

GMS Flash Alert



Immigration Edition

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United States - Plans to Raise H-1B, E-3, H-1B1, and PERM Wage Minimums

The U.S. Office of Management and Budget (OMB) is currently reviewing a Department of Labor (DOL) rule that is expected to raise the minimum wage requirements for nonimmigrant visa petitions in the H-1B, H-1B1, and E-3 categories. The rule would also increase wage minimums for Permanent Labor Certifications.

The rule, entitled "Restructuring of H-1B/H-1B1/E-3 and PERM Wage Levels," has not been published in a regulatory agenda and no details have been released by the government.¹ The text of the rule will, however, be available for public inspection at least one day before it is published in the *Federal Register*.

The OMB has 90 days to review the rule, but it may take less time. OMB review is generally the final step before a rule is published.

WHY THIS MATTERS

The rule is expected to change the way prevailing wages are established, potentially requiring employers to pay much higher wages to workers sponsored for employment-based permanent residence pursuant to a Permanent Labor Certification, or a visa in the H-1B, H-1B1, or E-3 categories.

The new rule is expected to be published as an Interim Final Rule, without the usual public comment period. If so, then it may go into effect immediately or very soon after publication.

Background

The federal regulations currently state: "The prevailing wage shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the prevailing wage shall be the average of the wages paid, weighted by the total employed in the classification."²

The New Rules: Plans and Expectations

Although the contents of the rule have not yet been released, it is expected to revise the way that prevailing wages are calculated. As a consequence, it is anticipated that the wages payable to H-1B, H-1B1, and E-3 workers, as well as employees sponsored for Permanent Labor Certification, will likely increase.

The rule related to wage restructuring is being reviewed while the OMB is simultaneously reviewing another rule that would dramatically alter the H-1B visa program and eligibility criteria.³ This rule and the rule related to restructuring wage levels for the H-1B, H-1B1, E-3, and PERM programs are expected to be published as Interim Final Rules, meaning that they could both be effective soon after publication.

KPMG NOTE

It is expected that the rule entitled “Restructuring of H-1B/H-1B1/E-3 and PERM Wage Levels” will face legal challenge.

KPMG Law LLP in Canada is carefully following the progress of the rule as it moves through the federal review process. We will provide updates as they become available.

FOOTNOTES:

1 The review of the Interim Final Rule: <https://www.nafsa.org/regulatory-information/h-1b-rulemaking> .

2 See 29 CFR § 1.2 Definitions. (a)(1).

3 See our prior GMS *Flash Alert* 2020-396 (September 10, 2020) “[United States - Changes to H-1B Visa Program Anticipated](#).”

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