November 9, 2020

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

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

Dear Administrator Pasternak:

Worldwide Employee Relocation Council (Worldwide ERC®) wishes to comment on the recently published Department of Labor ("DOL" or "the Department") rule, "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," 85 Fed. Reg. 63872. (October 8, 2020). Worldwide ERC® is the premier trade association for talent management and global mobility knowledge. Our network of professionals, partners, and stakeholders today includes nearly 2,750 corporations and 5,000 service industry members across Europe, the Middle East and Africa, Asia, and the Americas. Worldwide ERC®'s members come from a diverse range of professions and industries, including human resources, recruiting, military, real estate, financial services, moving, counseling, and consulting.

One of our major objectives is to analyze, communicate about, educate on, generate support around, develop responses to, and where necessary, influence public policy issues affecting the global workforce mobility industry. It is with that purpose that we are submitting our comment regarding the new DOL rule. We support DOL's mission of protecting the U.S. workforce, particularly in light of the COVID-19 pandemic. However, we do not believe that the hiring and retaining foreign talent is contrary to that mission.

In addition to providing a comment on the new rule, we would like to ask that the Department withdraw this rule and re-publish it as a Notice of Proposed Rulemaking with a sixty-day period to collect comments from the regulated community – and to provide a reasonable implementation period for businesses to adjust if and when the regulation is re-issued as an interim final or final rule.

Summary of Comment

The new interim final rule ("the Wage Rule"), which dramatically changes required wage computations for occupational immigration programs, will impede the competitiveness of U.S. employers and the U.S. operations of global employers. The rule's sudden publication and immediate implementation, without the prior input of affected industries, will disrupt the personnel systems of employers operating or headquartered in the United States and diminish the desirability of the United States as a destination for foreign investment.

The rule misinterprets the statutory requirement that foreign national workers not depress the wages of similarly employed U.S. workers by assuming that any foreign national worker, solely because of his or her nationality, is being paid an artificially low wage – even if a similarly employed U.S. worker is making the same amount of money and even if that wage is market competitive.

Employers operating or headquartered in the United States compete in a global economy. Their U.S. presence is based on our country's superior capital markets, legal system, the availability of the world's best technology and our economy's premiere competitive position in the global economy. These features rely on the unmatched quality of U.S. human capital – perhaps the most critical drawing card of the U.S. economy. Skilled U.S. workers are found domestically, some come here from abroad to work, and others are educated here in our renowned universities and then enter the U.S. labor market. Each facet of the highly skilled U.S. workforce is enabled by an immigration system that allows access to foreign national talent to allow employers to remain competitive. Highly skilled foreign executives and managers enter the U.S. to help run key aspects of U.S. companies and service providers that create thousands of well-paid jobs for domestic workers; highly skilled foreign national talent enter the U.S. to work alongside similarly employed and skilled U.S. workers; and smart and ambitious young people from around the world that come from abroad to study alongside U.S. students at our finest universities -- and then upon graduation join the U.S. workforce together. There is a symbiosis and synergy between foreign nationals and U.S. residents that underpins our vibrant economy and explains our leadership in the global economy.

This rule threatens the healthy and mutually beneficial relationship between foreign national workers and U.S. workers by pitting them against each other through an artificial wage structure that assumes negative wage competition and adverse effects between these groups that typically do not exist. As U.S. employers compete in the global market they confront the false dichotomy and distorted wage structures created by this rule, and will inevitably have to consider placing talent overseas and displacing some of the work that is presently performed in the United States by many U.S. workers. As discussed in more detail below, this is not speculation, but a result that has been studied by prominent U.S. researchers. The rule would result in the transfer of human capital outside of our country to a less-than ideal location because of this rule's unjustified and unwise interference with the U.S. labor market.

The immediate implementation of the new wage structure, without advance notice or public comment, will create short-term disruptions that seriously injures the companies and service providers that operate or are based in the United States – with start-ups, small businesses and nonprofits trying to survive the COVID-19 pandemic being particularly hard hit. Disruptions to businesses large and small include the inability to extend the status of H-1B workers or allow for change of status to H-1B workers of those who have already moved to this country, the disincentive for employers to recruit H-1B workers from one organization through the offer of better economic and professional opportunities, and the interruption of PERM recruitment programs intended to convert temporary workers into permanent residents of this country. The ability of U.S. employers to remain globally competitive relies on the global mobility of the world's most talented, something that the prior system largely facilitated. This rule threatens that key component of U.S. economic performance.

Background and Analysis

The wage computation process in effect before publication of the new Wage Rule was put in place after Congress enacted the H-1B Reform Act of 2004.[1] The statutory language stated the following: "Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least four levels of wages commensurate with experience, education, and the level of supervision." The four-tiered system was implemented by DOL in early 2005 as a part of the PERM regulatory initiative and over the years the Department has issued guidance to employers on its use, perhaps most notably prevailing wage guidance published in 2009.[2] While not perfect, the system did provide for clarity and predictability regarding required wages, and employers participating were able to reasonably budget the costs of essential hiring through

[1] The Reform Act was part of the Consolidated Appropriations Act of 2005, Public Law No. 108-447.
[2] "Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs" (Revised Nov. 2009), available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/ pdfs/NPWHC_Guidance_Revised_11_2009.pdf.

immigration programs. Notably, the four-levels were generally regarded as "levels of wages commensurate with experience, education, and the level of supervision." Unfortunately, the new Wage Rule imposes a computation structure untethered from the market and ignores controls already enshrined in the law and regulations – in the context of both H-1B and PERM related filings.[3]

The DOL labor condition application ("LCA") regulations provide a clear check against the payment of lower wages to specialty occupation workers. The regulations provide that employers must pay its H-1B workers the higher of the prevailing wage or the employer's actual wage in-house wage for similarly employed workers.[4] In every case, employers must pay H-1B workers at least what similarly employed members of their workforces are being paid. In some instances, the DOL wage system may yield higher wages than the employer's actual wage – in some cases lower. Employers are required to pay the higher of the two – making it unlikely or at least speculative that the presence of H-1B workers would systematically cause a lowering of U.S. worker wages.

The newly imposed wage requirements are dramatic. The immediate impact from the new rule is that a number of employers will be unable to retain current workers and hire newly needed talent. This could severely affect the ability of employers to extend the status of existing employees and to amend the status of existing employees to allow for a change in position. The strain may be particularly felt in the ability of employers to hire newly needed workers, particularly students who have been educated in the United States and are working on Optional Practical Training, and have long been regarded as "the best and the brightest" internationally.[5]

I. The Sudden Impact of the New Rule will be Disruptive and there was no "Good Cause" for Making it Effective Immediately

The sudden issuance of such a critically important rule without normal notice and comment has both legal and practical implications. Section 553 of the Administrative Procedures Act ("APA") requires that agencies provide the public notice of a change in rules as well as the opportunity to provide comment. Typically, an agency will first publish a rule as a proposal, give the public a chance to review and comment, and, after public comments are reviewed, publish the rule as a final or interim final rule – with at least a 30-day effective date. In the case of the Wage Rule, there was no notice, no opportunity to comment and virtually no time to prepare for the change. The preamble to the rule states that "advance notice of the intended changes would create an opportunity, and incentives to use it, for employers to attempt to evade the adjusted wage requirements." As discussed below, this concern is unfounded, as the bulk of H-1B filings take place during the Spring filing period and PERM-based green card cases are normally planned and budgeted for months or years in advance.

The Wage Rule preamble discusses the "good cause" exception to the notice and comment requirements – when the usual procedures are "impracticable, unnecessary or contrary to the public interest."[6] The preamble suggests that the strains on U.S. employment brought on by the COVID-19 pandemic necessitated quick action on adjusting wage computations for immigration programs as a way to protect U.S. workers. The associations between the economic strains resulting from the COVID-19 pandemic and how wage determinations for immigration are computed are tenuous at best, and in no way measure up to the kind of urgently needed action contemplated by the good cause exception. While no one would ever diminish the emergency nature of addressing the COVID-19

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[3] The new rule will also impact H-1B1 and E-3 filings. Our comments will primarily focus on the rule's impact on the H-1B program but are equally applicable to the other two nonimmigrant classifications, and largely as well to PERM-based green card cases.
[4] 20 CFR Section 555.731(a).
[5] See Raux, "Looking for the Best and Brightest": Hiring Difficulties and High Skilled Foreign Workers," (August 2020), available at https://www.thecgo.org/wp-content/uploads/2020/09/Looking-For-the-Best-and-Brightest.pdf.
[6] Some courts have suggested that are different standards for good cause to waive notice and comment versus good cause to waive the requirement to provide a 30-day effective date period, though we do not believe this distinction is pertinent to our comment.

pandemic and its consequent economic shocks to the U.S. workforce, there appears little nexus between revamping the prevailing wage computation formulas for certain high skilled immigration programs and truly providing emergency help and assistance to the medical and economic victims of the COVID-19 pandemic.

Courts have long held that the good cause exception should only be utilized in the rarest of circumstances. The preamble to the rule suggests that the good cause exception was utilized because of (1) the urgent need to assist U.S. workers in light of the COVID-19 situation and (2) concern about significant changed behavior to evade the new rule if there was advance notice.

The Department consequently suggests the changes in wage computation are changes that "should have been undertaken years ago." Assuming the Department's analysis is correct, it should not be able utilize its own previous inaction to justify its abrogation of longstanding APA standards. The current four level framework for prevailing wage determinations has been in place for over 15 years, and the current Administration has been in office for nearly the past four of those years. To our knowledge, there was but never before offered the interested public any inkling of taking serious action on this issue.[7] The preamble language also suggests: "Notwithstanding the ongoing COVID-19 emergency, hiring across the U.S. has increased, with continued hiring across all sectors of the economy anticipated." This aligns with the White House's optimistic economic forecasts, notably after third quarter growth exceeded expectations: "This morning's release of U.S. GDP for the third quarter of 2020 from the Bureau of Economic Analysis ("BEA") affirms President Trump's statement that "we're coming back, and we're coming back strong."[8] We are not in any way discounting the plight of U.S. workers affected by the COVID-19 pandemic.

However, there does not appear to be a strong nexus between the restructuring of wage computations for immigration programs and relieving the economic suffering of those who have lost their jobs as a result of COVID-19. Those occupations most affected by the COVID-19 pandemic are not often the same that are frequent or heavy users of immigration programs of professional personnel.

The Department concedes that a great deal of its concern involves "wage scarring," adverse effects on wages following an economic recession. While this concern may be legitimate, it undercuts the contention that the present situation requires such immediate action as to suspend normal administrative processes that might delay the imposition of the rule for a few months or even 30 days.

Regarding the suspension of the normal minimum 30-day implementation period, the Department suggests that notice could conceivably affect stakeholder behavior – utilizing the example of the prospect of a price freeze, which has in the past been the subject of litigation when implemented without notice and comment.[9] It is difficult to fathom just how radically employers could adjust their behavior if offered a reasonable implementation period, for either H-1B classification or PERM-based green cards. The bulk of first time H-1B cap filings for Fiscal Year 2022 would not be filed until the Spring of 2021. Clearly, a reasonable effective date period would not affect these cases.

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[7] To our knowledge, the regulation has not appeared in recent regulatory agendas of the Department. See https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1200.

[8] See White House Announcement at https://www.whitehouse.gov/articles/great-american-recovery-third-quarter-gdp-blows-past-expectations/.

[9] We would suggest that taking action to affect oil prices during an energy crisis may be distinguishable from changing computation formulas for prevailing wages used in immigration programs during a global health crisis. There is no doubt that we are in the midst of a global health crisis that has had severe effects on our economy. However, we fail to see a direct relationship between the rushed imposition of a more onerous computation formula for the four-tiered wage structure for prevailing wages used for immigration programs and in any way improving the lot of those severely impacted by the pandemic, and certainly not in the short or medium term.

Employers could conceivably accelerate their obtaining of new LCAs for use with extensions, but this might ultimately lead to truncated time periods of validity in the longer term, so their practicality may be limited. By the same token, PERM cases are normally carefully planned and employers would need to balance the disruption of the newly required wages versus the disruption of casting aside long scheduled plans to sponsor needed workers for green cards.

II. The New Rule Will Harm U.S. Employers, Reduce Their Competitiveness, and Jeopardize U.S. Jobs

The purpose of the Wage Rule is ostensibly to help U.S. workers in light of the COVID-19 pandemic. The preamble to the rule states the following: "Under the high unemployment rates experienced in the U.S. labor market this year, which reached 14.7 percent in April, a rate not seen since the Great Depression, and remain elevated, the existing flawed and arbitrary wage levels pose an immediate threat to the livelihoods of U.S. workers."[10] We are not aware of any study that bears out the Department's conclusion that dramatic wage increases for nonimmigrant workers would directly improve the lot of U.S. workers in terms of employment or wages. Instead, they may have the exact opposite effect by placing a severe strain on businesses trying to cope with the challenges of the COVID-19 pandemic.

The rule itself focuses on the Information Technology industry – with a view that the presence of H-1B workers may be displacing U.S. workers and driving down their wages. Given that a key impetus for publishing the rule was protection of U.S. workers in light of the COVID-19 pandemic, data would not seem to justify such a relationship between COVID-19 and the fortunes of IT workers. In spite of other major increases in unemployment, at least one study, based on Bureau of Labor Statistics ("BLS") data, found that the unemployment rate for individuals in computer and mathematical occupations did not increase markedly – from 3% in January 2020 to 3.5% in September of 2020.[11] Moreover, the BLS unemployment report for September 2020[12] suggested that industry sectors hardest hit by the COVID-19 pandemic include leisure and hospitality, retail trade, transportation and warehousing, construction and mining – sectors that have not historically been among the heaviest users of the immigration programs affected by the new rule.

Studies have demonstrated that the U.S. economy is not helped by limiting entry of foreign nationals coming to the United States in H-1B and other work-based classifications – quite to the contrary. One very recent study suggested that the Administration's June 21 proclamation eroded market valuation of sampled employers by an estimated $100 billion. The authors of the study concluded that "The sizable negative effect on the economy reflects the fact that investors – and markets more generally – understand that many of these firms will not be able to perform as well without the ability to hire top foreign talent."[13] This is supported by many previous works on the positive impact that legal immigration has on the economy.[14]

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[10] The Department at one point in the regulatory suggests that its position is based on the law of supply and demand – higher required wages and other restrictions will price foreign workers out of the U.S. labor market, thereby reducing the supply of workers and pushing wages up generally. See preamble to the wage rule, 85 Fed. Reg. 63872, at 63883.

[11] See "Employment Data for Computer Occupations for January to September 2020," National Foundation for American Policy" (October 16, 2020), available at https://nfap.com/wp-content/uploads/2020/10/Employment-Data-for-Computer-Occupations-January-to-September-2020.NFAP-Policy-Brief.October-2020.pdf.

[12] See https://www.bls.gov/news.release/empsit.nr0.htm, "Employment Situation Summary for September 2020" (October 2, 2020).

[13] "An Executive Order Worth $100 Billion," Brookings Institute (October 2020). The report is available at: https://www.brookings.edu/research/an-executive-order-worth-100-billion-the-impact-of-an-immigration-bans-announcement-on-fortune-500-firms-valuation/.

[14] See Raux, "Looking for the Best and Brightest": Hiring Difficulties and High Skilled Foreign Workers," (August 2020), available at https://www.thecgo.org/wp-content/uploads/2020/09/Looking-For-the-Best-and-Brightest.pdf.

In another recent study on the hiring of high skilled workers published by the Utah State University Center for Growth and Opportunity at Utah State University, the author concludes that "policymakers should see visa programs like the H-1B visa as a way for the US to recruit 'the best and brightest' workers, not as replacements for U.S. native workers. Employers in STEM fields seek out talented workers that ultimately make the U.S. more prosperous and US-based companies more competitive. In contrast, other research has shown that restrictive immigration policies encourage employers to leave the US to search for talented workers outside of the US. The U.S.'s long-term success will be better served by open immigration policies that give employers the most options to hire workers that fit their needs."

The notion of forcing labor offshore is not far-fetched. Professor Britta Glennon, an assistant professor at the Wharton School of Business at the University of Pennsylvania, in a summary to her recent study, "How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-1B Program," suggests the following:

> Skilled immigration restrictions may have secondary consequences that have been largely overlooked in the immigration debate: multinational firms faced with visa constraints have an offshoring option, namely, hiring the labor they need at their foreign affiliates. If multinationals use this option, then restrictive migration policies are unlikely to have the desired effects of increasing employment of natives, but rather have the effect of offshoring jobs. Combining visa data and comprehensive data on US multinational firm activity, I find that restrictions on H-1B immigration caused foreign affiliate employment increases at the intensive and extensive margins, particularly in Canada, India, and China.[15]

Increasing required wages in a way that is untethered to market forces will distort wage growth and make doing business in the United States less desirable.

Costs of Hiring Foreign Talent

On a practical level, recruiting and ultimately retaining both U.S. and foreign national talent is costly and presents ongoing challenges to U.S. employers. A 2016 report conducted by the Council for Global Immigration ("CFGI"), an affiliate of the Society for Human Resource Management ("SHRM"), concluded that employers in the U.S. that hire workers from abroad can spend more than three times what they do for domestic hires, while it can take six times longer to bring a foreign worker on board than U.S workers.[16]

According to the report, "Employment-based immigration requires careful planning and should not be considered a minor addition to the hiring process…Hiring foreign nationals takes time, is often expensive, and requires a major investment of time from staff in human resources, legal and global mobility offices."[17]

According to the CFGI-SHRM research, it typically takes 42 days to fill a professional position, from when an employer opens a job requisition until a candidate accepts an offer. Costs for hiring foreign professionals also exceeded those for domestic hires. According to a summary of the study, "In addition to the cost of in-house staff, employers pay government fees and often solicit the services of third parties to handle or assist with the process.

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[15] See https://www.dropbox.com/s/tp4okwocw2pajw5/BGlennon_JMP%20Draft.pdf?dl=0, for Professor Glennon's report, "How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-1B Program."

[16] Maurer, "Employers Invest Heavily When Hiring Foreign Talent," SHRM (March 13, 2017), available at https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/employers-cost-time-hiring-foreign-talent.aspx.

[17] Ibid.

First-time H-1Bs typically cost an additional $3,460 to $11,675 in immigration filing fees and legal fees, on top of the $3,424 average cost to hire a U.S. worker, according to the survey."[18]

Companies plan and budget their hiring months and often years in advance. Imposing such a dramatic increase in the cost of personnel may assist DOL in its objective of less foreign national hiring in the short term but could also damage U.S. employers in the longer term, and consequently hurt U.S. worker hiring. As previously mentioned, the problem may be particularly acute for start-ups, small businesses and nonprofits, which tend to pay slightly less generally, and may be particularly challenged by COVID-19.

The government has long recognized the planning, work, and resources employers invest to hire foreign talent. The H-1B registration rule, which was only fully implemented this year, recognizes the time and cost that employers invest in planning and implementing their H-1B programs.[19] The sudden, new changes will severely impact U.S. employers planning to hire H-1B workers. Placing this unexpected strain into the budgets of U.S. employers, especially now, may have the exact opposite effect than what was intended during this challenging economic period.

Effects on Retaining U.S.-trained and Educated Talent and Workers Present in the United States

The new Wage Rule will have a particularly detrimental effect on students from U.S. universities seeking to change to H-1B status. Both U.S. universities and U.S. employers have already invested greatly in these prospective H-1B workers, and while retaining their talent remains imperative, the dramatic increase in required wages brought on by the new rule will only serve to frustrate this goal, potentially driving some of the best trained and educated minds back to their home countries, and perhaps without intention forcing entire businesses off shore.[20] New graduates are by their very nature "entry-level," but are often in possession of the kind of highly specialized knowledge that enables them to perform work that is advanced, complex and may be based on new and emerging technology, processes and theoretical constructs that permit U.S. employers to maintain their competitive edge both domestically and internationally. The new wage rule, however, may require pay that exceeds that of comparable U.S. workers, which may result in personnel strains and ultimately new costs for U.S. companies.[21]

The problems created by the new Wage Rule are particularly acute for extensions, where H-1B professionals have already been working in their jobs, often for three years or longer. These are workers who not only have highly specialized knowledge of their various fields of endeavor – they are typically workers with proven track records who have highly specialized knowledge of the businesses and processes of their companies. Employers would already be required to pay workers increases commensurate with those for U.S. workers – along with likely bumps in wage levels with the filing of a new LCA and extension application. Normally, wage increases consistent with those paid to U.S. workers would have accounted for any changes, but such a dramatic wage increase was never anticipated, never budgeted for and will likely at the least put a strain on a company's ability to remain competitive. Such costs could result in not retaining an H-1B worker though could also have the unintended consequence of engendering a need to cut back on the U.S. workforce and laying off U.S. workers, particularly if enterprises begin to move abroad, as previously cited studies suggest.

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[18] Ibid.

[19] "Registration Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Cap-Subject Aliens," USCIS Final Rule, 84 Fed. Reg. 888, 889-894 (January 31, 2019).

[20] See previous discussion.

[21] There is also potential that the distortion of wages will raise U.S. labor law issues, such as national origin discrimination. A complete discussion of this issue is beyond the scope of this comment, but we believe that the current system, requiring the payment of the higher of the actual or prevailing wage to H-1B workers, has created a pay parity of sorts that has reduced the possibility of U.S. employment law challenges.

The New Computation Structure is of Questionable Need and May Lead to Wages Requirements Disconnected from Market Realities

As a part of its analysis, the Department acknowledges that H-1B workers at companies that are heavy users of the program often exceed prevailing wage requirements, and sometimes far exceed them.[22] The Department suggests that these higher wages paid to H-1B workers meant that the prevailing wages the previous Occupational Employment Statistics ("OES") wage computation structure yielded are too low but it would be just as easy to conclude that the system was working as expected and required, with employers required to pay the higher of the prevailing or actual wage, and that workers were indeed being paid at rates comparable with U.S. workers.[23] This appears consistent with other studies comparing U.S. and foreign national worker salaries. For instance, a PEW Research Center Analysis published in 2017 found that the median salary for H-1B visa holders was higher than the median wage for U.S. workers in similar jobs.[24]

The Wage Rule preamble starts its analysis by noting that the Standard Occupational Classification ("SOC") Code[25] and Occupational Outlook Handbook ("OOH") descriptions representing certain H-1B specialty occupation positions may not always require bachelor's degrees. From there, the Department then leaps to the conclusion that OES data is thereby skewed by underqualified, underpaid individuals would not qualify for H-1B classification. The Department, except for a brief mention in a footnote, fails to acknowledge that employers may accept equivalent credentials, which normally would be prior experience and training.

The Department denigrates the notion that a bachelor's requirement may be usual, common or customary or something other than "always" and cites a statistic suggesting that "over 13 percent of all jobs in the occupations that H-1B workers are most likely to work in do not require workers to have even a bachelor's degree."[26] While it is unclear as to how the DOL arrives at this data point, it is (1) a relatively small percentage of workers; (2) it disregards circumstances where training and experience may compensate for the lack of an undergraduate degree; and (3) it completely neglects the reality that workers in a given occupation who may lack a specified bachelor's degree, both nonimmigrant and U.S. workers, may be highly valued for many reasons (e.g., experience, special skills, history with the company or industry, not to mention highly specialized knowledge) and may not necessarily represent a lower paid cohort in a company. Wages may vary from company to company based on the size of the company, age of the company and many other factors. For instance, start-ups often offer lower salaries, but may also offer workers more creative space with promising longer-term prospects.

While the rule properly recognizes that bachelor's degrees may not always be required to enter occupational classifications common to H-1B workers, it provides no evidence that it is these workers necessarily that make up a lower paid cohort of employees.

In arriving at its revamped four-level computation construct, the Department observes that H-1B workers with master's degrees tend to be younger and less highly compensated than H-1B workers with bachelor's degrees but then concludes that workers with master's degrees and little experience serve as "an analytically appropriate proxy"

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[22] See preamble to the wage rule, 85 Fed. Reg. 63872, at 63886.

[23] This relates back to our earlier point: In every case, employers must pay H-1B workers at least what similarly employed members of their workforces are being paid. In some instances, the DOL wage system may yield higher wages than the employer's actual wage – in some cases lower. Employers are required to pay the higher of the two – making it unlikely or at least speculative that the presence of H-1B workers would systematically cause a lowering of U.S. worker wages.

[24] "Salaries Have Risen for High-Skilled Foreign Workers In U.S. on H-1B Visas," PEW Research Center (August 16, 2017), available at https://www.pewresearch.org/fact-tank/2017/08/16/salaries-have-risen-for-high-skilled-foreign-workers-in-u-s-on-h-1b-visas/.

[25] The Occupational Employment Survey (OES) uses the Standard Occupational Classification (SOC) for the collection of wage data.

[26] The cited document does not appear to include this statistic.

for approved entry level for H-1B and EB-2 programs at the same time. Whether this is indeed an appropriate proxy appears questionable, given the disproportionate increases that the new computation formulas will engender.[27]

Conclusion

We appreciate having the opportunity to provide input as a part of the rulemaking and policy implementation process. We understand the challenges that the COVID-19 pandemic has caused both from a health and economic standpoint and appreciate the Department's desire to move quickly.

Quick action is needed in the case of such emergencies. However, we do not believe the Department has adequately explained or justified how the revamping of the targeted wage computation process will provide a quick remedy, or any remedy for that matter, to those suffering from the COVID-19 pandemic. The benefits, if any, seem remote, and they seem far outweighed by the burdens of new costs on U.S. companies, some of which are struggling to survive, not to mention the disruption caused by the sudden publication and effective date of the rule.

As mentioned at the outset of our comment, we would request, therefore, that the Department withdraw this rule and work with our organization and other stakeholders to review the issues through a Notice of Proposed Rulemaking – in order to achieve a workable system that is fair, competitive and predictable.

Respectfully submitted,

Lynn Shotwell, GMS, SHRM-SCP
President and CEO
Worldwide ERC®

Worldwide ERC® is the professional association for employee mobility professionals. Since 1964, Worldwide ERC® has been committed to connecting and educating workforce mobility professionals across the globe. A global not-for-profit organization, we are headquartered in Washington, D.C., with offices in London and Shanghai, and are the source of global mobility knowledge and innovation in talent management from Europe, the Middle East and Africa, to Asia and across the Americas.

[27] In addition to litigation, several commentators have questioned DOL's new computation formula and the challenges that it will create for U.S. companies hiring foreign talent, including, Bier, "DOL's H-1B Wage Rule Massively Understates Wage Increases by up to 26 Percent" (Cato Institute, October 9, 2020), "An Analysis of the DOL H-1B Rule" (National Foundation for American Policy, October 2020), and Anderson, "Flaw in DOL Rule Sets H-1B Salaries at $208,000 a Year" (Forbes, November 2, 2020).