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New Regulations Narrow Eligible H-1B Occupations and Increase Required Wages for H-1B Workers

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In the last few months, it has been difficult for employers and immigration attorneys to keep up with the flurry of changes released by the Trump Administration, including the suspension on the issuance of H-1B visas at U.S. Embassies abroad in June and a new online pre-registration process to distribute the limited 85,000 visas.

The latest Administration Interim Final Rules (IFRs) announced on October 6th: **1) significantly increase the minimum prevailing wages that H-1B workers must be paid; 2) narrow the immigrant candidates who may qualify for an H-1B specialty occupation visa; and 3) scrutinize the placement of H-1B workers at third-party worksites through a new shorter one-year H-1B visa period.** The net impact of these changes will undoubtedly price-out many lower wage positions from H-1B visa qualification and will continue to increase the H-1B visa adjudication denial rate, which has already increased five-fold in the last five years, according to the National Foundation for American Policy.

1. Salaries for H-1B workers may need to be increased upon visa extension applications: Under pre-existing law, an employer must pay an H-1B worker the higher of the federal prevailing wage or actual wage paid to similar U.S. workers. Based upon the new Rules, the Department of Labor (DOL) has dramatically increased the prevailing wages by 30-60%. As an alternative to the DOL prevailing wages, employers may rely upon private wage surveys, such as Radford Surveys, in very limited instances where there is sufficient wage data for the specific county and occupation. In most circumstances, employers will need to rely upon the DOL prevailing wage for H-1B and PERM purposes.

Occupation and Wage Level	City	Preexisting Prevailing Wage (per year)	New Prevailing Wage
Software Developer - Level 2	Salt Lake City, UT	$88,504	$121,389
Computer and Information Systems Managers - Level 2	Salt Lake City, UT	$110,989	$161,138

Software Developer - Level 2	Denver, CO	$92,477	$128,398
Database Administrator - Level 2	Denver, CO	$76,419	$113,547
Software Developer - Level 2	Boise, ID	$77,854	$115,960
Software Developer - Level 2	Seattle, WA	$113,110	$167,918

New prevailing wage information may be accessed at https://www.flcdatacenter.com/

Who will be impacted: New H-1B applications and extension applications will be affected, as will other specialty occupations such as H-1B1 Singaporean/Chilean and E-3 Australian visas. These new DOL prevailing wages will apply to Labor Condition Applications (LCAs), associated with H-1Bs, filed after October 8th, 2020, and Prevailing Wage Requests for both H-1B and PERM processes filed on or pending after October 13th, 2020.

Who will NOT be impacted:

- Pre-existing H-1B visa approvals should not be impacted unless an amendment must be filed to update the government on a material change, such as a change in worksite location.
- ETA 9035 LCAs filed and ETA 9141 Prevailing Wage Requests filed and approved before the effective dates above will be subject to the old prevailing wages.
- Foreign nationals currently in the green card process who have a certified PERM or have already received the prevailing wage determination.
- Foreign nationals who are applying for an immigrant visa which does not require a Labor Certification, such as EB-1s, EB-2 National Interest Waivers, etc.
- Foreign nationals applying for/already holding non-immigrant visas that do not require a Labor Condition Application (L-1A, L-1B, TN, etc.)

How will the new prevailing wages be calculated: Since 2004, the Department of Labor has provided four levels of prevailing wages based on the Office of Employment Statistics (OES) survey, which correlate to the experience and education required for a given position. The four prevailing wage levels are currently calculated at the 17th, 34th, 50th and 67th percentiles of OES survey wage distribution.

The DOL will continue using the OES survey to calculate prevailing wages,

but will now discount the lowest segment of the OES wage distribution as they assert these workers are not "similarly employed to even the least skilled H-1B workers". The new four prevailing wage levels will be calculated based on the 45th, 62nd, 78th and 95th percentiles of the OES survey wage distribution. While there will still be four levels of wages that can be issued for a given SOC code, wages at all levels will be shifted to a higher percentile of the current wage distribution as mentioned above. This will likely result in increased prevailing wages that an employer must pay the foreign worker in the context of H-1B employment or the green card process.

This relatively arbitrary shift in prevailing wages may have unintended consequences in increasing H-1B worker wages above comparable U.S. workers, and thereby exposing employers to potential liability to equal pay regardless of nationality.

2. Under the new narrow definition of an H-1B "specialty" occupation, certain positions and immigrants may be denied. More specifically, immigrant applicants who hold mismatching degrees (i.e. a Mechanical Engineering Bachelor's degree for a software developer role) will face greater scrutiny, even for those previously approved. Similarly, occupations that permit a broad range of acceptable majors will face greater scrutiny, such as financial analyst positions permitting a broad range of business majors, data analytics roles permitting both computer science and statistic majors, or software quality assurance, which may not necessarily require a Computer Science Bachelor's degree. For those cases which may be under scrutiny, employers may consider premium processing such cases to receive a decision before the effective implementation date of December 7th, 2020.

What will be necessary to qualify for an H-1B visa: For all H-1B petitions filed after December 7th, 2020, employers will have to evidence that the employer has always required at least a Bachelor's degree in specific field(s) of study as a minimum required qualification for the position based on established recruiting and hiring practices. The insertion of the term "always" and removal of pre-existing terms "normally, common or usually" from the regulations, creates a mandate which is often out of sync with employers' real-world hiring standards.

If the employer cannot evidence that the position has always required the specific degrees for minimum entry requirements, the position will only qualify as a "specialty occupation" if 1) a degree in specific field(s) of study is always required for the particular occupation as a whole (e.g., lawyers must have a law degree); 2) a degree in specific field(s) of study is required in parallel positions at similar organizations within the employer's industry; OR 3) the position duties are so specialized, complex or unique that a degree in the specific field(s) of study is necessary to perform the duties.

Secondarily, the required degree field(s) of study must be specific and directly related to the position duties. General degree fields, such as engineering, are insufficient unless the employer can show how each engineering sub-field provides the specific knowledge necessary to

perform the duties for the position. The required degree field must also be directly related to the position duties. For example, electrical engineering degrees are recognized as being directly related to electrical engineer positions; however mechanical engineering degrees are not recognized as being directly related to software engineer positions, which will be more difficult to qualify as a specialty occupation under the new regulations. Additionally, if the minimum entry requirements list an array of degree fields (e.g., business, computer science and finance), the employer must demonstrate how each field of study is directly related to the position and duties. The net impact of these changes will increase the required evidence upon both the initial submission of an H-1B petition and responses to a request for additional evidence.

3. Additional scrutiny will be applied on the placement of H-1B workers at third-party worksites and relevant H-1B visas will be shortened to one year, rather than three years.

Both the Trump and Obama Administrations attempted multiple options to minimize the use of H-1B visas by information technology contracting companies, including new USCIS adjudication policies, increased filing fees for high-volume H-1B employers, and dramatically higher rates of denial. Under the latest Department of Homeland Security (DHS) rule, the employer-employee relationship, a pre-requisite to file an H-1B petition, now takes into account whether the H-1B visa holder will work offsite and how the petitioner maintains such supervision.

The Interim Final Rule attempts to re-institute a February 22, 2018 USCIS Memo on Third-Party Site Placements, which had been challenged in federal court and DHS was forced to rescind. The original 2018 USCIS Memo outlined the initial evidence required to demonstrate an employer-employee relationship such as "copies of contracts, work orders, or other corroborating evidence", and this latest rule reinforces that original requirement.

More importantly, the Interim Final Rule limits the maximum validity period for an approved H-1B petition to one year "where the beneficiary is working at a third-party worksite."

Is a legal challenge to the above new rules likely to succeed?

The DOL Interim Final Rule on prevailing wages will be effective this week, while the DHS rule on specialty occupation and third-party worksites will be effective 60 days after publication, which occurred on October 8th, 2020. Typically, new regulations generally do not become final and effective until the notice of proposed rulemaking process (i.e. publishing proposed rule, public comment period, and comment review and agency evaluation) is complete. However, IFRs can become effective without prior notice or public comment when there is "good cause." DHS and DOL have determined that in light of the impact of COVID-19 on the economy and U.S. workers and the declared public health emergency, as well as the Presidential Executive Orders issued this year, the agencies have good cause for the new regulations to go into immediate effect.

Because the DOL prevailing wages bypassed the traditional 60-day notice and comment period, the Administrative Procedure Act requires "good cause" to be shown for this exception. Due to the broad range of employers and immigrants impacted, many who have previously been approved, these Interim Final Rules are more likely to be rejected.