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Announcements

December 3, 2020. OFLC Announces Updates to Implementation of the Wage Protections Interim Final Rule; Compliance with District Court Orders

On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al. v. DHS, et al.*, No. 20-cv-7331, finding that the U.S. Department of Labor (the Department) failed to show it had good cause to forgo advance notice and comment under the Administrative Procedure Act for the Interim Final Rule (IFR), *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 FR 63872 (Oct. 8, 2020). The

court's order sets aside the IFR, which took effect on October 8, 2020 and implemented reforms to the prevailing wage methodology for the Permanent Employment Certification, H-1B, H-1B1, and E-3 visa programs. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al. v. Scalia, et al.*, No. 20-cv-14604, applying to the plaintiffs in that case.

The Department is taking necessary steps to comply with the courts' orders, including making required technical changes to the Foreign Labor Application Gateway (FLAG) system, in a manner that minimizes service disruptions for customers and OFLC staff. Specifically, the Department must make changes to the FLAG system modules to replace the 10/8/2020-6/30/2021 wage source year data that was implemented under the IFR with the OES prevailing wage data that was in effect on October 7, 2020. To reduce the risk of unintended system problems or errors while this occurs, employers and their authorized attorneys or agents may experience a brief delay in their ability to use the FLAG system to submit new *Labor Condition Applications for Nonimmigrant Workers* (LCAs), Form ETA-9035/9035E, and receive determinations on *Applications for Prevailing Wage Determination*, Form ETA-9141, where the Occupational Employment Statistics (OES) survey data is the prevailing wage source.

Implementation Timeframe for Technical Changes to FLC Online Data Center

- The OES prevailing wage data for each SOC and area of intended employment that was in effect on October 7, 2020 (*i.e.*, data for 7/1/2020-10/7/2020) has remained publicly accessible at <https://www.flcdatacenter.com/>.
- To limit any confusion for stakeholders, beginning at approximately 12:00PM (Noon) Eastern Time on December 4, 2020, this data source will be updated at <https://www.flcdatacenter.com/> to reflect the correct prevailing wage data for each SOC and area of intended employment through June 30, 2021.

Implementation Timeframe for Filing LCAs

- All Form ETA-9035/9035Es submitted using the FLAG system through 5:59AM Eastern Time on December 4, 2020, where the OES survey data is the prevailing wage source, will continue to be processed and issued a final determination without delay.
- Beginning around 6:00AM Eastern Time on December 4, 2020, the FLAG system will be temporarily unavailable to deploy necessary code changes to temporarily **disable** the OES prevailing wage calculator, which uses the 10/8/2020-6/30/2021 wage source year data to prepare Form ETA-9035/9035Es.
- Around 8:30AM Eastern Time on December 4, 2020, the FLAG system will be back online; however, employers and their authorized attorneys or agents will temporarily not be able to submit applications for processing where OES survey data is the prevailing wage source.
- Beginning around 8:30AM Eastern Time on December 9, 2020, employers and their authorized attorneys or agents will be able to submit new LCAs, Form ETA-9035/9035E, using the OES survey data that was in effect on October 7, 2020.

Implementation Timeframe for Processing Prevailing Wage Determinations

- OFLC's National Prevailing Wage Center (NPWC) has temporarily paused processing pending Form ETA-9141s for use in filing LCA and PERM applications. However, employers and their authorized attorneys or agents may continue to file new requests for a prevailing wage determination at any time.
- Beginning around 8:30AM Eastern Time on December 15, 2020, OFLC's NPWC will resume processing all pending and new Form ETA-9141s for use in filing LCA and PERM applications, and will use the OES survey data that was in effect on October 7, 2020 for prevailing wage determinations where the OES survey data is the prevailing wage source.

Opportunity to Request NPWC Review of a PWD Issued Under the IFR

Any employer desiring review of a PWD issued using the 10/8/2020-6/30/2021 wage source year data that was implemented under the IFR may make a request for review by the NPWC Director under 20 CFR 656.41 on or before January 4, 2021, and the Director will consider such request timely under 20 CFR 656.41(a).

Please use one of the following methods to submit a timely request for NPWC Director review:
AILA Doc. No. 20120430. (Posted 12/4/20)

- Online (preferred): Please access your [Foreign Labor Application Gateway \(FLAG\)](#) System account to request review of a prevailing wage determination issued by the NPWC Director. In the Historical Cases table, search for the case number, then open the case details. In the Actions tab, select Request Redetermination. You will be prompted to add a case note and may upload a document if needed. Upon submission, your request will be routed to an analyst for review. You will receive an email confirmation that your request submitted successfully.
- Email: FLC.PWD@dol.gov
In the email subject line, please include the phrase “IFR Request for Review” **followed by** the full case number on the Form ETA-9141.
- Mail: Employment and Training Administration
Office of Foreign Labor Certification
National Prevailing Wage Center
200 Constitution Ave NW
Room N-5311
Washington, DC 20210
- Attn: IFR Request for Review
- Please include either the full case number in the cover letter of the request for NPWC Director review **or** a hard copy of the Form ETA-9141 issued under the IFR methodology.

November 23, 2020. OFLC Announces Webinar on December 9, 2020, to Update Stakeholders on the Process for Filing H-2B Applications With a Start Date of April 1, 2021, or Later

The Office of Foreign Labor Certification (OFLC) invites stakeholders to participate in a webinar that provides best practices and helpful tips for preparing H-2B Applications for Temporary Employment Certification (Form ETA-9142B and appendices). The webinar will discuss:

- Regulatory timeframes for filing applications with a start date of need of April 1, 2021, or later;
- Procedures OFLC uses to randomly select H-2B applications for review and processing; and
- Actions the Department is taking to prepare the [Foreign Labor Application Gateway \(FLAG\) System](#) to support the submission of applications beginning January 1, 2021.

Details of the webinars are as follows:

Date: December 9, 2020

Start Time: 2:30 EST

Link: <https://usdol.webex.com/usdol/j.php?MTID=m7935686fca176037f113697ee0501664>

Meeting password: hfGmm4EkT36

Call-in information: *Due to the size of the call, please use the following toll-free number for audio:

- Conference Number: 800-779-2595
- Participant Passcode: 7995398

Please note: Webinars are limited to 1,000 participants.

November 19, 2020. OFLC Posts New Adverse Effect Wage Rates Webpage

On November 5, 2020, the Department of Labor (Department) published a final rule updating the methodology for determining hourly Adverse Effect Wage Rates (AEWR) for non-range agricultural occupations in the H-2A visa program. See Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 85 FR 70445 (Nov. 5, 2020) (“2020 AEWR Final Rule”). The AEWR is the minimum wage rate the Department has determined must be offered and paid by employers to H-2A workers and workers in corresponding employment to ensure that the employment of H-2A workers does not adversely affect the wages of agricultural workers in the U.S. Beginning on December 21, 2020, H-2A job orders submitted for non-range occupations must comply with the new methodology.

The Office of Foreign Labor Certification (OFLC) has created a new webpage that consolidates AEWR information for the H-2A