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IN FOCUS

January 30, 2025

Prevailing Wage Requirements for H-1B, H-1B1, and E-3 Workers in Specialty Occupations

Introduction

The H-1B, H-1B1, and E-3 visa programs allow for the temporary employment of foreign workers in specialty occupations in the United States. A *specialty occupation* is one that requires theoretical and practical application of a body of specialized knowledge and a bachelor's or higher degree in the particular specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

This In Focus provides an overview of the shared prevailing wage requirements of the H-1B, H-1B1, and E-3 visa programs. These required prevailing wages differ for each of four skill levels for each occupation in each geographic area. It also provides an overview of how paying certain wages to H-1B workers can exempt a subset of employers from additional requirements of the H-1B program. This is not a prevailing wage requirement but is included here because it is sometimes confused with one.

Congress created the H-1B program through the Immigration Act of 1990 (P.L. 101-649), which amended the Immigration and Nationality Act (INA, Title 8 of the U.S. Code). Its wage requirements were amended by the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998 (Title IV of P.L. 105-277) and the H-1B Visa Reform Act of 2004 (Title IV, Subtitle B of P.L. 108-447). The H-1B1 and E-3 programs are reserved for nationals of Chile and Singapore (H-1B1) and Australia (E-3) and have the same wage requirements as the H-1B visa program. (See CRS Report R47159, *Temporary Professional Foreign Workers: Background, Trends, and Policy Issues* for further discussion of these programs.)

The INA contains provisions intended to prevent U.S. workers from being adversely affected by the hiring of foreign workers. These include (in 8 U.S.C. §1182(n)) requirements that the employer offer a specialty occupation worker the greater of "(1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or (2) the prevailing wage level for the occupational classification in the area of employment" as well as the same non-wage benefits the employer offers U.S. workers. Prospective employers of specialty occupation workers comply with this wage requirement by applying to the Department of Labor (DOL) for *labor attestation*. In practical terms, this means filing a labor condition application (LCA) with the Office of Foreign Labor Certification (OFLC) within DOL.

Each LCA must include an attestation that the employer will pay the worker the greater of (1) the average of actual wages paid by the employer to similar employees or (2) the *prevailing wage* for that occupation in the geographic area of employment, based on the best information available at the time of filing. In the LCA, employers also must specify the occupational classification, geographic location, and the promised wage rate for each foreign worker.

Prevailing Wage Sources

DOL regulations on the LCA process are detailed at 20 C.F.R. part 655, subpart H. Employers have the option of using three methods to obtain the prevailing wage: (1) requesting a prevailing wage from the National Prevailing Wage Center (NPWC), (2) using a survey conducted by an independent authoritative source, or (3) using another legitimate source of information. Employers may use wage rates in collective bargaining agreements or the prevailing wages required of government contractors by the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act for this purpose.

OFLC does not maintain a list of acceptable independent authoritative sources of prevailing wages, although it occasionally provides lists of commonly used sources that were accepted in the previous year.

Prevailing Wages Provided by NPWC

OFLC provides "safe-harbor" status to employers using the prevailing wages provided by the NPWC. That is, if an employer's wage compliance is investigated for any reason, DOL will not challenge the validity of a prevailing wage provided by NPWC so long as the occupation, area, and skill level of the position were correctly classified. Occupations are classified using the Standard Occupational Classification (SOC) system; skill levels are classified in four groups: Level I—entry level, Level II—qualified, Level III—experienced, and Level IV—fully competent.

Before filing an LCA, an employer can submit a form ETA-9194 (Application for Prevailing Wage Determination) with the NPWC. This form includes a description of the job duties and the required education and experience for the position. Based on the job duties and requirements, the NPWC verifies the occupational classification and skill level suggested by the employer and determines the appropriate prevailing wage. The processing time for this determination is about six months.

Since 1998, prevailing wage levels provided by the NPWC have been based on the Occupational Employment and Wage Statistics (OEWS) program of the Bureau of Labor Statistics (BLS). This program produces estimates of the wage distribution by occupation for metropolitan and nonmetropolitan areas of the United States, Puerto Rico, Guam, and the U.S. Virgin Islands. The OEWS program

does not produce estimates of wages by skill level within occupations.

OFLC contracts with BLS to create two special wage estimates for each occupation in each geographic area, in addition to the mean and percentile wage estimates the OEWS program publishes on the BLS website.

BLS provides OFLC with special estimates of the mean wage for the lower-paid third of workers (approximately the 17th percentile of each wage distribution) for each occupation in each geographic area, which OFLC uses as the Level I wage. The second special BLS estimates are of the mean wage for the higher-paid two-thirds of workers (approximately the 67th percentile of each wage distribution) for each occupation in each area, which OFLC uses as the Level IV wage. Level II and Level III wages are then set midway between the Level I and Level IV wage levels (at approximately the 34th and 50th percentiles of each wage distribution).

Special Prevailing Wages for Institutions of Higher Education and Nonprofit Research Organizations

ACWIA specified that the prevailing wage level for employees of institutions of higher education and nonprofit research organizations should take into account only the wages paid to employees at similar institutions and organizations. Thus, OFLC contracts with BLS to make special tabulations of OEWS wages (by occupation and geographic area) in these industries, and the NPWC provides separate prevailing wages for them.

Availability of Prevailing Wages

Prevailing wages for each occupation, geographic area, and skill level (as well as separately for the industries specified in ACWIA) are listed on the OFLC website at https://flag.dol.gov/wage-data/wage-search, and are updated for LCAs submitted as of each July 1.

Proposed Changes in Prevailing Wages

Policymakers have proposed increasing the prevailing wage requirements for the H-1B, H-1B1, and E-3 visa programs.

2020/2021 Proposed Regulatory Changes

Regulatory changes proposed by the first Trump Administration as an interim rule in October 2020 (85 *Federal Register* 63872) and published as a final rule in January 2021 (86 *Federal Register* 3608) would have increased the four prevailing wage levels for each occupation in each geographic area. These changes would have increased Level I wages from approximately the 17th percentile of wages (for each occupation in each area) to approximately the 45th percentile of wages, and would have increased Level IV wages from approximately the 67th percentile of wages to approximately the 95th percentile of wages. A rule published in May 2021 (86 *Federal Register* 26164) by the Biden Administration delayed the effective date for this change to begin implementing it in 2023.

The U.S. Chamber of Commerce sued to block implementation of this rule. In June 2021, DOL indicated it had "identified a number of substantive and procedural concerns regarding the underlying rulemaking that warrant further consideration by the agency" and requested voluntary remand to assess these issues and determine appropriate further action. This remand was granted on June 22, 2021, and a Federal Register Notice in December 2021 (86 *Federal Register* 70729) withdrew the rule.

Selected Legislative Proposals

Versions of the H-1B and L-1 Visa Reform Act (S. 979 in the 118th Congress) have been introduced in nearly every Congress since 2009 with bipartisan support. Among other provisions, this bill would have required employers to pay H-1B workers at least the median wage for all workers in the same occupation and geographic area. Other recent bills would have raised minimum wage requirements for H-1B workers to $90,000 per year (H.R. 6542 in the 118th Congress) or $110,000 per year (H.R. 6206 in the 117th Congress).

Additional Attestation Requirements for H-1B Dependent Employers or Willful Violators

Additional attestation requirements apply to H-1B dependent employers and to employers found to have willfully violated H-1B obligations. *H-1B dependent employers* are defined based on the ratio of H-1B workers to all of their workers in the United States (employers with more than 50 workers are considered H-1B dependent if H-1B workers make up at least 15% of their U.S. workforce). *Willful violator employers* are defined as employers found by the Departments of Justice or Labor to have committed willful failures to comply with H-1B regulations or misrepresentations of facts in H-1B filings during the previous five years.

Such employers must comply with two additional attestation requirements. First, they must attest to making efforts to recruit U.S. workers and offering the position to any equally qualified U.S. worker before hiring an H-1B worker. They must document that they have done this before filing an LCA to hire H-1B workers. Second, they must attest that the H-1B workers they employ will not displace U.S. workers and must retain records of the circumstances under which any of their U.S. workers (in the same occupation and geographic area as H-1B workers) leave their employment.

These additional requirements do not apply to an LCA if all of the workers requested will either be paid at an annual rate of $60,000 or more, or have at least a master's degree. The $60,000 wage floor for "exempt H-1B nonimmigrants" was defined in the ACWIA (§412 (b)) and has not been adjusted for changes in wage levels since 1998. During FY2022-FY2024, approximately 13% of employers indicated on their LCA filings that they were either H-1B dependent or were willful violators. However, most of these employers planned to hire only exempt H-1B workers. Less than 1% of employers filing LCAs indicated that they were required to comply with the additional attestation requirements.

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