

Announcements

January 22, 2021. OFLC Announces Plan for Reissuing Certain Prevailing Wage Determinations Issued under the Department's Interim Final Rule of October 8, 2020; Compliance with the District Court's Modified Order

On January 20, 2021, the U.S. District Court for the District of Columbia in *Purdue University, et al. v. Scalia, et al.* (No. 20-cv-3006) and *Stellar IT, Inc., et al. v. Scalia, et al.* (No. 20-cv-3175) issued a modified order governing the manner and schedule in which the Office of Foreign Labor Certification (OFLC) will reissue certain prevailing wage determinations (PWDs) that were issued from October 8, 2020 through December 4, 2020, under the wage methodology 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), and at the request of employers under the H-1B, H-1B1, and E-3 temporary programs and PERM labor certification program.

The Department is taking necessary steps to comply with the modified order issued by the District Court. Accordingly, OFLC will be reissuing certain PWDs issued under the Department's IFR in two phases.

Employers that have already submitted a request in response to the December 3, 2020 announcement posted by OFLC have been issued a PWD and do not need to resubmit a second request for reissuance or take other additional action.

PHASE I: High Priority PWDs

Within 15 working days of receiving the requested list of named Purdue Plaintiffs and Associational Purdue Plaintiffs from Plaintiffs' counsel, OFLC will reissue all PWDs that have not yet been used in the filing of a Labor Condition Application (LCA) or PERM application as of January 20, 2021, and that fall into one or more of the following categories:

1. PWDs issued to all named Plaintiffs in the Purdue case and members of the Associational Plaintiffs in that case;
2. PWDs that an employer requested to support the filing of a LCA under the H-1B, H-1B1, and E-3 visa classifications;
3. PWDs issued that resulted in the default wage rate of \$100.00 per hour or \$208,000 per year; and
4. PWDs issued for job opportunities in healthcare related occupations, as defined by the Standard Occupational Classification system codes 29-0000 and 31-0000 series.

OFLC will individually email each requestor's point-of-contact identified on the Form ETA-9141, *Application for Prevailing Wage Determination*, who received a PWD under the IFR and who falls into one or more of the four categories described above to provide notice that OFLC

will reissue the applicable PWD automatically. Once completed, OFLC will email the requestor's point-of-contact a copy of the reissued PWD.

Finally, to provide the general public with transparency on the Department's commitment, OFLC will make publicly available on the Foreign Labor Application Gateway (FLAG) System website, at <https://flag.dol.gov/>, a list of all PWDs that are eligible for Phase I with weekly updates identifying the date on which OFLC reissued the applicable PWD.

PHASE II: Emergency Situations

No later than March 2, 2021, OFLC will reissue PWDs for all the requests received under Phase II as described below.

For employers with PWDs issued under the IFR that are not eligible for Phase I, the Department is extending the deadline to request reissuance of a PWD from January 4, 2021, to February 8, 2021, **only for employers attesting that they have an emergency situation necessitating reissuance of a PWD**. An emergency situation includes the following circumstances:

- PWDs issued in support of a labor market test conducted under the PERM program that is set to expire in the next 60 days;
- PWDs issued to support the filing of a PERM application within the next 60 days to allow for extension of H-1B status or otherwise is required for a foreign worker beneficiary to be able to remain in the U.S. or maintain work authorization;
- PWDs issued to support the filing of a PERM application where a child of a foreign worker beneficiary potentially will age out within one year; or
- Any other PWD issued where the employer attests to having an emergent need for a reissuance not otherwise covered in this list.

OFLC will individually email each requestor's point-of-contact identified on the Form ETA-9141 who received a PWD under the IFR and not yet requested a reissuance to alert them to the extended opportunity to request reissuance of a PWD no later than February 8, 2021. PWDs that OFLC has already reissued or those OFLC determined were used in connection with the filing of a LCA or PERM application will not receive these emails, as such PWDs are not eligible for reissuance.

Employers with emergency situations must affirmatively request reissuance of a PWD by accessing the redetermination function in their FLAG system account **OR** contacting the National Prevailing Wage Center (NPWC) by email at FLC.PWD@DOL.GOV, and including the words "IFR Request for Emergency Review" **followed by** the full case number on the Form ETA-9141 in the subject line of the email. **No documentation supporting the request based on an emergency situation is needed. However, a statement from the employer or requestor's point-of-contact attesting to an emergency situation is required.**

Finally, to provide the general public with transparency on the Department's commitment, OFLC will make publicly available on the FLAG System website, at <https://flag.dol.gov/>, an aggregate report, updated weekly, identifying the total reissuance requests received, total PWDs pending reissuance, and total PWDs reissued.

Additional Notes:

- Employers who received an OES-based PWD under the IFR and filed a second PWD requesting use of a non-OES wage source may withdraw the second PWD application at any time and request reissuance of the initial OES-based PWD, provided the employer has an emergency situation.
- PWDs issued using a wage source other than the OES are not subject to the agreement reached by the parties or the reissuance process created to comply with this agreement.
- Employers are reminded that they may choose to file LCAs at any time without an NPWC-issued PWD, using approved sources such as OFLC's online OES wage database at <https://www.flcdatacenter.com/>; a private wage survey; a Collective Bargaining Agreement; a Davis Bacon Act wage; or a McNamara O'Hara Service Act wage, in accordance with the regulations at 20 CFR 655.731.

To download and print a PDF copy of this announcement, please click [here](#).

January 20, 2021. U.S. Department of Labor Withdraws Forthcoming H-2A Temporary Agricultural Program Rule for Review

On January 15, 2021, the U.S. Department of Labor (Department) announced and posted on the Office of Foreign Labor Certification's website a forthcoming final rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States* (RIN 1205-AB89), pending publication in the *Federal Register* with a 30-day delayed effective date. On January 20, 2021, the Department withdrew this document from the Office of the Federal Register prior to its publication for the purpose of reviewing issues of law, fact, and policy raised by the rule, and therefore it will not take effect. The Department will notify the public of any further actions as appropriate once it completes its review.

January 20, 2021. U.S. Department of Labor Withdraws Program Bulletin Announcing Revised Interpretation and New Guidance under the H-1B Visa Program for Review

On January 15, 2021, the U.S. Department of Labor (Department) issued an Office of Foreign Labor Certification H-1B Program Bulletin and a Wage and Hour Division Field Assistance Bulletin (FAB) revising its interpretation of its regulations concerning which employers of H-1B workers must file Labor Condition Applications. The Department simultaneously submitted a Notice for publication in the *Federal Register* announcing and requesting public comments on this interpretation. On January 20, 2021, the Department withdrew its Notice from the Office of the Federal Register prior to its publication, and is now withdrawing the Bulletin and FAB for the

purpose of considering the process for issuing this interpretation as well as reviewing related issues of law, fact, and policy. Accordingly, the requirements of the Bulletin and FAB are no longer in effect. The Department will notify the public of any further actions as appropriate once it completes its review.

January 15, 2021. OFLC Announces Updates to Implementation of the H-2A Adverse Effect Wage Rate Methodology for Non-Range Occupations Final Rule; Compliance with District Court Order

On December 23, 2020, the U.S. District Court for the Eastern District of California issued an order in *United Farm Workers, et al. v. DOL, et al.*, No. 20-cv-01690, enjoining the Department of Labor (Department) from implementing its 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), and ordering the Department to operate under the 2010 rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884 (Feb. 12, 2010).

On January 12, 2021, the court issued a supplemental order requiring the Department to publish the adverse effect wage rates (AEWR) for 2021 in the *Federal Register* on or before February 25, 2021, using the methodology set forth in the 2010 rule, and to make those AEWRs effective upon their publication. Additionally, the court ordered the Department to notify all state workforce agencies (SWAs), employers, and the general public that the AEWRs in effect on December 20, 2020, will remain in effect during the interim period until the Department publishes 2021 AEWRs in the *Federal Register*.

Accordingly, all H-2A job orders filed on or after December 21, 2020, with SWAs serving the area of intended employment, as set forth in [20 CFR 655.121](#), including job orders filed concurrently with an *Application for Temporary Employment Certification* with the OFLC National Processing Center for emergency situations under [20 CFR 655.134](#), must continue to use the AEWRs in effect on December 20, 2020, until the publication of new AEWRs in the *Federal Register*.

Additionally, the court reserved decision on whether an award of backpay is warranted based on the difference, if any, between the 2020 AEWRs and the final 2021 AEWRs. Accordingly, the court ordered the Department to provide notice to all employers who submit job orders and applications under the H-2A program between December 21, 2020, and the publication of 2021 AEWRs in the *Federal Register*, that affected H-2A workers may have a potential claim for backpay. Accordingly, and as part of their regulatory obligations to maintain accurate and adequate earnings records (see [20 CFR 655.122\(j\)](#)), the Department reminds employers to record the names and permanent home addresses of all H-2A workers who may later be entitled to backpay, and make reasonable efforts to ensure that such information for each worker remains current. The Department will provide here a further notice if and when the court issues a ruling regarding potential backpay.

January 14, 2021. U.S. Department of Labor Published a Final Rule Updating Regulations for Wages Paid to Certain Immigrant and Nonimmigrant Foreign Workers and Better Protect the Wages and Job Opportunities of United States Workers

The U.S. Department of Labor [published](#) a Final Rule in the *Federal Register* that will help America's workers remain competitive by reforming the prevailing wage methodology for several foreign worker programs. This Final Rule will be effective on March 15, 2021. However, filers will not be required to use the prevailing wage methodology under this Final Rule until July 1, 2021.

January 7, 2021. OFLC Publishes List of Randomized H-2B Applications Submitted January 1-3 for Employers Seeking H-2B Workers Starting April 1, 2021

To keep the public informed regarding the submission and assignment of H-2B applications for review, the Office of Foreign Labor Certification (OFLC) published the assignment group(s) for 5,377 H-2B applications covering 96,641 worker positions with the start date of work of April 1, 2021.

Following the [randomization procedures](#) published in the Federal Register on March 4, 2019, OFLC completed the randomization process on January 5 and assigned to National Processing Center analysts all H-2B applications placed in Assignment Group A for issuance of Notices of Deficiency or Acceptance. Group A includes enough worker positions to reach the H-2B semi-annual visa allotment of 33,000. Four additional Assignment Groups (Groups B-E) were created for the remaining applications, each of which includes no more than 20,000 worker positions.

On January 5, 2021, OFLC provided written notice to each employer (and the employer's authorized attorney or agent) informing them about the Assignment Group for their application(s).

- [View the Assignment Groups for H-2B Applications Submitted January 1-3, 2021](#)

January 5, 2021. OFLC Conducts Randomization Process on H-2B Applications Submitted Requesting an April 1, 2021, Work Start Date

The Office of Foreign Labor Certification has completed the [randomization process](#) to randomly assign all H-2B applications submitted during the initial three-day filing window, January 1-3, 2021, requesting an April 1, 2021, work start date for the second half of the Fiscal Year 2021 H-2B statutory visa cap.

OFLC received a total of 5,377 H-2B applications requesting 96,641 worker positions during this filing period.

OFLC will be providing written notification to employers (and the employer's authorized attorney or agent) with their H-2B Assignment Group. On January 7, 2021, OFLC will also publish on its website the list of the H-2B applications assigned to each Assignment Group.