CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

JONATHAN BASELICE
EXECUTIVE DIRECTOR, IMMIGRATION POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5448 · 202/463-3194 FAX

November 9, 2020

Administrator Brian Pasternak
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

By electronic submission: www.regulations.gov

RE: Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States
85 Fed. Reg. 63872 (October 8, 2020)
RIN 1205-AC00

Dear Administrator Pasternak:

The U.S. Chamber of Commerce submits the following comments regarding the interim final rule referenced above. The Chamber is extremely concerned about the profoundly negative impact this rule would have on the business community, as it would prevent many companies across various industries from meeting their workforce needs. The disruption caused by this rule is exacerbated by the fact that the Labor Department ("DOL") implemented this rule on an interim final basis with the changes becoming effective on the date of the rule's publication in the Federal Register.

The Chamber strongly disagrees with the Department's assessment that it has satisfied the legal requirements under the Administrative Procedure Act to implement this rule on an interim final basis. The Chamber and many others filed a lawsuit against the Labor Department seeking to both enjoin the enforcement of DOL's prevailing wage determination change in the near term and to vacate and set aside this rule because it was not lawfully promulgated.

OVERVIEW

Since 2004, DOL has utilized a 4-tier prevailing wage structure whereby the prevailing wage for each level is commensurate with the experience, education, and level of supervision exercised by the worker in the execution of his/her job duties.[1] DOL implemented this four-level Occupational Employment Statistics (OES) wage system under its Prevailing Wage

[1] 85 Fed. Reg 63872, 63899 (October 8, 2020).

Determination Policy for Nonagricultural Immigration Programs guidance document in 2005. In doing so, DOL classified the four prevailing wage levels as follows: Level I "entry level," Level II "qualified," Level III "experienced," and Level IV "fully competent."[2]

For each of the prevailing wage levels to be commensurate with the education, experience, and supervisory duties of a given job in given area of the country, DOL assigned a percentile for each of the four wage rates to reflect what an employer would need to pay a particular worker at the relevant wage tier in a specific job in a given Metropolitan Statistical Area (MSA) or Metropolitan Division (MD) in the country.

Prior to DOL's publication of its rule on October 8, DOL utilized the respective percentiles for its prevailing wage levels:

Prevailing Wage Level	**Wage Percentile for Each Level of Worker**
Level I	17th percentile
Level II	34th percentile
Level III	50th percentile
Level IV	67th percentile

DOL's new prevailing wage rule increased these percentiles substantially. The percentiles for each prevailing wage tier under the OES system are now as follows:

Prevailing Wage Level	**Wage Percentile for Each Level of Worker**
Level I	45th percentile
Level II	62th percentile
Level III	78th percentile
Level IV	95th percentile

The increases made to the prevailing wage system by the DOL rule are divorced from the economic realities in the American labor markets. DOL reasonably claims that a well-functioning system for prevailing wages determinations would find that the wages that need to be paid for foreign national workers subject to these requirements "generally should approximate the going wage for workers with similar qualifications and performing the same types of job duties in a given labor market."[3] However, for the many reasons discussed below, the new system DOL created in this rule does not achieve a result whereby the wages paid to foreign nationals subject to these prevailing wage requirements would be paid similarly to their American counterparts with similar education, skills, and qualifications. In fact, this new system forces American employers to pay their H-1B, E-3, EB-2, or EB-3 workers significantly higher than their American counterparts to such an extent that it would prevent many companies from

[2] ETA Prevailing Wage Determination Policy, Nonagricultural Immigration Programs, May 2005, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/policy_nonag_progs.pdf, (accessed November 7, 2020).
[3] 85 Fed. Reg. 63872, 63886 (October 8, 2020).

meeting their workforce needs. Given the disruption this rule would cause, we implore DOL to withdraw the rule and work with stakeholders on a new and better-informed rulemaking process.

DOL LACKS GOOD CAUSE TO FORGO NOTICE AND COMMENT PROCESS

The profound changes made by DOL's Interim Final Rule (IFR) have already taken effect and are being enforced against American companies. This has caused significant disruptions to many different businesses, which are driven in large part by the fact that these sweeping changes were implemented without any formal notice to stakeholders. Specifically, the Chamber was very concerned about how this rule was handled during the regulatory review process at the Office of Information and Regulatory Affairs (OIRA). This proposal's review was suddenly waived by OIRA after the U.S. Chamber had expressed to OIRA officials its desire for an EO 12866 meeting to discuss multiple regulatory proposals concerning immigration prior to their promulgation. The Chamber believes that the implementation of these changes by means of an interim final rule was unjustified, unlawful, and the haphazard manner of this rule's implementation is inflicting significant, irreparable harms on many companies across the U.S.

DOL justified its decision to forgo the notice and comment rulemaking process on two basic premises. The first premise was that DOL had to act in response to the shock in the American labor market caused by the COVID-19 pandemic, which created exigent circumstances that threatened immediate harm to U.S. workers.[4] The other justification offered was that if the public was provided with advance notice and an opportunity to comment on these prevailing wage system changes prior to their implementation, it would create an opportunity for employers to evade the adjusted wage requirements.[5] Neither of DOL's stated justifications withstands scrutiny, and given how disruptive these changes would be to the American business community, we implore the agency to withdraw this rule.

Specifically, DOL's claim that the COVID-19 pandemic has provided the agency with good cause to forgo the notice and comment process due to the "high unemployment rates experienced this year, which reached 14.7 percent in April, a rate not seen since the Great Depression…," which caused millions of U.S. workers to experience one of the most significant, mass lay-off events in U.S. history.[6] While the Chamber unequivocally agrees that the pandemic has had devastating economic consequences on millions of Americans, the Department cannot claim that an exigent circumstance existed in October today based upon the unemployment level in the U.S. from six-months prior to the promulgation of this rule.

The Labor Department's unemployment data for the month of September (the most recent data available to DOL at the time of the rule's promulgation) was 7.9%. Most recently, the U.S. unemployment rate continued falling in the month of October to a rate of 6.9%. To put

[4] 85 Fed. Reg 63872, 63898 (October 8, 2020).
[5] Id, at 63898.
[6] 85 Fed. Reg. 63872, 63899-63900 (October 8, 2020).

this unemployment data into perspective, the unemployment rate in the U.S. was above 7.9% from January 2009 through January 2013. Periods of elevated unemployment may be undesirable, but such circumstances do not satisfy the "high bar" to trigger the good-cause exception to the notice-and-comment process required for rulemaking under the APA.[7] If elevated unemployment alone was sufficient grounds for invoking the good cause exception to the notice-and-comment rulemaking process, the government would have virtually unchecked authority to promulgate regulations with impunity, thus turning the "exception" for notice-and-comment rulemaking into the "rule" in contravention of Congress' intent in crafting the APA.

Similarly, DOL's stated concern about companies evading the new prevailing wage requirements due to advance notice of the changes contemplated in this prevailing wage rule are unpersuasive as a justification for bypass notice-and-comment rulemaking. Administration officials did not keep their desire to institute these types of changes a secret. On June 22, 2020, a "senior administration official" told reporters during a press call (wherein the administration was unveiling Presidential Proclamation 10052) that DOL would seek to amend its prevailing wage methodology. The senior official stated the following:

> "…The Department of Labor has also been instructed by the President to change the prevailing wage calculation and clean it up…the Department of Labor is going to fix all that, with the idea of setting the prevailing wage floor at the 50th percentile so these people will be in the upper end of earnings."[8]

Admittedly, the details of DOL's October rule are slightly different that what was broadcast to the public by administration officials in June. However, the administration put the public on notice as early as June that DOL was seriously considering these types of policy changes four months prior to this rule's publication.[9]

In addition, the President stated at press conference on August 3rd that his administration would be finalizing H-1B regulations to ensure that American workers are not "replaced" by H-1B workers and to ensure that such workers are "highly paid" and not "inexpensive labor that destroys American jobs."[10] Taken together, these comments made in June and August undermine the Department's justification for maintaining secrecy to avoid any potential evasion of these new requirements, as they openly broadcast their intentions to the public.

Furthermore, the notion that forgoing the notice-and-comment process would protect the interests of American workers by not allowing American businesses to "game" the system is

---

[7] See 5 U.S.C. § 553(b).
[8] Background Press Call by Senior Administration Official on the Administration's Upcoming Immigration Action, p. 4, June 22, 2020, available at https://perma.cc/Z9YU-MUZK, (accessed on November 8, 2020).
[9] Id, at p. 4.
[10] Remarks by President Trump in a Meeting with U.S. Tech Workers and Signing of an Executive Order on Hiring American, August 3, 2002, available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-u-s-tech-workers-signing-executive-order-hiring-american/, (accessed on November 8, 2020).

precluded by the structure of the prevailing wage determination process itself. Aside from DOL's assertions alleging that providing advance notice of this rule (and an opportunity to comment) would provide the "opportunity" and "incentives" for employers to evade these new prevailing wage requirements,[11] DOL provides no evidence in its rule to credibly suggest that employers would evade the new requirements by seeking to obtain the relevant prevailing wage determinations for employment-based immigrants and nonimmigrants under the rule. The lack of evidence and the presence of agency speculation do not give rise to a federal agency meeting its burden under the APA to dispense with the notice-and-comment rulemaking process.

DOL's lack of evidence in this regard is, in our view, driven in large part by DOL's own regulations governing its prevailing wage determination processes. Whether a company is seeking to employ foreign nationals on immigrant visas or nonimmigrant visas, DOL does not allow an employer to meet the respective prevailing wage requirements at one point in time and then these determinations are valid in perpetuity. The determination processes for the immigrant and nonimmigrant visa classifications covered by this rule have specific temporal limitations regarding their duration that prevent companies from rushing to the agency to obtain their prevailing wages determinations to evade the new requirements.[12] Given the limitations placed upon the relevant applications for immigrant and nonimmigrant workers, any evidence that DOL could have put forward to show this type of behavior would have been widespread would not have risen to the level of concern necessitating the abandonment of the notice-and-comment process under the APA. The fact that DOL did not put forward any evidence on this point suggests that bypassing the notice and comment process for this rule was unlawful.

PREVAILING WAGE CHANGES WOULD CAUSE SIGNIFICANT BUSINESS DISRUPTION

Many Chamber members are extremely concerned about the significant business disruptions caused by these prevailing wage changes. The prevailing wage increases are woefully disconnected from the economic realities in the U.S. labor market. Companies across a host of industries have indicated their anxiety over likely struggles to meet both their current and future workforce needs due to the business disruption caused by this rule.

The Chamber represents several manufacturers that are currently unable to hire or retain their critical employees, as they had relied upon DOL's prior prevailing wage construct to make their U.S. workforce planning decisions. We've heard from power equipment manufacturers that had to hold off on hiring and transferring key engineers because the new prevailing wage

[11] 85 Fed. Reg. 63872, 63898 (October 8, 2020).
[12] See 20 C.F.R 656.40(c), which states that validity period of a Prevailing Wage Determination in the employment-base immigrant visa context may be no less than 90 days and no more than 1 year in duration, and see 20 CFR 655.730(b) which states that a Labor Condition Application may not be submitted by an employer to DOL earlier than six months prior to the beginning date for the putative beneficiary's period of employment. These limitations preclude the ability for many employers to game the system in the manner suggested by DOL because there are several reasons why employers would not be able to try to apply for a Prevailing Wage Determination or an LCA.

requirements make these decisions cost-prohibitive. Similarly, a semiconductor manufacturer has stated the concern it has for its current inability to move forward with its plan to seek lawful permanent residency for hundreds of its critical engineers that drive the business's growth and innovation.

Healthcare providers have expressed similar concerns to us regarding the impact this rule would have on their businesses. An association representing several healthcare staffing firms has stated that for the types of workers they are most concerned about, the prevailing wages that must be paid to foreign nationals in those fields are increasing from 22%-67%, which all but prevents employers from finding new workers. The disruption caused by these wage increases would be most harmful to rural hospitals and healthcare facilities who have more difficulties in recruiting healthcare workers to less densely populated, less affluent areas of the country. Lastly, in some fields, such as physical therapy, some companies would have to significantly curtail their operations, as they are no longer economically feasible under the new prevailing wage construct. These changes would not only have a negative impact on the health care providers and their clients, but the negative impact on patient care would also be profound.

Many technology companies are also very concerned about the impact this rule change would have on their operations. Several companies have indicated to us that the future for their H-1B workers, in particular those H-1B workers for whom the companies were planning to seek lawful permanent residency, have now largely been put into limbo, as many of them would likely not be able to stay in the U.S. because this rule makes it economically unfeasible to continue employing them in the U.S. Many of these businesses are very concerned about the increased prevailing wage requirements would have on their ability to hire and retain the recruits they hired from American colleges and universities. The drastic increases for the Wage Level I workers are incredibly problematic for many companies, as these individuals, many of whom graduated from U.S. colleges, are critical to the research and development efforts of many different firms.

Companies across many industries devised their long-term workforce plans based upon their reliance on DOL's prior prevailing wage system. Businesses must reckon with the fact that maintaining their U.S. operations is now more costly, and the way this rule was implemented has caused several immediate problems with regard to the current workforce needs of many companies. Many valued employees of our members face an uncertain future because their businesses cannot maintain their current workers under the new wage requirements. Many businesses have indicated that if this rule stands, many of these companies would likely move a portion of their operations offshore to better ensure the continuity of their operations, which would harm the U.S economy in several ways. Simply put, if many talented foreign nationals are forced to leave the U.S. because these new wage requirements make it impractical to continue employing them in our country, the economic activity and U.S. jobs that these highly skilled foreign nationals support will be lost.

The feedback that several companies have provided to us regarding the harm inflicted by this rule seem to be borne out by the empirical studies on the new prevailing wage requirements.

The National Foundation for American Policy found that for all occupations and geographic locations, the new minimum salary that employers are required to pay when compared with the old prevailing system is, on average, 39% higher for Level 1 positions, 41% higher for Level 2, 43% higher for Level 3 and 45% higher for Level 4.[13]

Similarly, a study conducted by the American Action Forum found similarly high increases in prevailing wages for select occupational classifications, with the most popular occupational classifications utilized by H-1B employers seeing increases for entry level workers as high as 150%.[14] Lastly, the AAF study found that by making entry-level high-skilled foreign national workers considerably more expensive, this rule would discourage international students from attending U.S. colleges and universities.[15]

CONCLUSION

Businesses across multiple sectors of the U.S. economy are extremely concerned about the operational disruptions their companies are confronting because of this rule and the manner in which it was implemented. We urge DOL to withdraw this rule and revert to its prior policies, as that would provide much needed certainty for companies that rely upon nonimmigrant and immigrant workers to meet their high-skilled workforce needs. If DOL wishes to promulgate regulations governing the prevailing wage determination process, it is our hope that DOL does so in a new, separate effort that takes into account the concerns of the business community.

Thank you for considering our views.

Sincerely,

Jonathan Baselice
Executive Director, Immigration Policy
U.S. Chamber of Commerce

[13] National Foundation of American Policy, *An Analysis of the DOL H-1B Wage Rule*, p. 2, October 2020, available at https://nfap.com/wp-content/uploads/2020/10/Analysis-of-DOL-H-1B-Wage-Rule.NFAP-Policy-Brief.October-2020.pdf, (accessed on November 7, 2020).
[14] Isabel Soto and Tom Lee, *Assessing the Department of Labor's Rule Raising Wage Requirements for H-1B Workers,* November 3, 2020, available at https://www.americanactionforum.org/research/assessing-the-department-of-labors-rule-raising-wage-requirements-for-h-1b-workers/#ixzz6dIQIznhQ, (accessed November 7, 2020).
[15] Id.