

CLIENT ALERT

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IMMIGRATION

RECENT DHS AND DOL RULE CHANGES TO THE H-1B PROGRAM

(Updated as of October 9, 2020)

by Christian S. Allen

Earlier this week, much anticipated but still surprising [news](#) arrived from both the US Department of Homeland Security (DHS) and the US Department of Labor (DOL). Both agencies published new rules, which would significantly change the H-1B Specialty Occupation temporary work visa programs in the US. While we all wait to see how the government actually interprets and applies these new policies, below is a summary of issues to consider for communicating with your foreign workforce population right now.

What Rules Were Issued?

1. US Citizenship and Immigration Services (USCIS) Interim Final Rule (IFR) Revising the Definition of Specialty Occupation for H-1B Nonimmigrants¹
 - Will be effective on December 7, 2020, unless enjoined.
 - Comments on the IFR due on or before December 7, 2020, while related comments on the form changes are due by November 9, 2020.²
2. DOL IFR on Computation of Wage Levels³
 - Effective on October 8, 2020.
 - Note on October 13, 2020, the National Prevailing Wage Center (NPWC) will begin issuing prevailing wage determinations (PWD) using the new prevailing wage data based on the computations required by the DOL IFR. The delay is due to technical changes necessary for the DOL FLAG system to apply the computations.

USCIS “Strengthening the H-1B Nonimmigrant Visa ... Program” Rule

- Changes the Definition of a “Specialty Occupation”
 - H-1B sponsorship would effectively only be available for jobs where the employer could prove that a Bachelor’s degree in a specific specialty or its equivalent is *always* a requirement for the occupation as a whole, an occupational requirement within the industry, the petitioner’s particular requirement, or because the duties required for the position are so specialized, complex, or unique.
 - Any H-1B position allowing degrees in multiple disparate fields must establish how each field of study is in a specific specialty providing “a body of highly specialized knowledge” *directly* related to the duties and responsibilities of the particular position.
- Restores 3rd Party Worksite Requirements Recently Struck Down
 - Would severely restrict H-1B sponsorship involving a 3rd party

client worksite location (i.e. any worksite address not owned or directly controlled and operated by the H-1B sponsor company).

- Restores requirements for extensive end-client documentation to support a 3rd party worksite and provides a stricter analysis of “direct control” and how to establish an “employer-employee relationship” by the H-1B sponsor company.
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- Even if approved, most H-1B sponsorships for 3rd party worksites would be limited to one-year validity periods (maximum), requiring yearly renewals.
- The term, “worksite,” is amended to the location where the work is actually performed by the H-1B nonimmigrant.
- Expands site visits for H-1B compliance and *specifies that a refusal of the petitioner or a third party to cooperate with a site visit may be grounds for denial or revocation of any H-1B petition for H-1B workers performing services at the inspection sites.*
- Effective Date is December 7th
 - Issued directly as an IFR, meaning that USCIS will not accept and consider the usual public comments. This action makes the rule more susceptible to being temporarily enjoined or overturned completely by a court.
 - Legal challenges in federal court by December are very likely.

DOL “Strengthening Wage Protections...” Rule

- Changes the Methodology Used to Assign Prevailing Wages
 - Applies new statistical analysis to the DOL’s underlying wage database, to skew the four Prevailing Wage levels towards the very top of the salary survey scale, for every occupation, in every city/location.
 - Does not change the underlying rules for which Prevailing Wage level applies to a particular H-1B sponsor job offer. Rather, the salary survey data is remapped for each level.
 - The net result of the new math is that increases in the Prevailing Wages at each level are significant (i.e. 30% - 50%, or more, for some occupations). Anecdotal evidence shows the new figures to be way out of line with the average US worker compensation realities in many industries. Example below:

DOL Wage Level 2019	Wage Percentile (OES) ⁴	DOL Wage Level 2020
1	17%	45%
2	34%	62%
3	50%	78%
4	67%	95%

- Applies to New Applications, But Also Some Pending Ones
 - In an aggressive move, the new prevailing wage computations will not only apply to H-1B Labor Condition Applications (LCAs) filed with the DOL on or after October 8th (where the OES survey data is the prevailing wage source), but will also apply to any PWD (must be used for PERM Labor Certification/ aka greencard sponsorship) filed with the NPWC before and still pending after October 8th.
 - Will force many employers to rely on private salary surveys and other sources of more accurate prevailing wage data, which will slow the H-1B sponsorship process.
 - Will also force unexpected and costly strategy changes for PERM Labor Certifications, which would otherwise go directly into pre-filing recruitment, following what was previously a fairly predictable PWD.
 - *Does not* impact previously approved H-1B cases, nor currently pending H-1B petitions at the USCIS.
- DOL issued [Frequently Asked Questions](#) on the IFR regarding Prevailing Wage Determinations on October 6
- DOL Rule issued directly as an IFR and with no public comment period.
 - This makes the DOL rule similarly more susceptible to being temporarily enjoined or overturned by a court.
 - Legal challenges in federal court are also likely, but the rule will remain in effect for now.

FOR MORE INFORMATION CONTACT:



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1. 85 *Fed. Reg.* 63918 (October 8, 2020)
2. See, <http://www.regulations.gov> (DHS Docket No. USCIS-2020-0018).
3. 85 *Fed. Reg.* 63872 (October 8, 2020).
4. The Occupational Employment Statistics (OES) program produces employment and wage estimates annually for nearly 800 occupations. These estimates are available for the nation as a whole, for individual states, and for metropolitan and nonmetropolitan areas; national occupational estimates for specific industries are also available. <https://www.bls.gov/oes/home.htm>.

We hope that the above will help you to continue to navigate current and upcoming challenges with your foreign worker populations. Please feel free to reach out to your DW Immigration attorney with any specific questions or concerns you have about these new rules. As always, despite the relentless attacks from the current Administration on the lawful US immigration sponsorship system, we stand ready to help, in any way that we can.

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