000, and $8,000 for employers who have over half their workforce as sponsored H or L workers. The government has maintained very active task forces investigating and prosecuting employers who make misrepresentations about remote assignments, and that activity is expected to increase.

Use of staffing companies is a huge business in the U.S., particularly in high technology fields where arcane specialties are frequently staffed with foreign workers. Businesses that use staffing companies should consider internal controls on providing "end client letters" and similar documents and may want to audit their vendors for compliance with sponsorship rules to reduce the chance of liability for facilitating misrepresentations to the government. "End users" may want to sponsor key workers for H-1B status rather than obtaining their services through staffing companies, with a probable result of higher wages that the DOL intends.

Conclusion

The new rules reflect an "all-out attack" on the use of the H-1B visa classification and the permanent sponsorship of workers based on the unavailability of U.S. workers. Thousands of H-1B workers will now face inability to keep their U.S. jobs while waiting for a visa number. Interested parties should promptly submit formal comments to the agencies. Litigation is certain to ensue quickly. Election politics are involved. Employers needing to sponsor foreign professionals and other workers are tremendously impacted, as are foreign professional workers, and both need to consult competent counsel.

If you have any questions, please contact the author or any member of Baker Donelson's Immigration Team.