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Immigration

District Court Vacates Final Rule Affecting Wages for H-1B, PERM Workers; OFLC Updates Implementation

Legal Update

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By Immigration Group

This article was prepared with the assistance of ABIL, the Alliance of Business Immigration Lawyers, of which Loan Huynh, Fredrikson Immigration Department Chair, is a member.

On June 23, 2021, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce v. DHS*, vacating the final rule, "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States" and remanding the matter to the U.S. Department of Labor. The Department did not oppose the vacating of the rule. In its motion, the Department stated that until the agency conducts further review, it "cannot say for certain the extent to which the final rule may need to be revised, but the concerns raised to this point suggest that there may need to be significant changes to the rulemaking going forward."

The Department published the final rule on January 14, 2021, following district court orders that set aside an October 8, 2020, interim final rule. The final rule amended the Department's regulations governing the prevailing wages for employment opportunities that U.S. employers seek to fill with foreign workers on a permanent or temporary basis under the PERM, H-1B, H-1B1 or E-3 visa programs. The Department has twice delayed the effective date of the final rule. In light of these delays and now the June order vacating the final rule, the operative version of the regulations at 20 CFR §§ 656.40 and 655.731 "continues to be the version in place on October 7, 2020, prior to the publication" of the interim final rule, the Office of Foreign Labor Certification said.

The Department will need to issue a new regulation if it wishes to change the current prevailing wage for high-skilled foreign nationals. In April 2021, the Department requested information from the public on data sources for calculating the prevailing wage for H-1B visa holders and employment-based immigrants. DOL may use the information it received from the public if it decides to make changes to the prevailing wage system for foreign-born professionals.

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Details

- OFLC announcement (scroll down to June 29, 2021)
- Request for Information, Employment and Training Administration, Dept. of Labor, April 2, 2021