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GMS Flash Alert

Immigration Edition

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United States - Revised Rule Raises Prevailing Wages

On January 14, 2021, the U.S. Department of Labor ("DOL") published a revised prevailing wage rule that increases the minimum wage requirements for H-1B, E-3, and H-1B1 nonimmigrant cases and the PERM labor certification program.[1] The final rule contains significant prevailing wage increases for all wage levels, though the new wage minimums are not as high as the interim final rule issued on October 8, 2020; a rule that was subsequently set aside in federal court in December 2020. (For prior coverage, see the following issues of GMS *Flash Alert*: 2020-481 (4 December 2020) and 2020-424 (7 October 2020).)

This revised rule will take effect 60 days from publication, March 15, 2021. However, the increased wage minimums will not be imposed until July 1, 2021, followed by a phased increase of the four wage levels providing employers a transition period to adjust to the new calculations and plan accordingly.

WHY THIS MATTERS

The new DOL rule and restructured minimum wage requirements will impact the ability of U.S. employers to employ and sponsor foreign talent in the H-1B, H-1B1, and E-3 visa categories, as well their ability to sponsor PERM labor certifications for U.S permanent residency. By amending the method the agency uses to compute prevailing wage levels, there will be substantial increases to the minimum wages that must be paid to certain foreign workers. If employers are unable to either meet the new wage requirements or identify suitable alternative wage sources, then budgetary constraints may necessitate limiting sponsorship of employees pursuant to the H-1B, H-1B1, E-3, or PERM programs.

The Restructured Wage Calculations

The DOL relies on Occupational Employment Statistics (OES) data from the Bureau of Labor Statistics to determine the minimum wages payable in the context of the H-1B, H-1B1, E-3, and PERM programs. The prevailing wage rate is defined as the average wage paid to similarly employed workers in the area of intended employment. The OES

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prevailing wage is subdivided into four wage levels. The applicable wage level depends on the job duties and requirements of the specific H-1B, H-1B1, E-3, or PERM position.

Under the revised rule, OES prevailing wage minimums will increase at all four wage levels. Below is a chart summarizing the increases to the prevailing wages once the new wage regulation is fully implemented on July 1, 2022.

Wage Level	Column A – Current Percentile	Column B – New Percentile
Level I	17	35
Level II	34	53
Level III	50	72
Level IV	67	90

Source: KPMG Law LLP

Unlike the interim rule published on October 8, 2020, the revised rule provides a phased approached to increasing the minimum wage requirements for each of the four wage levels as follows:

- **Phase 1: March 15, 2021 to June 30, 2021**: Filed Labor Condition Applications (LCAs) and Prevailing Wage Determinations (PWDs) issued during this time will remain subject to the current wage levels and percentiles outlined above under column A. While the new rule is technically in effect during this period, the mathematical calculations used by the DOL in computing prevailing wage levels will remain unchanged.

- **Phase 2: July 1, 2021 to June 30, 2022**: The new wage minimums in column B will take effect but adjusted as follows:

    - The Level I Wage will be set as either 90 percent of the wage calculated at the 35th percentile of the wage distribution, or the mean of the lower one-third of the wage distribution, whichever is higher.

    - The Level IV Wage will be set as either 90 percent of the wage calculated at the 90th percentile of the wage distribution, or the mean of the upper two-thirds of the wage distribution, whichever is higher.

    - Levels II and III are to be set using the mathematical formula for wage calculations outlined in the Immigration and Nationality Act (INA), based on the amounts calculated for Levels I and IV above.

- **Phase 3: July 1, 2022 and onwards**: The increased wage minimums are to take effect per the new percentages as outlined in column B in the chart above.

Additionally, the revised rule provides a separate phased approach in adjusting the prevailing wage minimums for certain H-1B workers pursuing U.S. permanent residence. Special adjustments to the prevailing wage calculation will be made between July 1, 2021 and June 30, 2024, for H-1B workers who, as of October 8, 2020, were beneficiaries of an approved I-140 immigrant petition or were eligible for a post-sixth year H-1B extension.

Similar to the October 8, 2020 interim rule, the DOL's revised rule does not prohibit employers from relying on alternative wage sources such as independent compensation surveys in lieu of the DOL OES wage data for H-1B, H-1B1, E-3, and PERM applications. Independent wage surveys rely on alternative methods for computing prevailing wages and are not subject to the DOL's amended methodology in computing prevailing wages.

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KPMG NOTE

As stated earlier, the final rule is set to take effect 60 days from publication. However, the implementation of the final rule may be delayed as the incoming Biden Administration reviews other rules finalized in the last days of the Trump Administration. It is expected that President-Elect Biden will issue a memorandum on January 20, 2021, delaying implementation of "midnight regulations" including regulations issued since the election but not yet effective.

Employers and professional associations who previously challenged the October 8, 2020 interim rule may oppose the revised DOL rule through legal challenges in the federal courts.

KPMG Law LLP in Canada will continue to monitor for updates relating to DOL regulations and will endeavor to keep GMS *Flash Alert* readers informed as developments occur.

FOOTNOTE:

1 For the text and status of the DOL rule, click here.

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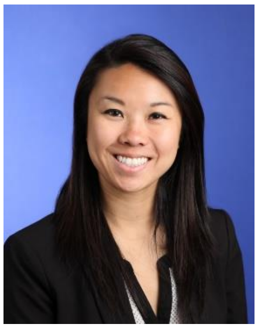

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