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OF THE  
UNITED STATES OF AMERICA

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June 1, 2021

Administrator Brian Pasternak  
Office of Foreign Labor Certification  
Employment and Training Administration  
U.S. Department of Labor  
200 Constitution Avenue NW  
Room N-5311  
Washington, DC 20210

*Via electronic submission:* [www.regulations.gov](http://www.regulations.gov)

**RE: Request for Information on Data Sources and Methods for Determining Prevailing Wages Levels for the Temporary and Permanent Employment of Certain Immigrant and Non-Immigrants in the United States**  
**86 Fed. Reg. 17343 (April 2, 2021)**  
**RIN 1200-AC00**

Dear Administrator Pasternak:

The U.S. Chamber of Commerce submits the following comments to the above-referenced request for information. The Chamber greatly appreciates the opportunity to offer its views on issues pertaining to the data and methods used to determine the prevailing wage levels for various types of high-skilled immigrant and nonimmigrant workers in the U.S.

Businesses of all sizes and across several industries are extremely concerned about the prevailing wage rule that was finalized by the agency in January 2021.<sup>1</sup> The Chamber submitted previous [comments](#) expressing its concerns with the regulatory approach taken by DOL since October 2020 on this issue. We appreciated DOL's willingness to delay the effective date of this rule, but as we have stated before, the underlying approach is fundamentally flawed and will cause significant harm to many different American companies if implemented by DOL.

The concerns companies have over the construct DOL utilized in the January final rule are of such significance that the Chamber joined many others in [ongoing litigation](#) to prevent the rule from taking effect. DOL's willingness to seek input from the regulated community is welcomed by many companies, as it is their hope, and ours, that the efforts undertaken pursuant

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<sup>1</sup> 86 Fed. Reg. 3608 (Jan. 14, 2021).

to this request for information will lead to a more collaborative rulemaking approach between the Department, the business community, and other interested stakeholders.

In order for such collaborative policymaking to occur, it is critically important that DOL abandon the approach taken in its January final rule. The changes proposed in that rule artificially inflate the wage rates that high-skilled foreign national workers must be paid to such an extent that the prevailing wage requirements do not reflect economic reality. The types of business disruptions that will be caused by these changes would be profound and devastating. These new wage requirements will not only prevent companies from finding new workers to meet their workforce needs, but they will also severely inhibit the ability of companies to retain their current foreign national workers. This job-killing approach to reforming the prevailing wage determination process cannot be allowed to go into effect.

There are several ideas that DOL should consider in future efforts to reform how it determines prevailing wage levels for high-skilled foreign national workers. One consideration for the Department to consider is to utilize more accurate and timely data to determine the wage levels. The Chamber believes this can be accomplished through utilizing the data contained in state unemployment administrative records, which will have several benefits over the current method used by the Bureau of Labor Statistics (BLS).

Another idea that many companies believe is critical to ensuring that prevailing wage determination reforms will not harm the interests of businesses is to provide clarity regarding how private wage surveys may be used by employers. While there are many ways DOL can improve the methodology and data it uses to determine prevailing wage levels, no system will ever be perfect. Providing businesses with the certainty that DOL will accept the conclusions of a private wage survey in certain circumstances will go a long way to ensuring that companies can meet their workforce needs in a timely fashion.

Lastly, several companies have expressed to us their desire to see DOL consider the issuance of Restricted Stock Units (RSUs) and similar forms of equity awards in the prevailing wage context. Given that this is a common practice among many companies, there is a strong desire that the payment of these types of benefits be accounted for in some fashion by DOL as they consider the prevailing wage determination for a given worker.

## **THE FINAL RULE MUST BE ABANDONED BECAUSE THE NEW WAGE LEVELS ARE INCONSISTENT WITH THE IMMIGRATION AND NATIONALITY ACT**

In the October 8 IFR, DOL reasonably claimed 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.”<sup>2</sup> Unfortunately, DOL’s Final Rule, much like its IFR, set the required prevailing wage levels for companies to hire critical immigrant and nonimmigrant workers at levels that are significantly higher than what would approximate the going wages for workers with similar qualifications performing the same duties. In short, this is the key reason why this rule must be abandoned in favor for a new approach.

With regard to the nonimmigrant workers impacted by the final rule, the Immigration and Nationality Act (INA) requires the employer to pay these types of workers the greater of “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question” or “the prevailing wage level for the occupational classification in the area of employment.”<sup>3</sup> By significantly and artificially inflating the wages of these types of workers in a manner that does not reflect the economic realities of the U.S. labor market, DOL’s final rule fails to accomplish what the law requires, which is to have a prevailing wage methodology that accurately reflects the wage levels in the marketplace.

Specifically, DOL explained in its final rule that in studying this issue prior to the IFR’s October issuance, it decided to set the prevailing wage level for entry level workers based on an internal review of the INA’s qualification requirements for H–1B and EB–2 workers, as well as its analysis of the demographic characteristics of workers in the H–1B program.<sup>4</sup> This led DOL to conclude that, for the purposes of identifying an entry-level wage under the OES system, it should look to the wages paid to U.S. workers who possess a master’s degree and limited work experience as its entry-level baseline for OES Wage Level 1.

DOL’s approach completely ignores that Congress crafted many employment-based visa classifications with the idea of allowing bachelor’s degree recipients to obtain these visas, including the EB-3, H-1B, and E-3 classifications contemplated in the final rule. The language in the INA governing the EB-3 classification is clear these types of immigrant workers do not possess master’s degrees.<sup>5</sup> Similarly, the term “specialty occupation” under the H-1B and E-3 nonimmigrant visa classifications is defined as an occupation that requires “theoretical and practical application of a body of highly specialized knowledge and...attainment of a *bachelor’s or higher degree*...as a minimum for entry into the occupation in the U.S.” (emphasis added).<sup>6</sup>

It stands to reason that Congress intended for the prevailing wage system governing these visa classifications would fairly approximate the wages for many immigrant and nonimmigrant

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<sup>2</sup> 85 Fed. Reg. 63872, 63886 (October 8, 2020).

<sup>3</sup> See INA § 212(n)(1)(A)(i), 8 USC § 1182(n)(1)(A)(i), which sets forth these requirements for H-1B workers, and INA §212(t)(first)(1)(A)(i), 8 USC § 1182(t)(first)(1)(A)(i), which states these requirements for H-1B1 and E-3 nonimmigrant workers.

<sup>4</sup> 86 Fed. Reg. 3608, 3614 (Jan. 14, 2021).

<sup>5</sup> See INA § 203(b)(3)(A)(ii), which states, in relevant part, that qualified immigrants in this subcategory of employment-based third preference category hold baccalaureate degrees and are members of the professions.

<sup>6</sup> See INA § 214(i)(1), 8 U.S.C. § 1184(i)(1), and 8 C.F.R § 214.2(h)(4)(ii).

workers that do not possess a master's degree. Unfortunately, DOL's approach in its final rule divorces the prevailing wage levels from the economic realities in the labor market by artificially raising prevailing wage levels in a manner that will force employers of bachelor's degree holders to standards for master's degree recipients. This presents a significant risk to many employers, as these misguided wage standards will likely operate in a manner that would functionally rewrite the INA in a manner that Congress never considered. This will severely hamper the ability of employers to hire and continue employing foreign nationals with bachelor's degrees, particularly those companies that hire a significant number of international students with degrees from U.S. universities. This approach is inconsistent with the INA's statutory requirements and should be abandoned by DOL. In abandoning this approach, DOL, the business community, and many other stakeholders will be best served by DOL continuing to process petitions using the data and methodology under the current process until it undergoes a thorough and exhaustive rulemaking process to make the types of changes that the Department deems necessary.

## **UTILIZING STATE UNEMPLOYMENT TO IMPROVE THE ACCURACY AND CERTAINTY OF PREVAILING WAGE DETERMINATIONS**

Many businesses have conveyed their desire for more accurate wage data to be used under the Prevailing Wage Determination (PWD) process. This is driven by the shortcomings their companies have experienced due to how the Labor Department currently constructs its Occupational Employment Survey (OES) wage levels. DOL currently relies upon generalized data that is collected from grouped data responses among very broad wage intervals. As such, there are many cases in which companies have been unable to meet their workforce needs due to the inaccuracies that are contained within DOL's current OES wage data.

Examples abound from companies where the wage that DOL insists must be paid to the worker simply is unfounded. This includes the cardiothoracic surgeon in Jacksonville, Florida, being told by DOL that this individual will not have their prevailing wage determination approved unless that doctor is paid substantially *more* than a similar physician in Miami, Florida. These types of conclusions make no sense, as the cost of living and prevailing wage levels are higher in South Florida than they are in North Florida. It also includes the company seeking to continue the employment of an applications software developer in Peoria, Illinois, being told they could not get their PWD approved unless they were being paid more than a similar worker in Chicago. Many other examples of these inequities can be found across the country.

The reason why these data problems exist in the OES wage levels is because of how DOL collects its data. Each employer participating in the OES survey categorizes all its employees into 12 broad bands of wage intervals.<sup>7</sup> When the participant is completing the survey, they must

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<sup>7</sup> The 12 wage intervals are:

Range A, under \$9.25 per hour (under \$19,240 annual salary);  
Range B, \$9.25 to \$11.74 (\$19,240 to \$24,439);  
Range C, \$11.75 to \$14.74 (\$24,440 to \$30,679);  
Range D, \$14.75 to \$18.74 (\$30,680 to \$38,999);

indicate how many employees in a detailed occupation are included in each of 12 wage intervals, which range from under \$9.25 per hour (\$19,240 per year) to over \$100 per hour (\$208,000 per year). While the employer reports the number of employees in each occupational job title by the wage interval, at no time does the employer provide OES with the salary figure of a single employee.

Given the breadth of occupations (over 800) covered by OES and the interest in having one survey and one set of wage intervals to be presented to all participating employers, it is understandable as to why DOL has utilized this approach for as long as it has. However, the lack of clarity and specificity rendered by this method brings about the unfortunate result of the prevailing wages generated from the OES survey being far less accurate than they could be. This is important to many companies across a host of industries because in their efforts to obtain/maintain their foreign national employees, only one or a handful of the pay interval ranges surveyed are applicable to the workers they desire in a particular sector and geography.

Revising the large-scale collection of labor data to capture individualized salary figures would greatly augment the accuracy of prevailing wage calculations for the nation's high-skilled immigration programs, as would the collection of educational level information. To accomplish this would require a significant overhaul of how DOL compiles its wage data. This would likely be a very time-consuming endeavor, but if done properly, a prevailing wage determination process based upon more accurate data could be something that is supported by various different stakeholders.

The U.S. Chamber of Commerce Foundation has been working with many other companies and trade associations to develop and consider effective ways to improve labor market information. Key to this is establishing public-private record-keeping standards that reduce data reporting costs for employers and improve labor market information. For example, the U.S. Chamber of Commerce Foundation's "T3 Innovation Network" of about 500 different firms and associations has partnered with the HR Open Standards Consortium and the National Association of State Workforce Agencies to develop data standards and data collection systems for jobs and employment data that can be used for enhancing of State Unemployment Insurance (UI) records.

Based on this work, the U.S. Chamber of Commerce Foundation launched the Jobs and Employment Data Exchange (JEDx) initiative to promote the development and use of job and

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Range E, \$18.75 to \$23.99 (\$39,000 to \$49,919);  
Range F, \$24.00 to \$30.24 (\$49,920 to \$62,919);  
Range G, \$30.35 to \$38.49 (\$62,820 to \$80,079);  
Range H, \$38.50 to \$48.99 (\$80,080 to \$101,919);  
Range I, \$49.00 to \$61.99 (\$101,920 to \$128,959);  
Range J, \$62.00 to \$78.74 (\$128,960 to \$163,799);  
Range K, \$78.75 to \$99.99 (\$163,800 to \$207,999);  
Range L, \$100.00 and over (\$208,000 and over).

employment data standards that can be used for enhancing state UI records.<sup>8</sup> Enhanced State UI records based on these public-private data standards would provide the necessary data about jobs and workers in all 50 states (e.g., job title, job duties, work site location, work hours, hourly wages and salaries, other types of compensation, and qualifications such as education and work experience) for determining the going wage for workers with similar qualifications and performing the same types of job duties in a given labor market.

A former BLS Commissioner, Erica Groshen, has recently explained how and why U.S. labor statistics could be more granular and timely if we reformed Unemployment Insurance wage and claims records.<sup>9</sup> Given that a) employers are increasingly moving on their own toward the need for uniform job and employment data collection and exchanges and b) employers are already required to file quarterly returns with the States that identify the wages paid to their employees under state unemployment insurance programs, some further data collection from the UI administrative records would not only be helpful for this purpose, but it would also be feasible to do so.

Former Commissioner Groshen argues that reforming the collection of labor statistics has many uses and that the value proposition for more timely and detailed labor statistics is compelling. If DOL were to use the existing Unemployment Insurance reporting platform in the States, the vast majority of employees working across the country would be represented in this expanded, timely, and more detailed reporting apparatus. There would be four additional fields of reporting by employers: identifying whether the individual works full-time or part-time; the employer's internal job title (text analysis technology would be used for conversion to SOC codes); the work site where the job is to be performed, and; the demographic data of the individual workers (education level, age, race, and gender).<sup>10</sup> Critically, Commissioner Groshen acknowledges that securing this data will be crucial to ensure the success of this type of effort for the government to improve its data collection efforts. In addition, to promote further study of American labor markets the government should provide access to this data to statistical agencies, researchers, and program evaluators.<sup>11</sup> Lastly, the Commissioner states that employers should be encouraged to adopt consistent wage and employment record-keeping practices, such as those under development by the T3 Innovation Network. Widespread adoption of common data schema will dramatically lower the reporting burden on employers, raise the quality of the data reported, and facilitate employers' comparisons of their internal data with published statistics.

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<sup>8</sup> See [Jobs and Employment Data Exchange \(JEDx\) | U.S. Chamber of Commerce Foundation \(uschamberfoundation.org\)](https://www.uschamberfoundation.org/jobs-and-employment-data-exchange-jedx).

<sup>9</sup> Erica Groshen, Cornell University Industrial and Labor Relations School, [Pandemic, Racial Inequities Underscore Need for Better Labor Market Data](https://www.uschamberfoundation.org/pandemic-racial-inequities-underscore-need-for-better-labor-market-data) (May 5, 2021). Former Commissioner of the Bureau of Labor Statistics from January 2013 to January 2017, Ms. Groshen earned her PhD in Economics from Harvard University and most of her work has focused on studying the role of employers in the labor market, among other issues. Prior to her service with BLS, Ms. Groshen served for 15 years before that was an economist at the Federal Reserve of New York in various positions.

<sup>10</sup> Id.

<sup>11</sup> Id.

If DOL were to pursue these types of changes, our view is that the resulting wage calculations for immigration purposes would be much more accurate (because they would no longer rely on very broad wage intervals for group data collection), would provide enhanced occupational and geographical coverage in the underlying data (because Unemployment Insurance data collection covers almost all employees), and could be presented as commensurate with education level (because that is a demographic data point). Most importantly, these new methods of collecting data will be more trustworthy for both employers and workers. On the one hand, companies will have a greater degree of certainty that the wage data accurately reflects the labor market conditions for a job in a given area of the country. On the other hand, the more accurate and timely wage data provides added benefits for American workers by ensuring that less accurate data doesn't undermine their ability to compete for these jobs in the domestic labor market.

Labor economists have already been collaborating for several years to study the value proposition of more timely and detailed labor statistics in the United States, and viable means to achieve such improvement. This has led to proposals from the Workforce Information Advisory Council (WIAC) and the BLS LMI Oversight Council (BLOC) including the suggestion that Unemployment Insurance data collection be revised and ultimately replace OES and National Compensation Survey (NCS).<sup>12</sup> The Chamber understands that these types of broad changes would take a significant amount of time to craft and implement, and we encourage DOL to engage in a much broader dialogue with the business community on how to improve its prevailing wage determination process along these lines.

### **THIRD PARTY COMPENSATIONS SURVEYS**

While the Chamber believes that much can be done to improve upon DOL's current method for determining prevailing wages for all sorts of highly-skilled foreign national workers in the U.S., no system devised by DOL will ever be perfect. In order to prevent unnecessary businesses disruptions caused by a reliance on inaccurate wage data, DOL should provide for the expanded use of alternate, privately published wage surveys and leverage available data relating to wage levels and occupational development. These surveys provide accurate and reliable data that is probative to employee compensation levels for broad segments of the economy. These have become integral components of compensation determinations in the private sector and there are different ways in which DOL could expand the usage of these surveys.

In order to understand the shortcomings of the current system for estimating the average hourly wage rates for each detailed occupation across the U.S., one must understand how DOL

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<sup>12</sup> See e.g. [Recommendations to Improve the Nation's Workforce and Labor Market Information System](#) September 2020, on the WIAC website (recommendations to the Labor Secretary from the Workforce Information Advisory Council); [Draft Recommendations to the Labor Secretary to Improve Workforce and Labor Market Information System](#) January 2018, on the WIAC website (recommendations of the Administrative Wage Record Enhancement Study Group of the Workforce Information Advisory Council); [Enhancing Unemployment Insurance Wage Records](#) September 2015, on the BLOC website (BLS LMI (Labor Market Information) Oversight Council).

collects its data. The Bureau of Labor Statistics supplements initial OES survey results with data from the NCS.<sup>13</sup> The BLS uses the NCS to convert reported OES information about *groups of individuals in pay ranges* to an average hourly wage rate computed to the nearest cent. The NCS, like OES, is a general survey that is not focused on particular occupations or geographic areas. By definition, because it is designed to secure only 10% of the respondent numbers of the OES, the NCS will have a limited number of observations of individual hourly wage rates in the occupations that are key to the employers of high-skilled immigrant and nonimmigrant workers. Those limited observations are distributed nationally, providing very little insight into wages in a particular geographic area of employment. Moreover, just like the OES survey, the NCS, unlike private compensation surveys, does not ask employers questions concerning the education level or prior employment experience needed to perform in particular jobs.

Given these shortcomings, the Department should consider purchasing certain fields of data from legitimate private sector compensation surveys that provide significant numbers of observations in certain geographies in certain occupations. In addition, DOL should consider establishing certain criteria or clarifying the types of situations wherein it will accept the usage of private-wage data by employers seeking to utilize that data for the purposes of complying with the prevailing wage requirements.

To implement these concepts into policy, DOL should undertake a technical evaluation on the use of certain third-party compensation survey data as a source of data to replace or complement NCS data in converting OES group data. The assessment should measure whether there are certain third-party compensation surveys that provide far superior data on wage rates as compared to the national figures in NCS for certain sectors or occupations and provide such wage information commensurate with education and experience. DOL should then assess whether it is feasible to purchase relevant fields of data for purposes of providing prevailing determinations in the high-skilled immigration programs. DOL should also work with the business community to craft the criteria or lay out the situations wherein it will accept the private wage data provided by employers that will be utilized by DOL in determining whether a putative employee meets the prevailing wage requirement.

## **USAGE OF RESTRICTED STOCK UNIT AND OTHER EQUITY AWARDS UNDER PREVAILING WAGE ANALYSIS**

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<sup>13</sup> According to the OES technical documentation: “The mean hourly wage rate for all workers in any given wage interval cannot be computed using grouped data collected by the OES survey. For the mean wage rate formula, we assume that we can calculate the average wage rate for workers in each interval. This value is calculated externally using data from BLS’s National Compensation Survey (NCS). Although smaller than the OES survey in terms of sample size, the NCS program, unlike OES, collects individual wage data for private sector and state and local government employees. With the exception of the highest wage interval, mean wage rates for each panel are calculated using NCS data for the panel’s previous reference year, since this is the latest data available.” See technical documentation from the Bureau of Labor Statistics’ on survey methodology for the Occupational Employment Statistics survey.

One key aspect of calculating prevailing wage levels that is absent from the Department's current analysis is explicitly recognizing Restricted Stock Unit (RSU) awards and similar forms of equity to meet prevailing wage obligations under the H-1B program. Compensation that includes equity reflects the philosophy that employees are owners of the company and therefore a regular percentage of compensation is in stock, especially for those at more senior levels. By utilizing a more comprehensive accounting of compensation, DOL can modernize its approach for wage calculations to align with standard industry compensation practices in the technology and commercial sectors.

Many companies are worried that if DOL does not conduct a more expansive accounting of current compensation trends in the technology and commercial sectors, it will hinder the global mobility of top-tier talent, especially in emerging STEM fields where multi-disciplinary educational/job backgrounds are essential for cutting-edge innovation. This is incredibly important to employers of H-1B nonimmigrants because it is the principal work visa for foreign graduates of U.S. universities, many of whom earn degrees in STEM fields. The National Center for Science and Engineering Statistics noted that 40% of doctoral degrees awarded in science and engineering last year went to temporary-visa holders. In the view of many companies, if DOL's prevailing wage determination process can account for the payment of a commission, hazard pay, tips and other non-salaried forms of compensation, they believe a more inclusive and modern approach to determining their company's prevailing wage obligations would account for these common equity compensation practices.

## CONCLUSION

The Chamber greatly appreciates DOL providing stakeholders with this opportunity to comment on the data and methodologies used for prevailing wage determinations. We look forward to continuing this critical dialogue with the agency on improving the data and methodologies underlying DOL's prevailing wage determination process.

Thank you for considering our views.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Baselice', written in a cursive style.

Jonathan Baselice  
Vice President, Immigration Policy  
U.S. Chamber of Commerce