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IMMIGRATION

FEDERAL COURT SETS ASIDE IMMIGRATION RULES IMPACTING WAGE REQUIREMENTS AND H-1B ELIGIBILITY

On December 1, 2020, a federal district court set aside two immigration-related rules, finding that the U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) had failed to promulgate the rules in a legally compliant manner. Importantly, this means that DOL has reverted to the lower prevailing wage rates in effect prior to October 8, 2020.

As noted in our prior [LEGALcurrents](#), the DOL rule immediately (as of October 8, 2020) increased prevailing wage requirements for H-1B visa holders and for certain foreign nationals seeking permanent residence through employment-based sponsorship. The DHS rule sought to tighten restrictions on the H-1B visa program. In response to a legal challenge by the U.S. Chamber of Commerce, joined by numerous trade groups and universities, a federal district court in California has set aside both rules. As a result of the court order, DOL has reverted to the wage levels in place before the rule took effect, and DHS has halted implementation of its H-1B rule, which was set to take effect on December 7, 2020. Employers may now proceed with H-1B filings and permanent residence sponsorship pursuant to the DOL's original wage data in effect prior to October 8, 2020. As of December 9, 2020, DOL had updated its website to reflect this corrected wage data. Employers who received a prevailing wage determination pursuant to the increased wage levels have until January 4, 2021, to request a correction.

Even with DOL reverting to its more favorable wage data, employers may choose to rely on private wage surveys to establish the prevailing wage, as 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. 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](#). 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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