

**Employment and Training Administration
Office of Foreign Labor Certification
National Prevailing Wage Center**

**EFFECTS OF THE 2016 DEPARTMENT OF LABOR APPROPRIATIONS ACT
(2016 DOL APPROPRIATIONS ACT)
DIVISION H, TITLE I OF PUBLIC LAW 114-113**

December 29, 2015

1. What prevailing wage rates are required for the H-2B program under the 2016 DOL Appropriations Act?

Section 112 of the 2016 DOL Appropriations Act provides:

“The determination of prevailing wage for the purposes of the H-2B program shall be the greater of — (1) the actual wage level paid by the employer to other employees with similar experience and qualifications for such position in the same location; or (2) the prevailing wage level for the occupational classification of the position in the geographic area in which the H-2B nonimmigrant will be employed, based on the best information available at the time of filing the petition. In the determination of prevailing wage for the purposes of the H-2B program, the Secretary shall accept private wage surveys even in instances where Occupational Employment Statistics survey data are available unless the Secretary determines that the methodology and data in the provided survey are not statistically supported.”

We interpret the statutory provision to impose the following prevailing wage requirements. The prevailing wage that must be paid in the H-2B program is now the higher of:

- 1) the actual wage level paid by the employer to other employees with similar experience and qualifications for such position in the same location, or
- 2) the wage determined by the Department of Labor (DOL or Department) from other sources based either on the “best information available” or a private survey with methodology and data that are “statistically supported.”

The wage determined by DOL under the second provision shall be an applicable collective bargaining agreement (CBA) wage in all circumstances where one exists since DOL and the Department of Homeland Security (DHS) determined, in the most recent H-2B rulemaking (Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 80 Fed. Reg. 24146 (April 29, 2015) (2015 Wage Rule)), that an applicable CBA wage must be used to set the prevailing wage in all circumstances where one is available because “[w]hen negotiated at arms’ length by a

duly elected or recognized bargaining representative, the CBA wage accurately represents the wage paid to similarly employed workers in a specific occupation in the area of intended employment.” 80 Fed. Reg. at 24176. Thus, we interpret the “best information available” to set the “prevailing wage level” to be an applicable CBA where one exists. Otherwise it shall be the mean wage for the occupation from the Occupational Employment Statistics (OES) survey issued by the Bureau of Labor Statistics unless the employer submits a private wage survey with methodology and data that is “statistically supported.”

In circumstances where there is no collective bargaining agreement or private wage survey, we determined that the mean wage from the OES for the occupation was the appropriate prevailing wage because the OES is the most accurate data source from which to set the prevailing wage. The decision to maintain a mean wage rather than a “tiered” approach was based on the determination that “there are no significant skill-based wage differences in the occupations that predominate in the H-2B program.” 80 Fed Reg. at 24159.

Section 212(n)(1)(A) of the Immigration and Nationality Act (INA) requires H-1B employers to offer the higher of the actual wage or the “prevailing wage level for the occupational classification in the area of employment.” In the H-1B program, DOL issues prevailing wages based on four wage tiers because INA Section 212(p) expressly requires DOL to issue prevailing wage rates in H-1B using “at least 4 levels of wages”. Significant differences between these provisions of the INA and the 2016 DOL Appropriations Act, as well as differences between the H-1B and H-2B programs lead us to set the “wage level” for the H-2B program at the OES mean rather than based on tiers. First, the 2016 DOL Appropriations Act does not include the key language from INA Section 212(p)(4) requiring DOL to issue an H-1B prevailing wage using “at least 4 levels of wages.” Second, unlike in the H-1B, a program for skilled occupations, we have previously determined that there are generally no meaningful skill-based differentials in the H-2B program. Thus, a single “level” is appropriate for the H-2B program even though four tiers are used for H-1B prevailing wages.

The 2016 DOL Appropriations Act requires DOL to accept “private wage surveys even in instances where OES survey data are available,” thus overturning limitations on use of such surveys set out at 20 CFR 655.10(f)(1). Those limitations, will not be implemented for the duration of the 2016 DOL Appropriations Act: Accordingly, an employer may now submit a “statistically supported” private survey, including one that was privately conducted by an entity other than a state, even if it does not fit within one of the exceptions in 20 CFR 655.10(f)(1). However, an employer may not submit a private survey if there is an applicable CBA.

2. How does the 2016 DOL Appropriations Act affect my current case pending in the National Prevailing Wage Center (NPWC)?

Prevailing wage applications will be processed in first-in, first-out (FIFO) order. However, each prevailing wage request is unique, and processing times may vary depending on the individual circumstances of the request. All cases in process on or after December 19, 2015, the date after passage of the DOL Appropriations Act, will be processed under the wage requirements of that law. The point of contact may check case status via the iCERT portal at <https://icert.doleta.gov/>.

Note: Section 112 of the 2016 DOL Appropriations Act no longer permits DOL to limit the categories of employers who may submit a survey to those in 20 CFR 655.10(f)(1) of the H-2B Final Wage Rule for the duration of the 2016 DOL Appropriations Act. Thus it eliminates any distinction between the use of state surveys and other surveys to set the prevailing wage.

3. Can I amend a pending request to include a new or different private survey?

No. The NPWC will not accept survey wage requests to amend pending applications. If the employer seeks consideration of a survey wage the employer must submit the survey information with its initial submission of the Form ETA-9141, *Application for Prevailing Wage Determination*. A new Form ETA-9141 must be submitted with the appropriate documentation and completed forms.

4. Will the Department collect information from employers on the actual wage level paid to other employees with similar experience and qualifications?

No. The Department has determined that it will not collect information on the actual wages paid for employees of similar experience and qualifications. Instead, the prevailing wage determinations (PWDs) issued by the NPWC will require the employer to pay the higher of the actual wage paid to employees with similar experience and qualifications or the wage issued by the NPWC.

The Department will determine the prevailing wage level for the occupational classification of the position in the geographic area in which the H-2B nonimmigrant will be employed, based on the best information available at the time of filing the petition, and place that wage in Section F 4 of Form ETA-9141. That PWD will also be placed in Section F 7 of Form ETA-9141. Section F7 will also provide that “The Prevailing Wage Determination for the purposes of the H-2B program shall be the greater of the (1) actual wage level paid by the employer to other employees with similar experience and qualifications for such positions in the same location; or (2) the wage listed in Section F4 of the Form ETA-9141.”

5. What is the Department’s interpretation of the term “private wage survey” in the context of 2016 DOL Appropriations Act?

Because the 2016 DOL Appropriations Act required DOL to accept “statistically supported” private surveys, there is no longer any distinction between State surveys and surveys that are conducted by private entities. Accordingly, DOL interprets the term “private survey” to include both: 1) government surveys not conducted or issued by DOL and 2) nongovernment surveys conducted by private individuals or organizations.

6. Will employers continue to be required to submit the Form ETA-9165, Employer-Provided Survey Attestations with a private survey requests?

Yes. The Form ETA-9165 is still a required document for those employers choosing to submit a survey wage as part of their request for a PWD.

7. What methodology and data requirements apply to private surveys?

We interpret the requirement in the 2016 DOL Appropriations Act that the “methodology and data” in a private survey be “statistically supported” to be those methodological criteria for surveys set out in the 2015 Wage Rule. In publishing the 2015 Wage Rule, DOL and DHS considered the appropriate methodological criteria needed for DOL to approve any employer-provided survey. Those criteria are as follows:

- (1) The survey must provide the arithmetic mean of the wages of all workers similarly employed in the area of intended employment, except that if the survey provides a median but does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.
- (2) In each case where the employer submits a private survey, the employer must submit, concurrently with the Form ETA-9141, a completed Form ETA-9165 containing specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey.

In addition, the information provided by the employer on Form ETA-9141 must include the attestation that:

- (a) The surveyor either made a reasonable, good faith attempt to contact all employers employing workers in the occupation and geographic area surveyed or conducted a randomized sampling of such employers.

- (b) The survey includes wage data from at least 30 workers and three employers.
- (c) The collection was administered by a bona fide third party.
- (d) The survey was conducted across industries that employ workers in the occupation, with the “occupation” determined based on the job descriptions used in the survey.
- (e) The wage reported in the survey includes all types of pay, consistent with Form ETA–9165.

(3) The survey must be based upon recently collected data: The survey must be the most current edition of the survey and must be based on wages paid not more than 24 months before the date the survey is submitted for consideration.

Each of these criteria and the reasons for these requirements are further explained in the 2015 Wage Rule.

8. May an employer conduct its own survey or have an H-2B agent, representative, or agent conduct the survey.

No. The definition of bona fide third party includes a state agency, college, or university and may include a non-government entity or person. However, the following are not bona fide third parties: Any H–2B employer or any H–2B employer's agent, representative, or attorney. This requirement does not bar an employer from paying an otherwise bona fide third party to conduct the survey. As discussed in the 2015 Wage Rule, this requirement is necessary to reduce the possibility of bias in the survey. Therefore, we determine that the standard must be maintained in order for the methodology in the survey to be “statistically supported.” Although the employer cannot conduct its own survey, it is appropriate to require the employer to attest to the methodology in the survey to the best of its knowledge and belief. Because the employer is seeking to use the survey to set the prevailing wage, the employer is ultimately responsible for ensuring that the survey meets all required methodological standards.

9. Where can I find instructions on completing the required Form ETA-9165 Employer-Provided Survey Attestations to Accompany H-2B Prevailing Wage Determination Request Based on a Non-OES Survey, to accompany my H-2B request for a PWD?

The instructions on how to complete the Form ETA-9165 to provide the required employer-provided survey attestations can be found on the Office of Foreign Labor Certification Web site under Forms and Instructions:

<http://www.foreignlaborcert.doleta.gov/form.cfm>

10. I am ready to submit my request for PWD in connection with an H-2B application. How can I upload my completed Form ETA-9165, Employer-Provided Survey Attestations to Accompany H-2B Prevailing Wage Determination Request Based on a Non-OES Survey, into the iCERT System?

To upload the Form ETA-9165 into the iCERT System users will select the “Browse” button and then select the file saved in their system. Once the document has been identified, select the “Upload” button. The uploaded document will then be displayed in the attachments table.

11. Does the Department permit private surveys that separate wage data by skill level for workers in an occupation within the area of intended employment for the H-2B program?

No. We have interpreted the provisions in the 2016 DOL Appropriations Act to set the “wage level” for the H-2B program at the OES mean rather than by utilizing tiers, based on a previous determination that there are generally no meaningful skill-based differentials in the H-2B program. Thus, making use a survey using skill levels would not be “statistically supported.” Employer-provided surveys must provide the single arithmetic mean of the wages paid to all workers in the occupational classification within the area of intended employment, regardless of skill level or experience, education, and length of employment.

Reminder: Where the survey provides only a median, not an arithmetic mean, a median wage will be acceptable.

12. Can I use a private survey that limits the sample to only U.S. workers for the H-2B program?

No. Since we interpret the requirement in the 2016 DOL Appropriations Act that the “methodology and data” in a private survey be “statistically supported” to be those methodological criteria for surveys set out in the 2015 H-2B Wage Final Rule, data collection for a private survey must be conducted without regard to the immigration status of workers. The survey must provide the arithmetic mean of the wages paid to all workers in the occupational classification within the area of intended employment; it may not exclude worker data based on immigration status. Accordingly, an employer-provided survey that samples only U.S. workers, or only nonimmigrant workers, will be rejected.

13. I am requesting consideration of a private survey with my application for an H-2B PWD. The survey only provides median wages in the area of intended employment. Will this median wage be acceptable?

Since we interpret the requirement in the 2016 DOL Appropriations Act that the “methodology and data” in a private survey be “statistically supported” to be those methodological criteria for surveys set out in the 2015 Wage Rule, if the survey provides only a median wage, and the private survey meets all the methodology requirements in the 2015 Wage Rule, the median wage will be considered acceptable for purpose of processing the request for a prevailing wage.

14. How can I make sure my survey provides the required arithmetic mean wage?

The arithmetic mean is defined as the sum of wages paid to all workers divided by the number of workers included in the sample. It is not acceptable for employers to submit a survey with the wage calculated by dividing the sum of wages paid by employers divided by the number of employers participating in the survey.

15. What is the median wage? When can the median wage be used in an employer-provided survey for the H-2B program?

The median wage is the midpoint wage of all wages participating employers report they paid to workers in the occupation and the area of intended employment. If the survey provides a median wage of workers in the occupation and area of intended employment, but does not provide an arithmetic mean, the median wage can be used as the basis for making a PWD.

16. The surveyor has not been able to elicit a response to the survey in the occupation and area of intended employment that meets the minimum sample size requirements (i.e., at least 3 employers and 30 workers) of the 2015 H-2B Wage Final Rule. May the geographic area surveyed be expanded?

Yes, under certain limited conditions, as set out in 20 CFR §655.10(f)(3) the geographic area surveyed may be expanded incrementally until employer-provided survey sample size requirement is met (i.e., at least 3 employers and 30 workers). A survey may be expanded to cover a geographic area larger than the area of intended employment in which the job opportunity is located only where that area of intended employment does not generate a sufficient sample to meet minimum size requirements. Under that condition, the survey may only be expanded to geographic areas that are contiguous to the area of intended employment only to the extent necessary to generate a sample of satisfying the minimum sample size requirement. The survey’s expansion may take

place across state lines, as long as the new area(s) added to the survey are contiguous to the area of intended employment in which the job opportunity is located and the expansion extends only as much as is necessary to satisfy the minimum sample size requirement. If the surveyor determines after surveying the area of intended employment that the survey does not meet minimum sample size requirements, it must either conduct a new random sample of the expanded area (including the area of intended employment) or must make a reasonable, good faith effort to survey all employers occupying workers in the occupation and expanded area surveyed.

17. I submitted a request for PWD seeking consideration of a private survey for the H-2B program. Will the NPWC request additional information about the survey?

During the course of processing a request for PWD, the NPWC may ask an employer for additional information before issuing a determination. If, despite additional information provided, the NPWC determines the private survey does not meet methodological requirements, it will reject the survey.

18. How does a private survey meet the requirement that the survey not limit the survey participants by the nature of the employer?

The survey must base inclusion of a worker or employer's wage information solely on the duties performed. Factors relating to the nature of the employer, such as whether the employer is public or private, for profit or nonprofit, large or small, charitable, a religious institution, or a job contractor are not relevant to determining the prevailing wage for an occupation. Private surveys in which the survey's sample is based on the nature of the employer rather than duties of the job will be rejected.

Reminder: Private surveys must reflect a good faith effort to include all employers who employ workers in the occupation and area surveyed or a randomized sample of those employers.

19. Can the employer provide a private survey for consideration for the first time while requesting an H-2B Center Director Review (CDR)?

No. If the employer seeks consideration of a private survey for an H-2B PWD, the employer must submit the survey information with its initial Form ETA-9141, *Application for Prevailing Wage Determination*, submission. While an employer may submit supplemental information to rectify survey deficiencies of a survey already submitted and considered during Form ETA-9141 processing, the NPWC will not consider surveys submitted for the first time in the CDR request. Instead, to seek consideration of the employer-provided survey, the employer must submit a new Form ETA-9141 and include the survey information to be considered.