

Mobility: immigration alert

March 2021

United States

Extended delay in the effective and transition dates of the Department of Labor's high-skilled wage rule

Executive summary

On Monday, 22 March 2021, the Department of Labor (DOL) published in the Federal Register a delay in the effective date of the high-skilled wage rule until 14 November 2022, with an applicability date of 1 January 2023.

Background and analysis

On 8 October 2020, the DOL issued an Interim Final Rule (IFR) amending regulations governing the computation of Occupational Employment Statistics (OES) Survey-based wage levels for the H-1B, H-1B1, E-3 non-immigrant visas, and certain immigrant visa categories. The changes resulted in higher prevailing wages for occupational classifications across the board and went into effect immediately.

On 1 December 2020, a federal court struck down the IFR, finding DOL had not satisfied the "good cause exception" and failed to provide advanced notice to the public.

On 14 January 2021, the DOL published a final rule in the Federal Register ("final rule" or "high-skilled wage rule") that adopted changes to the department's regulations governing the wage levels for permanent labor certifications (PERM) and Labor Condition Applications (LCAs). Under the amended rule, the OES prevailing wage levels, representing the range of skills from entry level (i.e. Level I) to experienced (i.e. Level IV), would have significantly increased the minimum wages across the four-tiered wage structure for purposes of PERM, H-1B, H-1B1, E-3 non-immigrant work visas, to the 35th, 53rd, 72nd, and 90th percentiles of the OES Survey, respectively.

This final rule was scheduled to be formally implemented on 15 March 2021 with wage levels taking effect on 1 July 2021.

As a result of a Regulatory Freeze Memo issued by the Biden administration, which directed agencies to consider delaying the effective date for regulations, the effective date of DOL's final rule was delayed to 14 May 2021.

DOL has now proposed a further delay in the effective date of the final rule by eighteen months or until 14 November 2022, along with corresponding proposed delays to the rules transition dates, to 1 January 2023, under which adjustments to the new wage levels would begin.

This proposed rule was published in the Federal Register on 22 March 2021.

The Department has determined that delaying the effective and transition dates of the high-skilled wage rule while the Department undertakes a comprehensive review of this rule is "...the fairest and most prudent approach..." as the concerns raised by the regulated community "...call into question the fundamental aspects of the rulemaking...".

The extended delay "...will provide agency officials with sufficient amount of time to compute and validate prevailing wage data covering specific occupations and geographic areas, complete and thoroughly test system modifications, train staff, and conduct public outreach to



EY Law LLP

ensure an effective and orderly implementation of any revisions to the prevailing wage levels.” Further, a delay in the effective and transition dates will:

- ▶ Provide DOL with the opportunity to employ additional technical studies and data to ensure the appropriateness of the wage rates established in the Final rule, and its implementation dates
- ▶ Provide DOL with the opportunity to issue a separate Request for Information (RFI) and evaluate commenters’ concerns and issues raised during the RFI and consider any other regulatory actions in response
- ▶ Allow for the time needed by the Office of Foreign Labor Certification (OFLC) and Bureau of Labor Statistics (BLS) for proper testing and implementation of the new methodology for computing wage levels
- ▶ Prevent confusion and uncertainty amongst the regulated community and ensure that employers continue using the correct set of prevailing wage data and maintain accurate public inspections files
- ▶ Result in savings to employers and minimize the needless fluctuations in wages and burden’s imposed on employers
- ▶ Permit continued Federal litigation challenging the final rule to unfold and avoid significant disruptions to both BLS and OFLC processes should DOL receive an adverse decision

What this means

Given this delay, U.S. employers remain subject to the existing DOL wage requirements, which are set at approximately the 17th, 34th, 50th, and 67th percentiles of the OES Survey. A transition period to the new wage levels would not begin until 1 January 2023 and remaining proposed transition dates will also be delayed in one-year increments and revised to 1 January 2024, 1 January 2025, and 1 January 2026.

DOL is preparing to engage in a comprehensive review and analysis of the final rule and will thoroughly consider the legal and policy issues raised by the public. DOL intends to seek additional guidance from the public and allow for a meaningful opportunity for employers and the regulated community to comment and adequately engage in the rulemaking process. In doing so, this may invite further possible changes to the substance and/or implementation of the existing high-skilled wage rule.

EY Law will continue to monitor these developments. Should you have any questions, we encourage you to contact one of our US immigration professionals.

George Reis, Managing Partner
+1 416 943 2535
george.reis@ca.ey.com

Batia Stein, Partner
+1 416 943 3593
batia.j.stein@ca.ey.com

Roxanne Israel, Partner
+1 403 206 5086
roxanne.n.israel@ca.ey.com

Authored by:
Mariam Arbabi, Business Immigration Attorney
+1 416 932 5347
Mariam.Arbabi@ca.ey.com

Alex Israel, Partner
+1 416 943 2698
alex.d.israel@ca.ey.com

Christopher Gordon, Partner
+1 416 943 2544
christopher.d.gordon@ca.ey.com

Jonathan Leebosh, Partner
+1 604 899 3560
jonathan.e.leebosh@ca.ey.com

EY | Building a better working world

EY exists to build a better working world, helping create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, law, strategy, tax and transactions, EY teams ask better questions to find new answers for the complex issues facing our world today.

For more information, please visit ey.com/ca.

Follow us on Twitter @EYCanada.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via ey.com/privacy. EY member firms do not practice law where prohibited by local laws. For more information about our organization, please visit ey.com.

About EY Law LLP

EY Law LLP is a Canadian law firm, affiliated with Ernst & Young LLP in Canada. Both EY Law LLP and Ernst & Young LLP are Ontario limited liability partnerships. EY Law LLP has no association or relationship with Ernst & Young LLP in the US, or any of its members. Ernst & Young LLP in the US does not practice law, nor does it provide immigration or legal services. For more information, please visit EYLaw.ca.

© 2021 EY Law LLP.

All Rights Reserved.

A member firm of Ernst & Young Global Limited.

EYG no. 002451-21Gbl

This publication contains information in summary form, current as of the date of publication, and is intended for general guidance only. It should not be regarded as comprehensive or a substitute for professional advice. Before taking any particular course of action, contact EY or another professional advisor to discuss these matters in the context of your particular circumstances. We accept no responsibility for any loss or damage occasioned by your reliance on information contained in this publication.

ey.com/en_ca