



Labor & Employment ADVISORY ■

OCTOBER 8, 2020

Trump Administration Proposes Three New Sets of Employment Visa Regulations, Primarily H-1B

by [Eileen Scofield](#)

With the upcoming election and unemployment numbers, we anticipated that the Trump Administration would announce proposed changes to the U.S. immigration process each month. Each announcement creates confusion and anxiety. Once the dust settles though, in substance, to date, few proposals have come to fruition or the impact has been minor.

This week, the Administration announced three new sets of proposed immigration-related regulation, primarily affecting H-1B employers and employees.

1. Department of Homeland Security regulations to amend the H-1B definition and evidence.
2. Department of Justice Executive Office for Immigration Review regulations to expand the ability of the U.S. government to investigate and fine employers for employment verification (Form I-9/E-Verify, recruiting, hiring) errors and citizenship/national origin discrimination.
3. Department of Labor (DOL) Interim Final Rule for the DOL prevailing wage determination and process.

The first two sets of regulations include a December 7, 2020 implementation date. The third, the DOL Interim Final Rule, published October 8, 2020, indicates it will be effective on the date of publication.

Highlights of Proposed Regulations

The first two sets of regulations are subject to a public comment period that ends after the election. Hence, perhaps amended, but if implemented, not effective until then. Alston & Bird is reviewing these proposed regulations. We plan to submit comments and may ask the same of others. We will also consider litigation if the regulations are not aligned with the statute drafted and passed by Congress. Naturally, as needed, we will individually address any impacted case once our assessment is completed and the proposed regulations finalized.

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The third new regulation relates to the DOL prevailing wage for H and PERM cases. Historically, all proposed new regulations require at least a 30- to 90-day public comment period before potentially becoming effective. Here though, the Administration wants the regulations to be effective immediately—October 8. We are considering efforts to enjoin the immediate implementation and the legal basis of the language in the proposed new DOL prevailing wage rule. (Recently, we supported successful H-1B litigation.) The new rule will not apply to approved or already-pending cases. Assuming the new rule stands, it will apply to future filings, including future extensions of H-1B status.

The new rule on the DOL prevailing wage process will cause some prevailing wages to increase. The DOL determines the prevailing wage by using data from the government's Occupational Employment Statistics (OES) wage survey and using a mathematical formula to create four levels of wages for each occupation. For decades, the DOL has been processing prevailing wages. Interestingly, through this Administration's DOL regulations, the DOL announced that its use of the definition of "arithmetic mean," in conjunction with the OES data, was incorrect. The timing of this announcement suggests to some that it is focused more on next month's election than on sound immigration policy needed to support U.S. businesses.¹ In addition, even though only a new reading, the DOL felt a new rule was required and added some new provisions; some prevailing wages may increase by 40 percent or more. The DOL has provided no examples or any evidence to support the position that the historical prevailing wages were too low and that H-1B workers have been underpaid for decades.

More to follow. If needed or interested, do contact us to discuss further.

DHS: <https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22347.pdf>

DOL: <https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22132.pdf>

¹ Among other benefits, of the approximately \$5 billion raised via the H-1B employer's \$1,500 U.S. scholarship and training fee: 30% goes to the [National Science Foundation](#) (NSF) to fund scholarships for U.S. students in science and engineering, 10% supports programs for K-12 students and teachers in science, and 50% is allocated to the DOL to provide training for U.S. workers.

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