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IMMIGRATION

NEW RULES WOULD INCREASE IMMIGRATION WAGE REQUIREMENTS AND RESTRICT H-1B ELIGIBILITY, BUT FACE SIGNIFICANT LEGAL CHALLENGES

On October 8, 2020, the Department of Labor (DOL) published a rule immediately increasing wage requirements for H-1B visa holders and for certain foreign nationals seeking permanent residence through employment-based sponsorship. Separately, the Department of Homeland Security (DHS) published a rule that would tighten restrictions on the H-1B visa program. Litigation is underway to challenge these rules, and we expect courts to block the government from enforcing both rules in the coming weeks.

In the event these rules survive legal challenges, they will create significant immigration planning issues for employers. Specifically, employers may face higher wage obligations, and will need to rely more heavily on private wage surveys to establish the 'prevailing wage' for H-1B and permanent residence sponsorship purposes. In addition, employers can expect heightened scrutiny on government determinations of H-1B eligibility.

Prevailing Wage Increases

Employers seeking to sponsor foreign nationals for H-1B visas or for certain categories of permanent residence must pay the foreign national employee at least the 'prevailing wage,' which is the average wage paid to similarly employed workers in the same occupation in the geographic area of employment. Many employers rely on the DOL's publicly available wage survey data to establish the 'prevailing wage.'

By assigning the four DOL experience levels to higher percentiles in its wage survey, the DOL rule immediately increases wage data across the board, significantly increasing the calculated prevailing wage. For example, the Level 1 wage previously was assigned to the 17th percentile, but under the new rule it is assigned to the 44th percentile. With respect to the H-1B program, the new wage data applies to any Labor Condition Application (LCA) filed on or after October 8, 2020. With respect to permanent residence sponsorship, the new wage data applies to any prevailing wage determination adjudicated on or after October 8, 2020, even if filed prior to that date.

Importantly, employers may continue to rely on private wage surveys to establish the prevailing wage, so long as the private survey meets certain DOL guidelines. Generally, the private survey should provide a weighted average or median, rely on a statistically valid methodology, and use an industry-wide sample over an area no broader than the metropolitan area in which the job is located. If that area fails to result in a large enough sample, the area can be expanded until a statistically valid sample is obtained. If the rule survives court challenges, obtaining qualifying surveys will be an important strategy for employers moving forward. To see a list of surveys that have generally been accepted by the DOL, and a full list of the DOL criteria for private wage surveys, please click [here](#).

Tightening Restrictions on H-1B Program

The H-1B visa program covers so-called 'specialty occupations,' which are those jobs requiring a bachelor's degree or higher in a specific specialty. The DHS rule seeks to restrict the definition of "specialty

occupation” for H-1B eligibility, requiring a more direct relationship between the job and the employee’s degree. For example, the standard would no longer be whether a bachelor’s degree is “normally”, “commonly” or “usually” required for a position, but whether it is “always” required.

The rule would impose additional restrictions on H-1B employers that routinely place employees at end-client worksites. For example, the rule would only allow for a one-year validity period for H-1B workers placed at third-party worksites, rather than the normal three years. Further, the rule would require employers to demonstrate available work for the requested validity period. In many ways, this regulation reflects USCIS practice with respect to the H-1B program, as the program has seen increased scrutiny in recent years. If it proceeds, this rule would take effect December 7, 2020.

Please contact any member of our Immigration Practice Group if you have any questions regarding these new rules at 585.232.6500 or visit www.hselaw.com.

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