

Order No. 871, that a certificated facility could have its notice to proceed with construction withheld potentially for an *unlimited* period of time while requests for rehearing remained pending before the Commission.

4. Today's order is necessary to address the present unsustainable situation. While it may not be perfect nor exactly how I alone would resolve the uncertainties and threats created by Order No. 871, it does represent an acceptable compromise, consistent with the applicable law.

5. Notably, it puts clear time limits—where there are none now under Order No. 871—on how long the Commission is required to withhold a notice to proceed with construction while the Commission considers a request for rehearing.

6. Second, it sets forth a *policy* for future cases—not mandatory, but subject to the facts and circumstances of each case—that a property owner opposing the involuntary use of eminent domain should be protected from a seizure of his or her property during a reasonable period of time while the Commission is still considering requests for rehearing; however, this period will also be subject to the same time limits as the withholding of the notice to proceed with construction.

7. Third, nothing in today's order will prevent the developer from continuing expeditiously with all development activities that do not involve construction or the use of eminent domain against unwilling property owners. Voluntary land acquisition is unaffected by this order.

8. I understand the desire of the dissent simply to repeal Order No. 871 with nothing more,<sup>3</sup> but that is not a realistic prospect; put bluntly, it is not going to happen. Rather than allow the current unsustainable *status quo* to continue, under present circumstances I believe this order represents a realistic path forward. If it is not administered fairly or does not bring the clarity and certainty needed, it can be revisited.

Accordingly, I respectfully concur.

Mark C. Christie,  
Commissioner.

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## DEPARTMENT OF LABOR

### Employment and Training Administration

#### 20 CFR Parts 655 and 656

[Docket No. ETA-2020-0006]

RIN 1205-AC00

#### Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States: Delay of Effective and Transition Dates

**AGENCY:** Employment and Training Administration, Department of Labor.

**ACTION:** Final rule; delay of effective and transition dates.

**SUMMARY:** On March 12, 2021, the Department of Labor (Department or DOL) published a final rule delaying the effective date of the January 14, 2021, rule entitled *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States* (the rule or Final Rule), from March 15, 2021 until May 14, 2021. On March 22, 2021, the Department proposed to further delay the effective date of the rule by eighteen months from May 14, 2021 until November 14, 2022, along with corresponding proposed delays to the rule's transition dates. The Department proposed an additional delay to provide a sufficient amount of time to thoroughly consider the legal and policy issues raised in the rule, and offer the public, through the issuance of a Request for Information, an opportunity to provide information on the sources and methods for determining prevailing wage levels covering employment opportunities that United States (U.S.) employers seek to fill with foreign workers on a permanent or temporary basis through certain employment-based immigrant visas or through H-1B, H-1B1, or E-3 nonimmigrant visas. The Department also proposed the further delay to provide agency officials with a sufficient amount of time to compute and validate prevailing wage data covering specific occupations and geographic areas, complete and thoroughly test system modifications, train staff, and conduct public outreach to ensure an effective and orderly implementation of any revisions to the prevailing wage levels. The Department invited written comments from the public for 30 days, until April 21, 2021, on the proposed further delay and received 627 timely comments. The Department has reviewed the comments received in response to the proposal and

will delay the effective date of the Final Rule for a period of 18 months, along with corresponding delays to the rule's transition dates.

**DATES:** This final rule is effective November 14, 2022. As of May 13, 2021, the effective date of the Final Rule published on January 14, 2021, at 86 FR 3608, and delayed on March 12, 2021, at 86 FR 13995, is further delayed until November 14, 2022, and the corresponding transition dates are delayed until January 1, 2023, January 1, 2024, January 1, 2025, and January 1, 2026, respectively.

**FOR FURTHER INFORMATION CONTACT:** Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room N-5311, Washington, DC 20210, telephone: (202) 693-8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On January 14, 2021 (86 FR 3608), the Department published a final rule in the **Federal Register**, which adopted changes to an interim final rule (IFR), published on October 8, 2020 (85 FR 63872), that amended Employment and Training Administration (ETA) regulations governing the prevailing wages for employment opportunities that U.S. employers seek to fill with foreign workers on a permanent or temporary basis through certain employment-based immigrant visas or through H-1B, H-1B1, or E-3 nonimmigrant visas. Specifically, the IFR amended the Department's regulations governing permanent (PERM) labor certifications and Labor Condition Applications (LCAs) to incorporate changes to the computation of wage levels under the Department's four-tiered wage structure based on the Occupational Employment Statistics (OES) wage survey administered by the Bureau of Labor Statistics (BLS). A general overview of the labor certification and prevailing wage process as well as further background on the rulemaking is available in the Department's Final Rule, as published in the **Federal Register** on January 14, 2021, and will not be restated herein. 86 FR 3608, 3608-3611.

Although the Final Rule contained an effective date of March 15, 2021, the Department also included two sets of

<sup>3</sup>Danly Dissent at PP 1-2.

transition periods under which adjustments to the new wage levels would not begin until July 1, 2021. 86 FR 3608, 3642. For most job opportunities, the transition would occur in two steps and conclude on July 1, 2022. For job opportunities that will be filled by workers who are the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or are eligible for an extension of their H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000, Public Law 106-313, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273 (2002), the transition would occur in four steps and conclude on July 1, 2024. 86 FR 3608, 3660.

On February 1, 2021 (86 FR 7656), the Department published a notice of proposed rulemaking in the **Federal Register** (60-day NPRM) proposing to delay the effective date of the Final Rule for 60 days. The Department based the action on the Presidential directive as expressed in the memorandum of January 20, 2021, from the Assistant to the President and Chief of Staff, entitled “Regulatory Freeze Pending Review.” The memorandum directed agencies to consider delaying the effective date for regulations for the purpose of reviewing questions of fact, law, and policy raised therein. In accordance with the memorandum, the Department proposed to delay the effective date of the Final Rule from March 15, 2021 until May 14, 2021. Given the complexity of the regulation, the Department determined that a 60-day extension of the effective date was necessary to provide time to consider the relevant legal questions that were raised. In its proposal, the Department invited written comments on the proposed delay, specifically the proposed delay’s impact on any legal, factual, or policy issues raised by the underlying rule and whether further review of those issues warranted such a delay and noted that all other comments on the underlying rule unrelated to the proposed delay would be considered outside the scope of the action.

On March 12, 2021, the Department published a final rule (60-day rule) adopting the proposal and delaying the effective date of the underlying rule to May 14, 2021. 86 FR 13995. The Department acknowledged the need to assess and evaluate the prevailing wage methodology and computations in the Final Rule due to the complexity of the rule, concerns voiced by commenters in response to the 60-day rulemaking, and issues raised in litigation challenging the underlying rulemaking. 86 FR

13996–13997. To permit time to continue its review, the Department published a second NPRM (18-month NPRM or NPRM) on March 22, 2021, proposing to further delay the effective date of the Final Rule by eighteen months from May 14, 2021 until November 14, 2022, along with corresponding proposed delays to the rule’s transition dates. 86 FR 15154. As explained below, the Department proposed the additional delay to allow sufficient time for the Department to thoroughly consider legal and policy issues related to the Final Rule; to prevent confusion and uncertainty among the regulated community over the operative wage rates while the Department conducts its review; to allow agency officials adequate time to compute and validate prevailing wage data covering all occupations and geographic areas; to complete and thoroughly test modifications to the Office of Foreign Labor Certification (OFLC) Foreign Labor Application Gateway (FLAG) system; and to train staff and conduct sufficient public outreach to ensure an effective and orderly implementation should the initial transition wage rates become effective on July 1, 2021. 86 FR at 15155–15156.

The 18-month NPRM also highlighted the Department’s intent to publish a Request for Information (RFI) to allow the public the opportunity to provide the Department with information to further inform its assessment of prevailing wage levels. The Department issued this RFI on April 2, 2021, with a 60-day comment period that closes on June 1, 2021, to provide the public an opportunity to provide information on the sources of data and methodologies for determining prevailing wage levels. 86 FR 17343. The Department noted that information received in response to the RFI will inform and be considered by the Department as it reviews the Final Rule, which may result in the development of a future notice of proposed rulemaking to revise the computation of prevailing wage levels. *Id.*

## II. Basis for Proposed Delay of Effective and Transition Dates

The Department proposed in the 18-month NPRM to delay the effective date of May 14, 2021, and the transition date of July 1, 2021, under which adjustments to the new wage levels would begin, for a period of eighteen months, or until November 14, 2022 and January 1, 2023, respectively. In addition, the Department proposed corresponding one-year delays for each of the remaining transition dates, which

would be revised to January 1, 2024, January 1, 2025, and January 1, 2026, respectively. As explained in the NPRM, the Department proposed this delay for three primary reasons.

First, the Department proposed this delay so that it has sufficient time to engage in its comprehensive review of the Final Rule, and to take further action as needed to complete this review. Many comments on the 60-day NPRM raised substantive and procedural concerns regarding the underlying rulemaking. The 18-month NPRM explained that the concerns called into question the appropriateness of the wage rates established in the Final Rule, including the transition rates currently scheduled to take effect on July 1, 2021. The 18-month NPRM also noted that many of these same concerns have been raised in the ongoing litigation concerning the IFR and the Final Rule. Accordingly, the Department believed the proposed delay, in conjunction with additional actions such as the RFI that was issued on April 2, 2021, would best inform the Department’s comprehensive review of the Final Rule and consideration of alternate paths. The NPRM noted that the Department considered allowing the rule to take effect pending its review and the assessment of potential new rulemaking. However, because the concerns raised during the 60-day rulemaking and in litigation were substantial and called into question fundamental aspects of the rulemaking, the Department believed the fairest and most prudent approach was to propose a further delay of the rule’s effective and transition dates rather than allow the rule to take effect without seeking additional public input. For example, the NPRM explained that, based on the Department’s review to date, additional time was needed to comprehensively review the record relied upon to support the underlying rulemaking before it is allowed to take effect, including litigants’ claims that the Department’s failure to publicly disclose certain data and analysis relied upon to establish the new wage levels will otherwise result in wages that, contrary to the Final Rule’s conclusions, do not “accurately reflect[] the portion of the OES distribution where workers with levels of education, experience, and responsibility similar to the vast run of entry-level H-1B and PERM workers likely fall.” 86 FR 15154, 15155 (quoting 86 FR 3608, 3639).

Second, and relatedly, the Department preliminarily assessed that delaying the effective and transition dates as proposed in the NPRM—instead of allowing those dates to be implemented—would prevent confusion

and uncertainty among the regulated community over the operative wage rates while the Department conducted its review.

Third, the Department explained that the length of the proposed delay would allow BLS and ETA's OFLC adequate time to compute and validate prevailing wage data covering all occupations and geographic areas, complete and thoroughly test modifications to the OFLC FLAG system, train staff, and conduct sufficient public outreach to ensure an effective and orderly implementation if, following the Department's comprehensive review, the rule's changes associated with the computation of wage levels under the Department's four-tiered wage structure ultimately must take effect.

While the Department acknowledged that the proposed delay was significant, the Department explained that, based on its initial review and the concerns raised, it was clear that a significant amount of time was needed to consider all aspects of the rulemaking, including the underlying methodology employed, and relevant studies and data. The Department sought public comment on the proposed delay, including whether it should delay the effective date and the transition dates of the Final Rule and whether the proposed period of delay was an appropriate length of time or whether another length of time may be more appropriate. The Department also sought comment on:

- Whether, rather than delaying implementation as proposed herein, the Department should allow the rule, and any accompanying transition dates, to take effect while it conducts its review and considers any new proposal(s) to amend the regulations in question.

- Specific details and any available data regarding the specific challenges commenters face in complying with the Final Rule by the current transition date of July 1, 2021.

- Any relevant knowledge and specific facts about any benefits, costs, or other impacts of this proposal on the regulated community, workers, and other relevant stakeholders.

- Any other potential consequences of not delaying the effective date and transition dates of the Final Rule.

### III. Public Comments Received

The Department invited written comments for a 30-day period on its proposal to delay the effective date of the Final Rule by 18 months, with corresponding delays to the rule's transition dates. The comment period opened on March 22, 2021 and closed on April 21, 2021, with comments submitted electronically at [http://](http://www.regulations.gov/)

[www.regulations.gov/](http://www.regulations.gov/) using docket number ETA-2020-0006. During this comment period, ETA received 627 comments on its proposal, including 595 unique comments. The vast majority of commenters supported the NPRM's proposed 18-month delay of the effective and transition dates of the Final Rule.

The Department appreciates all of the comments it received. After full consideration of the comments and for the reasons explained below, the Department is adopting the proposal in the NPRM to delay the effective date of the Final Rule by 18 months, with corresponding delays to the rule's transition dates.

#### *A. Comments Supporting a Delayed Effective Date and Transition Dates*

##### 1. Public Comments Received Supporting the Proposal

The comments received on the Department's NPRM overwhelmingly supported an 18-month delay or, in some instances, longer postponement or abandonment of the rule, and raised key issues including the Department's need to review the data and sources used in determining the prevailing wage levels in the Final Rule as well as the need to further assess the rule's impact. As a result, most of these commenters noted that the Department should take the time and opportunity to thoroughly and comprehensively review the rule.

Commenters supported the proposed delay for various reasons, such as disapproval of the Final Rule, fears that the process in adopting the rule was rushed, and concerns that the rule lacked evidence and scientific data to support the revised prevailing wage levels. These commenters included academic institutions, trade and professional associations, and a significant number of individual commenters who also expressed their concerns about the impact of the Final Rule on international students, current visa holders, and prospective visa holders. Commenters voiced concerns regarding the Final Rule's impact on businesses and industries, particularly academic institutions and businesses in the information technology (IT) industry, as well as the impact on small to mid-sized entities. Commenters raised concerns that the rule is heavily geared toward the IT industry and encouraged the Department to review prevailing wage data across industries and sectors within industries, and to review the impact of the Final Rule on occupational markets by geographic location.

##### 2. General Comments Supporting the Proposal

Many commenters expressed general, and often strong, support for the Department's proposal to delay the effective and transition dates of the Final Rule without providing specific reasons for support. The Department values the commenters' general input on the delay proposed in the NPRM. Because of the general nature of these comments, the Department is unable to address them in further detail. More specific comments related to the proposal are addressed in the sections that follow.

##### 3. Delaying the Rule To Allow Time To Evaluate Matters of Fact, Law, and Policy

Numerous commenters agreed with the Department's proposal to delay the Final Rule to allow the Department time to evaluate matters of fact, law, and policy related to the rule. One commenter stated it is in favor of the proposed delay and provided a policy report to assist the agency in evaluating issues of "fact, law, and; raised by the rule. Many individual commenters stated the proposed delay would afford the public with more time to review the rule and assess its advantages and disadvantages. Other individual commenters expressed concern that the rule would discourage immigration and generally discussed the benefits that immigrants bring to the United States, including increased diversity, strong work ethic, and knowledge of or talent in specialized fields. Several commenters noted the rule was published during the final days of the previous administration and supported the proposed delay to allow entities, such as the Department, the public, policymakers, and stakeholders, time to review the rule, including for consistency with the current administration's policy goals.

Many commenters expressed general agreement with the proposed delay so that the Department can fully and thoughtfully consider the rule, its implications, and the appropriateness of the wage levels in the rule. Specifically, commenters requested the Department adopt its proposal to allow for thorough review and comprehensive analysis of the prevailing wage data and methodology used to establish the prevailing wage levels in the rule. Commenters also recommended the Department adopt its proposal in order to use the time to reconsider whether changes to prevailing wage levels are needed, with several commenters stating the changes to the prevailing

wage levels were too drastic, and others suggesting that the current prevailing wage level methodology is sufficient because it provides for yearly wage increases in most instances.

Commenters observed that the rule imposes significant impacts on workers, businesses, and the economy, such that the data cited in support of the rule needs careful evaluation and verification.

Based on concerns that the data used in the rule was flawed or inaccurate, commenters argued that the proposed delay would afford the Department time to “scientific ally” review the rule’s prevailing wage methodology and determine more appropriate prevailing wage levels. A commenter, for example, urged the Department to address substantive concerns with the methodology in the Final Rule before implementing any changes to the prevailing wage requirements. According to the commenter, the methodology in the Final Rule is inconsistent with the INA, as the rule set the Level 1 “entry level” wage using the comparator of an individual with a master’s degree with no work experience even though this standard exceeds the requirements for an H-1B specialty occupation visa. Other commenters noted substantive concerns with the Final Rule, including that key provisions in the rule are at odds with the INA, the prevailing wage levels were set in an irrational manner and based on “cherry-picked” studies, the agency did not fully consider factors such as non-compensatory income separate from a base salary, and that sources of authority cited in the rule, such as Executive Order (E.O.) 13788 (“Buy American and Hire American”) and a U.S. Citizenship and Immigration Services policy memorandum on H-1B computer related positions have since been revoked or rescinded. Numerous commenters pointed to the Department’s recent RFI (86 FR 17343) and requested the Department reconsider the data and sources used in the Final Rule in light of sources obtained through the RFI or other available sources of data.

Several commenters also supported the proposed delay because it would provide the Department with an opportunity to review the “procedural irregularities” associated with the underlying rule, including those identified in ongoing litigation. These commenters raised two main procedural concerns with the rule, namely that the Department did not provide the public with proper notice and a meaningful opportunity to comment, and failed to disclose relevant data and analysis to

permit informed comments from the public. One of these commenters asserted the Final Rule violated the Administrative Procedure Act’s (APA) notice and comment requirements while another commenter cited a Federal appellate case for the proposition that “where the agency has used data as part of its rationale for major policy issues, the data must be disclosed.” Several commenters urged the Department to consider making more of the underlying data used to compute the wage levels in the Final Rule available for public review. A commenter supported the delay to allow the agency time to review the rule and determine it is “unjustified, ignores labor market realities, and would harm the country’s economic recovery.” The commenter explained that should the agency not make this determination, the proposed delay is needed for courts to render final decisions in related litigation.

The Department acknowledges the suggestion of commenters that the Department adopt its proposed delay of the Final Rule’s effective and transition dates to review all aspects of the underlying rulemaking, including those related to the methodology in the Final Rule, the procedures used to promulgate the rule, and the agency’s need and alleged failure to disclose the data or studies it relied upon during the rulemaking. These serious concerns with the substance of the Final Rule and the process through which it was promulgated support the proposal to delay the Final Rule in order to allow the agency to continue its comprehensive review of the rule, evaluate the information it receives from the RFI, and take additional action as necessary, which may include the development of a future notice of proposed rulemaking and/or the receipt of final decisions in the related litigation.

The Department’s ongoing review underscores the need to further review and assess the Final Rule in light of the assertions and concerns raised by these commenters, including the concern raised by litigants, and echoed by the commenters to this rulemaking, that the agency failed to make available portions of the technical basis for the IFR and Final Rule in time to allow them to provide meaningful comments. For example, the litigants specifically allege that the Final Rule’s adjustments to the IFR “stem from undisclosed data and analyses that DOL failed to place on the public rulemaking docket.” First Amended Complaint at ¶ 94, *ITServe Alliance, Inc., et al. v. Walsh, et al.*, No. 20-cv-14604 (D.D.C. Apr. 7, 2021); see also First Amended Complaint at ¶ 147,

*Purdue University, et al. v. Walsh, et al.*, No. 20-cv-3006 (D.D.C. Feb. 19, 2021) (“The agency also failed to provide the public with advance notice of the technical studies and data underlying its decision, including the data from the National Science Foundation, and, the methodology and technical studies it did reveal, prevented the public with a meaningful opportunity to comment and adequately engage in the rulemaking process.”). While continuing its review of the Final Rule and responding to the related litigation, the Department recently certified the contents of the rulemaking record to the plaintiffs in pending litigation challenging the Final Rule. Notice of Filing of Certified List of Contents of the Administrative Record, *Stellar IT, et al. v. Walsh, et al.*, No. 20-cv-3175 (D.D.C. Apr. 12, 2021); Notice of Filing of Certified List of Contents of the Administrative Record, *Purdue University, et al. v. Walsh, et al.*, No. 20-cv-3006 (D.D.C. Apr. 12, 2021). In doing so, the Department has identified potential issues surrounding the rulemaking record, which has necessitated the parties entering into a protective order in order to make portions of the record relied upon by agency decision makers available to these litigants. See, e.g., Defendants’ Unopposed Motion for Protective Order, *Stellar IT, et al. v. Walsh, et al.*, No. 20-cv-3175 (D.D.C. Apr. 19, 2021).

Although the Department considered allowing the Final Rule to take effect pending its review and consideration of additional action, the issues raised above strongly caution in favor of finalizing the proposed delay as they call into question fundamental aspects of the Final Rule—including the process by which the rule was promulgated and whether the prevailing wage levels in the rule appropriately reflect the wages of workers in the United States similarly employed. The Department believes the fairest and most prudent approach is to delay the effective date of the rule, otherwise the Department runs the risk of allowing a potentially procedurally and substantively flawed rule to take effect, which would unfairly affect the regulated community given the potential harm that immediate implementation of the rule would impart. The Department believes this delay, along with the recently-issued RFI, will best inform the Department’s comprehensive review of the Final Rule and allow it to meaningfully consider all available options.

#### 4. Implementing, Instead of Delaying, the Rule as the Department Conducts Its Review

Many commenters supporting the proposed delay noted the harm that immediate implementation of the Final Rule could cause stakeholders. According to several individual commenters, stakeholders who would benefit from the proposal include (1) prospective or current H-1B applicants planning their careers or career transitions; (2) recent university graduates or students close to completing their education who will soon enter the labor market; and (3) employers such as academic institutions and entities in other industries who would otherwise need to adjust their hiring practices or staffing models in response to the Final Rule. Commenters explained that a delay is needed because of inaccuracies with the computation of wage levels in the Final Rule, because the rule did not properly consider the impact on certain industries or types of workers, and because the rule will not have its intended impact. Commenters also stated that a delay is necessary as the U.S. economy is still recovering from the impact of the COVID-19 pandemic and employers need time to adjust to the salary fluctuations caused by the rule should it be implemented. According to these commenters, if the Final Rule went into effect now, it would be harmful to employers and workers in various industries. The comments discussed in this section further highlight potential substantive errors with the underlying rulemaking and the harmful impact of these errors on the regulated community should the Final Rule go into effect, especially now. The concerns raised in the comments discussed below support the Department adopting its proposed delay of the rule, rather than allowing it to take effect, while the Department conducts its review and considers additional action. Even if some of the concerns raised below could be alleviated or eliminated as a result of the rule's transition provisions, the procedural and substantive concerns discussed above remain, calling into question the appropriateness of the wage rates established in the Final Rule, including the transition rates, and support the Department's decision to delay implementation of a potentially procedurally and substantively flawed rule before it takes effect.

#### a. Impact of Not Delaying the Rule on Academic Institutions and International Students

Many commenters supported delaying the Final Rule on the basis that immediate implementation of the rule would potentially cause harm to academic institutions and international students. Two academic institutions provided an overview of how H-1B workers enrich their campuses, serving as faculty members, researchers, scholars, medical residents and fellows, and professional staff. Commenters stated that academic institutions, research institutions, and non-profit organizations would not be able to meet the prevailing wage requirements in the rule to retain the requisite talent should it be implemented immediately. For example, an academic institution explained that for some of its positions, immediate implementation of the rule would result in a required wage increase of more than \$40,000 annually per employee. Such increases, according to the commenter, would be challenging economically and academically, particularly in light of budget pressures caused by the pandemic. The commenter expressed support for delaying the effective and transition dates of the "flawed" rule—rather than allowing it to go into effect—so as to "minimize confusion and unnecessary complications" during the Department's review and consideration of additional action. Commenters also noted it will be difficult for U.S. colleges and universities to attract and retain international students because the rule, by setting entry-level wages too high, will damage new graduates' employment prospects and discourage talented foreign students or workers from coming to the United States to study or work. Commenters explained that the proposed delay will allow H-1B workers, new graduates, and prospective H-1B workers and their employers time to adjust to the rule should the Department implement it after its review.

The Department appreciates that the comments provided practical information related to potential impacts of the rule on academic institutions, international students, and other individual commenters. The Department is taking a comprehensive look at the rule's impact on the regulated community and may take additional action as necessary after it completes its review.

#### b. Impact of Not Delaying the Rule on Workers

Many commenters supporting the delay stated the Final Rule was flawed or would not achieve its intended objectives to revise prevailing wage levels and would adversely affect workers instead. The commenters recommended that the Department take additional time to assess the rule and design a more effective rule to serve its intended purpose, including an assessment of the appropriate point in the OES wage distribution at which to establish the entry-level wage under the four-tiered wage structure. For example, an employer expressed concern that the 35th percentile for Level I wages is too high and does not accurately reflect the wage of entry-level workers because the 35th percentile is "usually given to" candidates with a master's degree and two to three years of relevant work experience, whereas the minimum requirement for a H-1B visa is a bachelor's degree. Similarly, other commenters argued that the Final Rule's Level IV wage was set too high, even for workers with many years of experience, and that the rule would diminish the pool of skilled laborers in the United States. A commenter supported the delay to allow the Department time to adjust the wage levels to a more "reasonable percentile." Another commenter elaborated on potential adverse effects that workers would experience by explaining that without the delay, "many people who are currently applying for H-1B and employment-based permanent residence will be given only a month[']s notice before the new rule takes place," which "could adversely affect a lot of people who just received job offers and are preparing to file" their applications.

Several commenters warned that a sudden change to the prevailing wage levels would cause some employers to lose employees or access to talented workers, including those with skills and backgrounds in science, technology, engineering, and mathematics (STEM) fields, and would exacerbate the shortage of high-level talent in certain industries, such as the technology industry. Commenters also noted immediate implementation of higher prevailing wage levels could result in layoffs or the firing of U.S. and H-1B workers, which would exacerbate the unemployment rate and harm the U.S. economy, and potentially result in the offshoring of work by U.S. businesses. A few individual commenters explained immediate implementation of the rule would hurt both employers and jobseekers, with some arguing that the

rule's higher prevailing wage rates would disrupt foreign workers' contributions towards companies' growth or the stability of the U.S. economy. Other commenters stated that the wage level changes will result in significant wage increases for businesses, such that the delay is necessary to provide employers the time to adjust businesses practices and payroll details.

Some commenters supported the delay because, in their view, the Final Rule unfairly preferences foreign workers by requiring "employers to discriminate against [U.S.] workers by paying foreign workers higher salaries for doing the same work." Other commenters supported delaying the rule on the basis that it is unfair to immigrant and non-immigrant workers and negatively impacts guest workers from certain countries. One commenter remarked that the delay would send a positive message to high-skilled foreign workers, including those interested in pursuing careers in STEM fields, and would improve the United States' competitive edge by enhancing the nation's ability to attract and maintain talented workers. Lastly, several commenters expressed support for the delay because of their concern that the Final Rule would make it more difficult for them to secure an H-1B visa, an outcome the commenters stated would force them to return to their countries of origin.

The Department acknowledges the concerns expressed by commenters regarding the impact of the Final Rule on U.S. and foreign workers, including those seeking entry-level or senior positions. The Department endeavors to protect the wages and working conditions of both U.S. and foreign workers, and the concerns raised by these commenters suggest that the Department needs to take additional time to review this rulemaking to ensure that it accomplishes this goal. In terms of the suggestions that commenters provided on the appropriate wage level, the Department appreciates the recommendations and encourages commenters to submit relevant information on the sources of data and methodologies for determining prevailing wage levels by commenting on its recently-issued RFI, whose comment period closes on June 1, 2021.

#### c. Impact of Not Delaying the Rule on Industries and Business Processes

Several individual commenters remarked that the economic challenges associated with higher prevailing wage rates would disproportionately impact small and medium businesses or start-

up companies because they are less capable of affording significant salary increases than larger companies. An advocacy organization supported the proposed delay, arguing that the delay would avoid the "significant business disruptions" that the Final Rule would introduce.

Many commenters stated that the rule will affect high-paying industries such as the IT industry to a lesser extent, while other commenters stated that the rule may potentially harm technology companies and an individual commenter expressed the belief that even large companies will not be able afford the wage increases required by the rule, particularly during the COVID-19 pandemic. An individual commenter remarked that the Final Rule would negatively impact growth in creative industries because individuals, such as artists, would be unable to secure jobs with wages that meet the rule's increased prevailing wage rates.

An anonymous commenter stated that immigration officials and lawyers need more time to prepare for the new regulations. Likewise, a professional association commented that adopting the proposed delay would help make the transition less chaotic and confusing for both businesses and employees by affording more time for "practical and systematic changes necessary to implement" the Final Rule. Similarly, a trade association in favor of the delay said it would help employers avoid significant near-term logistical and operational challenges. Lastly, an individual commenter agreed that the 18-month delay was needed to afford the BLS and OFLC additional time to compute and review prevailing wage estimates, including integrating prevailing wage data into the Foreign Labor Certification Data Center system and FLAG system upon conclusion of the Department's review.

The Department appreciates the comments received regarding the rule's potential impact on businesses and the need to afford BLS and OFLC sufficient time to compute and review prevailing wage estimates if the Department ultimately implements the Final Rule. The Department takes seriously the possible effect that this rule will have on business operations, especially new, small, and medium-sized businesses. This delay will allow the Department to more closely review the rule's impact on the regulated community and employers of varying sizes who use the PERM, H-1B, H-1B1, or E-3 programs.

#### d. Impact of the COVID-19 Pandemic as an Additional Consideration To Delay the Rule

Many commenters stated that the Final Rule needed to be delayed due to the COVID-19 pandemic. For example, several individual commenters expressed concern that more immediate implementation of the Final Rule would negatively impact the U.S.'s economic recovery, such as by causing attrition or turnover in the workforce. One of these commenters added that such impacts would be especially harmful to the IT industry, which they said is an important element of the U.S. economy. Relatedly, an anonymous commenter remarked that H-1B workers help develop innovative software and other tools that keep the United States competitive in the global economy and such workers would be difficult to replace quickly. Other individual commenters asserted that without more time, current and prospective foreign workers and sponsor companies hard hit by the pandemic would have trouble adjusting to the Final Rule. One of the commenters reasoned, without additional explanation, that the proposed delay would make enforcement of the rule easier should it ultimately go into effect.

Commenters also explained that the U.S. economy is still recovering from the impact of the pandemic and delaying the rule will allow businesses time to recover and adjust to changes in the computation of prevailing wage levels should the Department decide to implement the rule after its review. The commenters generally agreed that allowing the rule to go into effect or be implemented now, in the midst of the country's pandemic recovery, would be detrimental to employers and would negatively affect workers. For example, one commenter noted that "the U.S. economy is still recovering from COVID" and it "is almost impossible for new [graduates] and entry level employees to obtain reasonable wage levels due to COVID," such that not adopting the proposal "would result in loss of talent and further harm the economy already in distress." Another commenter stated, "Companies already struggling economically in the wake of COVID will not be able to afford these wages."

The Department appreciates the concerns raised by the commenters regarding the timing of the rule during the country's pandemic recovery, and think that they further support the decision to delay the Final Rule.

### 5. Further Delaying, Postponing, or Rescinding the Rule

Numerous commenters stated they supported the delay of 18 months and suggested they would support an even longer delay, though they did not specify how much longer or why. One commenter expressed disagreement with the Final Rule, but requested, if the rule is retained, that it be postponed for a couple of years to permit more time for people to adjust. One commenter requested the rule be delayed for two additional fiscal years due to the ongoing COVID-19 pandemic and associated negative economic effects. A trade association suggested that the “implementation of the” rule be delayed until July 1, 2023, in the hopes that the Department would perform a comprehensive review of the Final Rule, decide to rescind the rule, and also, after evaluating prevailing wage evidence, issue a new rulemaking that meets APA requirements. However, it did not provide a clear explanation for why it recommended that specific date as opposed to another date. An academic institution asked the Department to postpone the effective date of the rule until July 1, 2023, after the academic recruitment season, to allow colleges and universities the opportunity to adjust business practices and budgets for what it called “significant budgetary impacts.”

The Department understands that the initial transition date of January 1, 2023 may be inconvenient for employers and institutions tied to an academic school year. However, academic institutions are not the only users of the labor certification programs and the Department cannot accommodate every industry’s unique processes in its selection of an implementation date. With regard to the trade association’s comment, the Department notes it is unclear if the commenter is suggesting a delay of the effective date, or the first transition date, until July 1, 2023. While the Department appreciates the commenter’s suggestion to delay implementation of the rule until July 1, 2023 in order to align with annual prevailing wage update schedules, the Department has taken all factors into consideration, including the potential effect on businesses and workers’ wages and determined that a two-year delay is not needed at this time, even if it may align better with current annual wage level updates. The proposed 18-month delay is a significant length of time and the Department believes it is a sufficient period to engage in a comprehensive review of the underlying rule and allow the Department the needed time of

approximately eight months to compute and validate prevailing wage data covering all occupations and geographic areas, complete and test modifications to the OFLC FLAG system, train staff, and conduct sufficient public outreach to ensure an orderly implementation should the Final Rule go into effect.

Many commenters including trade associations, academic institutions, and individual commenters also asked the Department to reconsider whether it moves forward with the Final Rule and requested the Department rescind, withdraw, terminate, or abandon the rule entirely. Other commenters suggested delaying or rescinding the rule because the rule is reflective of the immigration policies of the prior administration and not reflective of those of the current administration. Still other commenters gave varying reasons for rescinding the Final Rule, ranging from harm to potential foreign students and U.S. academic institutions, to U.S. businesses who would not be able to pay the higher wages to entry-level foreign workers, to criticisms of how the underlying final rule was written, proposed, and finalized.

In addition to rescinding the underlying rule, some commenters encouraged the Department to take the necessary time to analyze the Final Rule and its data and engage in new rulemaking. For example, one individual commenter stated that the rule should be delayed and replaced with a proposal that does not harm workers, but “filters out outsourcing companies.” Several commenters also urged the Department to provide the public with notice and the opportunity to comment on any new rulemaking and data in accordance with APA requirements.

The Department acknowledges the position espoused by many commenters that the underlying rule should be rescinded and/or replaced. The Department is currently conducting a comprehensive review of the Final Rule, which included the issuance of an RFI soliciting public input to inform its review by June 1, 2021, 86 FR 17343, and the Department may take additional action as needed, such as potentially engaging in new rulemaking. Even if the Department’s review were already complete, to effectuate these suggestions would have required allowing the Final Rule to take effect while the Department engaged in rulemaking to rescind or amend this rule, and would have resulted in confusion and uncertainty among the stakeholder community as well as potentially needless fluctuations in wages and unnecessary burdens imposed on workers and employers. To

avoid this, the Department proposed the 18-month delay so that it may fully reevaluate the Final Rule in terms of both the methodology used and the policy objectives and goals of this administration, receive information from the public through the recently-issued RFI, and ultimately choose an appropriate path forward. Nonetheless, these comments and the vast majority of the commenters’ support for the NPRM’s 18-month proposal reinforce the Department’s position that the Final Rule should be delayed at this time and thoroughly reviewed based on the procedural and substantive concerns discussed above.

### *B. Comments Opposing a Delayed Effective Date and Transition Dates*

As explained above, an overwhelming majority of the commenters supported the Department’s proposed delay and raised key issues including the Department’s need to review the data and sources used in determining the prevailing wage levels in the Final Rule as well as the need to further assess the rule’s impact. However, a minority of commenters expressed opposition to the proposed delay, referencing concerns surrounding alleged abuse of the H-1B program and lottery, as well as support for raising wages for U.S. and foreign workers. Many individual commenters discussing the H-1B program argued that abusive outsourcing companies hire foreign workers for less pay, thus taking job opportunities from qualified U.S. workers. One individual commenter asserted that, under the current system, immigrants are “indentured” to employers that treat them unfairly and take advantage of them. An institutional commenter stated that H-1B visa holders are at a disadvantage and limited in their ability to change jobs and negotiate better wages and benefits. Commenters asserted that the underlying rule is key to fighting H-1B abuse and protecting U.S. workers. An anonymous commenter reasoned that immediate implementation of the Final Rule would protect workers from exploitation while still allowing the Department to improve the regulations in the future, such as by tailoring wages based on geography. Similarly, a policy organization said the Department should not forgo an immediate opportunity to improve wages, benefits, and job security. Many commenters also cited the pandemic as a reason to enact the rule now to protect the American workforce and assist with economic recovery.

Many individual commenters opposed the proposed delay and supported implementing policies that

favor and attract higher skilled workers. Commenters also argued the Final Rule provides more opportunities to attract and retain foreign workers in the technology, science, finance, and healthcare industries to strengthen U.S. competitiveness and the economy. Other commenters supported increasing wage levels for highly-skilled foreign workers so the United States will retain the best foreign talent. An anonymous commenter expressed concern that the proposed delay would subject worthy applicants to continued uncertainty as well as defeat the goal of attracting top talent to the United States. Two individual commenters asserted that implementing the Final Rule now would allow many talented foreign workers who have had to leave the United States return and help contribute to the U.S. economy.

Two anonymous commenters stated that raising wages immediately would benefit foreign students with F-1 visas as well as U.S. workers. Other commenters claimed that implementing wage increases without delay would not harm highly qualified international students because after three years of optional practical training (OPT) their wages will reach the higher wage level. A few other commenters opposed delaying the implementation of the Final Rule stating “it is not fair” to international students who have obtained their education in the United States, but then have trouble competing for job opportunities because outsourcing companies hire foreign H-1B workers at lower wages.

One institutional commenter opposed the delay alleging that it would cause companies to continue to hire foreign workers at less than market wages, and that the delay would cause confusion among stakeholders as to “what the H-1B wages rules will be after [the delay].” Furthermore, it noted that the current methodology was promulgated outside notice and comment rulemaking and the Final Rule is thus more legally defensible. It alleges as well that changing the methodology to the proposed method “should not be burdensome on DOL staff.” In spite of this, the commenter acknowledges that the “wage methodology in the final rule is not perfect, and there is more work to be done to fulfill DOL’s duty to protect the integrity of the H-1B program and ensure it meets its intent.” The commenter added it would like wages to be raised even higher and for the Department to address, in its view, the “lax standards” for employers when choosing independent wage sources. The Department notes that this rulemaking is about the proposal to

delay the effective date of the Final Rule, not the underlying rule itself and, as noted above, serious procedural and substantive concerns have been raised repeatedly as to the viability and defensibility of the Final Rule.

Another policy organization opposed the delay arguing that the Final Rule lessens the risk that U.S. workers would be “replaced by cheaper labor from abroad.” The commenter noted that the current wages are below market level. However, much like the aforementioned institutional commenter, this commenter also acknowledged that the “proposed wage levels are still too low” and urged the Department to set the Level 1 wage “to at least the 50th percentile.”

These two institutional commenters and a third individual commenter argued that the delay would cost workers billions of dollars over the next decade and cited to the 18-month NPRM. See 86 FR 15154, 15159. One commenter noted that technology companies have performed strongly in the past year as demand for their services have increased, which the commenter believed to mean the companies could remain profitable while paying higher wages. The individual commenter also pointed to the 18-month NPRM and argued that the statement that “the Department expects that the increase in wages may incentivize some employers” to hire domestic workers rather than H-1B employees is justification for implementing the rule now. See 86 FR 15154, 15158. Finally, the individual commenter stated that adjusting the wage levels to ameliorate the impact from legal immigration on domestic workers’ wages should be the immediate priority.

The Department appreciates the comments provided and addresses them in turn. First, the Department continues to be as diligent as possible in investigating and preventing abuse within the H-1B program, and shares the commenters’ concerns for the protection of U.S. and H-1B workers. The Department is unable to address commenters’ concerns related to alleged abuse of the H-1B lottery system or this visa program generally at this time since it is beyond the scope of the Department’s regulatory authority and beyond the scope of this rulemaking.

Second, the Department notes that while it has been suggested that determining the wages is something “straightforward” and requires nothing more “complex than what is currently done,” this is not the case. As mentioned previously, the Department has determined that it needs

approximately eight months to compute and validate prevailing wage data covering all occupations and geographic areas, complete and thoroughly test modifications to the OFLC FLAG system, train staff, and conduct sufficient public outreach to ensure an orderly implementation should the Final Rule go into effect. More specifically, under a Memorandum of Understanding (MOU), changes to the computation of prevailing wages for Levels I and IV, data categories, or other specific terms must be agreed to by OFLC and BLS six months in advance of the deliverable date. 86 FR 15154, 15156. In addition to prevailing wages for occupations covered by all industries, BLS must produce a separate set of prevailing wages for occupations in institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, or governmental research agencies. Once the initial wage estimation process is completed, BLS then creates prevailing wage estimates for specific occupations and geographic areas, and transmits the files to each State for validation and confidentiality review, since the actual collection of occupational wage data from employer establishments is conducted by the States. After addressing any corrections or errors and receiving confirmation from the States, BLS creates the final prevailing wage estimates and applies any suppression or confidentiality rules. These final prevailing wage estimates undergo a rigorous internal review by BLS economists and statisticians who then deliver to OFLC the final set of prevailing wages for Levels I and IV for specific occupations and geographic areas. After receiving the final prevailing wages for Levels I and IV, OFLC would need approximately one month to compute and review initial prevailing wage estimates for the two intermediate levels according to the mathematical formula identified in the statute. Once validated for accuracy, OFLC must then load and thoroughly test integration of the final prevailing wage data into its online Foreign Labor Certification Data Center system, accessible at <http://www.flcdatacenter.com>, as well as the FLAG system used to assign the leveled prevailing wages and issue official PWDs for each occupation and geographic area to employers. The final process for OFLC to load, thoroughly test, and implement the official prevailing wage data takes up to an additional one month.

An individual commenter stated that this justification for extension suggests

poor planning and timing by the Department. In response, the Department acknowledges that, when the IFR was published in October 2020, the abbreviated timeline available to BLS and OFLC meant that the Department could not ensure the proper testing and implementation of the new methodology for computing the wage levels or follow the standard implementation process as detailed above. As a result, the wages produced by BLS yielded significant anomalies and far more instances where BLS was unable to provide a leveled wage than would typically occur. Had BLS and OFLC had sufficient time to implement the new methodology, the prevalence of these anomalies and absence of leveled wages could have been identified prior to implementation and steps could have been taken to proactively address those issues. This experience supports the Department's action here; to avoid similar issues in the future, it is critical that BLS and OFLC have sufficient time to implement the wage methodology in the Final Rule should it take effect after the Department completes its comprehensive review. Indeed, one commenter supported the delay precisely because they agreed BLS and OFLC needed additional time to compute and review prevailing wage estimates, including integrating prevailing wage data into the Foreign Labor Certification Data Center system and FLAG system upon conclusion of the Department's review.

Third, the Department acknowledges the potential substantial economic impact of this delay not only on employers but also on U.S. and foreign workers. Commenters argued that delaying the rule would harm workers and wages and could incentivize the hiring of H-1B workers over domestic workers. Two institutional commenters opposed the proposed delay but criticized the Final Rule on the basis that the wage methodology outlined in the rule does not sufficiently protect workers' wages and the integrity of the programs. In contrast, commenters supporting the proposed delay argued that the Final Rule would lead to outcomes that are detrimental to workers, including an increase in companies outsourcing jobs, the potential bankruptcy of small businesses, and negative impacts on academic institutions both in terms of their financial viability and ability to conduct meaningful research. In recognition of commenters' differing opinions on the Final Rule's expected impact on U.S. and foreign workers, the Department considered allowing the

Final Rule to take effect pending its comprehensive review. However, the Department believes, on balance, that the serious concerns with the substance of the Final Rule and the process through which it was promulgated strongly counsel in favor of finalizing the proposed delay to allow the agency the time to carefully reevaluate the Final Rule, including the accuracy of the costs and benefits articulated in the rule and to avoid implementing changes to the Department's regulations that it may ultimately determine to lack a basis in law and that may not survive judicial scrutiny. The Department's decision to finalize the delay avoids some or all of the potential effects described by commenters from occurring only to then require stakeholders—employers and workers alike—to unwind actions taken to comply with the Final Rule or to take further action should the rule not survive judicial scrutiny or should the Department engage in additional action such as new rulemaking after it completes its review. In short, while the Department acknowledges the concerns raised by commenters opposed to the delay it has concluded that the fairest and most prudent approach is to delay the effective and transition dates of the rule.

Indeed, the Department's ongoing review of the Final Rule serves to underscore the assertions and concerns raised by the vast majority of commenters on the 18-month NPRM and litigants in pending litigation that the agency failed to make available portions of the technical basis for the IFR and Final Rule in time to allow for meaningful comments. For example, the Department has itself identified potential issues surrounding the rulemaking record, which recently necessitated the courts' issuance of protective orders in pending litigation challenging the Final Rule before certain contents of the rulemaking record could be disclosed to litigants. *See, e.g., Defendants' Unopposed Motion for Protective Order, Stellar IT, et al. v. Walsh, et al.*, No. 20-cv-3175 (D.D.C. Apr. 19, 2021). As discussed above, these concerns highlight the risk faced by the Department in ongoing litigation and support the decision to delay the effective and transition dates of the Final Rule rather than risk continual disruption to the stakeholder community.

While the Department noted in the 18-month NPRM that the delay may result in a significant reduction of transfer payments, the delay could also lessen the potential for "deadweight losses . . . in the event that requiring employers to pay a wage above what

H-1B workers are willing to accept results in H-1B caps not [being] met." 86 FR 15154, 15158. The Department believes this delay, along with the recently-issued RFI, will best inform the Department's comprehensive review of the Final Rule and allow it to meaningfully consider all available options to ensure prevailing wage levels appropriately reflect the wages of workers in the United States similarly employed. The Department also notes that should commenters believe the existing methodology and wage levels or those contained in the Final Rule are harmful to U.S. or foreign workers and have relevant information on sources of data and methodologies for determining prevailing wage levels, they are encouraged to submit comments on the RFI before the comment period closes on June 1, 2021, 86 FR 17343, especially as comments unrelated to the proposed delay are outside the scope of this action.

Finally, many commenters expressed general opposition to the proposed delay or opposed the proposed delay and urged the Department to implement the higher wage levels as soon as possible without providing additional explanation for their positions. Unfortunately, the Department is unable to address such general comments in a meaningful way. An anonymous commenter asserted that the proposed delay would adversely affect workers by making them wait longer for prevailing wage determinations. However, OFLC's National Prevailing Wage Center is continuing to process prevailing wage applications as normal. An anonymous commenter asserted that the reasons given for the proposed delay are "not substantive and data-driven," but did not provide any elaboration. The Department notes that it has discussed in detail, both here and in the NPRM, serious substantive and procedural concerns raised by other commenters and litigants as well as the steps needed to implement the Final Rule should the Department ultimately do so.

The Department values and appreciates the commenters' input on the 18-month NPRM. As discussed above, the Department believes the proposed delay will best inform a comprehensive review of the Final Rule. While the Department has considered allowing the rule to take effect pending its review and the assessment of potential new rulemaking, it has concluded that the concerns raised by commenters regarding procedural and substantive flaws with the Final Rule call into question fundamental aspects of the rulemaking to such a degree that

the fairest and most prudent approach is to delay this rule.

### C. Out of Scope Comments

The Department's 18-month NPRM invited comments related to the Department's proposal to delay the effective and transition dates of the Final Rule. Comments received that are unrelated to the Department's proposal are beyond the scope of this action and have not been considered in the Department's assessment of its proposed 18-month delay.

Numerous comments were beyond the scope of this action. Many of the comments were too general to determine the nature of the comment. Other commenters expressed satisfaction or dissatisfaction with aspects of the Department's Final Rule or the rule's methodology without addressing the proposed delay. Several commenters expressed concerns with the H-1B lottery, concerns with the immigration system as a whole, and expressed personal sentiments on immigration or particular visa circumstances and potential prospective employment that were beyond the scope of this rulemaking. Many comments appeared to be addressing a rule which had been proposed by U.S. Citizenship and Immigration Services (USCIS), but the comments were unclear.

### D. Immediate Effective Date

Section 553(d) of the APA provides that substantive rules should take effect not less than 30 days after the date they are published in the **Federal Register** unless "otherwise provided by the agency for good cause found." 5 U.S.C. 553(d)(3). The Department determines it has good cause to make this rule effective immediately upon publication because allowing for a 30-day period between publication and the effective date of this rulemaking would be impracticable and cause unnecessary confusion over the applicable prevailing wage methodology. In particular, a 30-day period would result in the Final Rule entitled *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States* taking effect on May 14, 2021, before the delay finalized in this rulemaking would begin. As such, a 30-day period would undermine the purpose for which this rule is being promulgated and result in confusion and uncertainty for the regulated community should the Final Rule go into effect only for the rule's effective and transition dates to change a few weeks later.

This confusion could lead to harm and hardship to the regulated

community, including to employers, U.S. workers, and foreign beneficiaries, who, if unclear on the operative prevailing wage methodology due to the inclusion of a 30-day period, may expend costs or resources they otherwise would not spend. A professional association, for example, encouraged the Department to "finalize the delay as soon as possible" given the current initial transition date of July 1, 2021, in order to "provide certainty to companies," who need sufficient time to plan and ensure compliance with applicable requirements of the PERM, H-1B, H-1B1, and E-3 programs. An academic institution indicated the adoption of the proposed delay, rather than allowing the rule to go into effect, will "prevent confusion and uncertainty among the regulated community over the operative wage rates," suggesting that allowing the Final Rule to take effect for only a month would cause unnecessary confusion and uncertainty. Other commenters highlighted the adverse effects that employers and workers could experience from immediate implementation of the Final Rule, including the termination of workers, significant business disruptions, and the potential bankruptcy of small businesses, which further support a finding of good cause.

Moreover, this rulemaking institutes a delay of the Final Rule, rather than itself imposing any new compliance obligations on employers. Therefore, the Department finds that a lapse between publication and the effective date of this rule delaying the Final Rule's effective and transition dates is unnecessary. To eliminate any possible uncertainty about the applicable prevailing wage methodology, especially given the substantive concerns that have been raised by litigants and commenters regarding the appropriateness of the prevailing wage levels in the Final Rule as well as the Department's identification of potential issues surrounding the rulemaking record and conclusions therein, and due to unavoidable limitations of time related to the Final Rule's current effective date of May 14, 2021, the Department finds it has good cause to make this rule effective immediately upon publication.

### E. Conclusion

Numerous comments raised substantive and procedural concerns related to the Department's publication of the Final Rule, the methodology or computations contained within the rule, and the harm that immediate implementation of the rule could cause the regulated community and the U.S. economy. The Department

acknowledges these public comments as well as concerns that have been raised by commenters to the 60-day rulemaking and in pending litigation challenging the Department's Final Rule. While the Department recognizes that the additional delay is significant, based on its ongoing review and the concerns described above, it is clear that a substantial amount of time is necessary to consider all aspects of this rulemaking, including the underlying methodology employed and relevant studies and data. Given the complexity of the regulation, the serious concerns that have been raised, and the potential harm that would result from immediate implementation of the Final Rule, the Department believes a delay to allow the agency sufficient time to evaluate the rule, instead of permitting the rule to take effect while the Department conducts its review, is the more prudent path. This delay will in turn provide the Department time to review sources and data received on its recently-issued RFI that could inform further action on the rule and/or the development of a future rulemaking to revise the computation of prevailing wage levels in a manner that more effectively ensures the employment of certain immigrant and nonimmigrant workers does not adversely affect the wages of U.S. workers similarly employed. Finally, the delay will afford BLS and OFLC adequate time to appropriately implement changes to the prevailing wage structure should the Department ultimately implement the Final Rule as published in the **Federal Register** on January 14, 2021.

## IV. Statutory and Regulatory Requirements

### A. Executive Orders 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Under E.O. 12866, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious

inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* Pursuant to E.O. 12866, OIRA has determined that this is an economically significant regulatory action. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated that this rule is a "major rule," as defined by 5 U.S.C. 804(2).

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and qualitatively discuss values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The 2021 Final Rule<sup>1</sup> updated the computation of wage levels under the Department's four-tiered wage structure based on the OES wage survey administered by BLS. The 2021 Final Rule also included a transition period under which the revised Level I–IV wages were adjusted over time to final wage levels. To calculate the 2021 Final Rule's transfer payments from employers to employees, the Department simulated wage impacts for historical certification data based on the 2021 Final Rule's Level I–IV wage percentiles for each transition group (85, 90, 95, and 100 percent of the final Level I–IV wage levels). The Department then used the simulated wage impacts for each transition group, to construct a 10-year series of annual total wage impacts (transfers from employers to employees). More details on the wage computations and methodology used to calculate transfer payments are available in the Department's 2021 Final Rule.

The 2021 Final Rule transition period allowed foreign workers and their employers time to adapt to the new wage rates. For most job opportunities,

the 2021 Final Rule transition followed two steps with a delayed implementation period, concluding on July 1, 2022. For these jobs, current wage levels would be in effect from January 1, 2021 through June 30, 2021. From July 1, 2021 through June 30, 2022 the prevailing wage would be 90 percent of the final wage level. From July 1, 2022 and onward the prevailing wage would be the final wage level. Job opportunities in the four-step transition group had a delayed implementation period, with a transition to final wage levels concluding on July 1, 2024. For these jobs the baseline wage levels would be in effect from January 1, 2021 through June 30, 2021. From July 1, 2021 through June 30, 2022 the prevailing wage would be 85 percent of the final wage levels; from July 1, 2022 through June 30, 2023 the prevailing wage would be 90 percent of the final wage levels; from July 1, 2023 through June 30, 2024 the prevailing wage would be 95 percent of the final wage levels; and from July 1, 2024 onwards the prevailing wage would be the final wage levels.

The Department is delaying the effective date of May 14, 2021, and the transition date of July 1, 2021, under which adjustments to the new wage levels would begin, for a period of eighteen months, or until November 14, 2022 and January 1, 2023, respectively. In addition, the Department is instituting corresponding one-year delays for each of the remaining transition dates, which are revised to January 1, 2024, January 1, 2025, and January 1, 2026, respectively. The Department is delaying the implementation of the 2021 Final Rule for three primary reasons: (1) To allow the Department to have sufficient time to engage in its comprehensive review of the 2021 Final Rule; (2) to prevent confusion and uncertainty among the regulated community over the operative wage rates while the Department conducts its review; and (3) because BLS and OFLC will not have adequate time to compute and validate prevailing wage data covering all occupations and geographic areas, complete and thoroughly test modifications to the OFLC FLAG system, train staff, and conduct sufficient public outreach to ensure an effective and orderly implementation should the 2021 Final Rule go into effect.

Under the Final Rule, current wage levels would be in effect through December 31, 2022, and wage impacts estimated in the 2021 Final Rule will not begin until January 1, 2023. For the two-step transition, the current wage levels will be in effect through December 31, 2022, and from January 1, 2023 through December 31, 2023 the prevailing wage will be 90 percent of the final wage level. From January 1, 2024 and onward the prevailing wage will be the final wage level. For the four-step transition the current wage levels will be in effect through December 31, 2022. From January 1, 2023 through December 31, 2023, the prevailing wage will be 85 percent of the final wage levels; from January 1, 2024 through December 21, 2024, the prevailing wage will be 90 percent of the final wage levels; from January 1, 2025 through December 21, 2025, the prevailing wage will be 95 percent of the final wage levels; and from January 1, 2026 onwards the prevailing wage will be the final wage levels.

The Final Rule's delay in effective date will result in the reduction of transfer payments in the form of higher wages from employers to H–1B employees. Additionally, the Final Rule would delay the potential for deadweight losses to occur in the event that requiring employers to pay a wage above what H–1B workers are willing to accept results in H–1B caps not being met. The Department has observed that the annual H–1B cap was reached within the first five business days each year from FY 2014 through FY 2020. While the Department expects that the increase in wages may incentivize some employers to substitute domestic workers for H–1B employees, provided that domestic workers are available for the jobs, it is likely that the same number of H–1B visas will be allotted within the annual caps in the future. To calculate the reduction of transfer payments the Department considered the transfer payments of the 2021 Final Rule as the baseline and shifted them according to the Final Rule's new transition effective dates. To shift transfer payments the Department used the average annual wage impacts from Exhibit 7 in the 2021 Final Rule's E.O. 12866 section and applied them to the Final Rule's transition period. Exhibit 1, below, presents the revised wage transition schedule under the two groups.

<sup>1</sup> The 2021 Final Rule was published in the *Federal Register* on January 14, 2021. 86 FR 3608, 3608–3611.

EXHIBIT 1—FINAL RULE WAGE TRANSITION FOR THE TWO APPLICATION GROUPS

Year	Wage transition	
	Two-step	Four-step
2021 .....	Baseline .....	Baseline.
2022 .....	Baseline .....	Baseline.
2023 .....	90% .....	85%.
2024 .....	Final Wage Level .....	90%.
2025 .....	Final Wage Level .....	95%.
2026–2030 .....	Final Wage Level .....	Final Wage Level.

\* Beginning January 1, 2026, the transitions are both complete and all workers are at the final wage level.

The shift in the transition schedule presented in Exhibit 2, below. To see Rule, refer to Exhibit 10 of the 2021 results in the annual transfer payments total transfer payments in the 2021 Final Rule.

EXHIBIT 2—SHIFTED TRANSFER PAYMENTS OF THE 2021 FINAL RULE  
[2019\$ millions]

Cohort	<1		1–2 Years		2–3 Years			Total
	New	Continuing	New	Continuing	New	Continuing	Continuing 3+	
2021 .....	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2022 .....	0	0	0	0	0	0	0	0
2023 .....	9	0	31	0	960	0	0	1,000
2024 .....	20	5	39	69	2,529	876	0	3,538
2025 .....	20	11	77	168	2,622	5,065	2,838	10,801
2026 .....	28	11	111	178	3,772	5,251	7,474	16,824
2027 .....	28	15	111	244	3,772	7,553	7,749	19,472
2028 .....	28	15	111	244	3,772	7,553	11,150	22,872
2029 .....	28	15	111	244	3,772	7,553	11,150	22,872
2030 .....	28	15	111	244	3,772	7,553	11,150	22,872
10-year Total .....	188	90	700	1,391	24,972	41,403	51,510	120,253

The Department expects that the Final Rule’s delay in effective date will result in savings to employers (and a reduction in wages to employees) represented by the reduction of transfer payments (wages) from employers to employees. The Department calculates the Final Rule’s reduced transfer payments by differencing the shifted transfer

payments in Exhibit 2 from the 2021 Final Rule’s transfer payments (Exhibit 10 of the Final Rule). The Department estimates the total reduction of transfer payments over the 10-year period is \$32.05 billion and \$28.19 billion at discount rates of 3 and 7 percent, respectively. The Department estimates annualized reduced transfer payments

of \$3.76 billion and \$4.01 billion at discount rates of 3 and 7 percent, respectively. Exhibit 3, below, presents the total transfer payments of the 2021 Final Rule, the shifted transfer payments resulting from the Final Rule delay, and the resulting reduction of transfer payments by the Final Rule.<sup>2</sup>

EXHIBIT 3—TOTAL TRANSFER PAYMENTS OF THE FINAL RULE  
[2019 millions]

Year	2021 Final Rule transfer payments	Shifted 2021 Final Rule transfer payments	Final Rule reduction of transfer payments
2021 .....	\$416	\$0	\$416
2022 .....	2,368	0	2,368
2023 .....	7,026	1,000	6,026
2024 .....	13,542	3,538	10,005
2025 .....	18,964	10,801	8,163
2026 .....	21,924	16,824	5,100
2027 .....	22,872	19,472	3,400
2028 .....	22,872	22,872	0
2029 .....	22,872	22,872	0
2030 .....	22,872	22,872	0
10-Year Total Undiscounted .....	155,730	120,253	35,477

<sup>2</sup>Delayed transfer payments under the proposed rule are approximately the Final Rule transfer payments shifted by two years. They are not exactly shifted because the transition period under the

Final Rule resulted in each wage level of the transition occurring for half a year rather than a full year due to the Final Rule transition occurring on

a July 1st to June 30th basis rather than a calendar year basis as under the proposed rule.

EXHIBIT 3—TOTAL TRANSFER PAYMENTS OF THE FINAL RULE—Continued  
[2019 millions]

Year	2021 Final Rule transfer payments	Shifted 2021 Final Rule transfer payments	Final Rule reduction of transfer payments
10-Year Total with a Discount Rate of 3% .....	130,830	98,781	32,049
10-Year Total with a Discount Rate of 7% .....	105,157	76,969	28,188
Annualized Undiscounted .....	15,573	12,025	3,548
Annualized at a Discount Rate of 3% .....	15,337	11,580	3,757
Annualized at a Discount Rate of 7% .....	14,972	10,959	4,013

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.*

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department believes that this Final Rule will have a significant economic impact on a substantial number of small entities and is therefore publishing this Final Regulatory Flexibility Analysis as required.

1. Why the Department Is Considering Action

The Department is delaying the effective date of the 2021 Final Rule for three primary reasons: (1) To allow the Department to have sufficient time to engage in its comprehensive review of the 2021 Final Rule; (2) to prevent confusion and uncertainty among the

regulated community over the operative wage rates while the Department conducts its review; and (3) because BLS and OFLC will not have adequate time to compute and validate prevailing wage data covering all occupations and geographic areas, complete and thoroughly test modifications to the OFLC FLAG system, train staff, and conduct sufficient public outreach to ensure an effective and orderly implementation should the Final Rule go into effect.

2. Objectives of and Legal Basis for the Proposed Rule

The Department is now delaying the effective date of May 14, 2021, and the transition date of July 1, 2021, under which adjustments to the new wage levels would begin, for a period of eighteen months, or until November 14, 2022 and January 1, 2023, respectively. In addition, the Department is instituting corresponding one-year delays for each of the remaining transitions dates, which are revised to January 1, 2024, January 1, 2025, and January 1, 2026, respectively.

The Immigration and Nationality Act, as amended, assigns certain responsibilities to the Secretary of Labor (Secretary) relating to wages and working conditions of certain categories of employment-based immigrants and nonimmigrants. This Final Rule relates to the labor certifications that the Secretary issues for certain employment-based immigrants and to the LCAs that the Secretary certifies in connection with the temporary employment of foreign workers under the H–1B, H–1B1, and E–3 visa classifications. *See* 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i)(b), 1101(a)(15)(H)(i)(b1), 1182(a)(5), 1182(n), 1182(t)(1), 1184(c).

3. The Agency’s Response to Public Comments

The Department did not receive public comments on the IRFA.

4. Response to Comments From the Chief Council for Advocacy of the Small Business Administration

The Department did not receive comments from the Chief Council for Advocacy of the Small Business Administration.

5. Number of Small Entities Affected by the Final Rule

The Final Rule does not change the number of impacted small entities. A summary of impacted small entities can be found in Exhibit 13 of the 2021 Final Rule’s RFA section.

6. Compliance Requirements of the Final Rule, Including Reporting and Recordkeeping

The Final Rule does not have any reporting, recordkeeping, or other compliance requirements impacting small entities. The Department expects that the change will result in savings to employees represented by transfer payments from employees to employers due to the Final Rule’s delay in effective date.

7. Calculating the Impact of the Final Rule on Small Entities

The small entity impacts are unchanged in magnitude from Exhibit 14 in the 2021 Final Rule’s RFA section. However, under this Final Rule the small entity impacts represent wage savings to small businesses relative to the 2021 Final Rule because of the delayed transition period. The Department estimates that wage savings from the delayed transition will occur between 2021 and 2027 as presented in the E.O. 12866 section of the Final Rule. The Department estimates that small entity savings as a proportion of total revenue will be equivalent in magnitude to the cost impacts as a proportion of total revenue estimated in Exhibit 15 in the 2021 Final Rule’s RFA section. Therefore, the Department estimates that this Final Rule will have a significant economic impact on a substantial number of small entities.

#### 8. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Final Rule

The Department is not aware of any relevant Federal rules that conflict with this Final Rule.

#### 9. Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities

This Final Rule results in wage savings to small entities and therefore has a beneficial impact on small entities. The Department did not receive public comments on viable alternatives to the proposed rule.

#### C. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value equivalent of \$100 million in 1995 adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI-U) is approximately \$168 million based on the Consumer Price Index for All Urban Consumers.<sup>3</sup>

While this final rule may result in the expenditure of more than \$100 million by the private sector annually, the rulemaking is not a “Federal mandate” as defined for UMRA purposes.<sup>4</sup> The cost of obtaining prevailing wages, preparing labor condition and certification applications (including all required evidence) and the payment of wages by employers is, to the extent it could be termed an enforceable duty, one that arises from participation in a

<sup>3</sup> See U.S. Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items, available at <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf>* (last visited June 2, 2020).

Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = [(Average monthly CPI-U for 2019 – Average monthly CPI-U for 1995) / (Average monthly CPI-U for 1995)] \* 100 = [(255.657 – 152.383) / 152.383] \* 100 = (103.274 / 152.383) \* 100 = 0.6777 \* 100 = 67.77 percent = 68 percent (rounded). Calculation of inflation-adjusted value: \$100 million in 1995 dollars \* 1.68 = \$168 million in 2019 dollars.

<sup>4</sup> See 2 U.S.C. 658(i).

voluntary Federal program applying for immigration status in the United States.<sup>5</sup> This final rule does not contain a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DOL has not prepared a statement under UMRA. Therefore, no actions were deemed necessary under the provisions of the UMRA.

#### D. Congressional Review Act

OIRA has determined that this final rule is a major rule as defined by 5 U.S.C. 804, also known as the “Congressional Review Act,” as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868, *et seq.*

#### E. Executive Order 13132 (Federalism)

This final rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### F. Executive Order 12988 (Civil Justice Reform)

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

#### G. Regulatory Flexibility Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have “tribal implications” because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

#### H. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501, *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency’s need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed

<sup>5</sup> See 2 U.S.C. 658(7)(A)(ii).

on the public, and how to minimize those burdens. This final rule does not require a collection of information subject to approval by OMB under the PRA, or affect any existing collections of information.

#### List of Subjects in 20 CFR Part 656

Administrative practice and procedure, Employment, Foreign workers, Labor, Wages.

#### Department of Labor

Accordingly, for the reasons stated in the preamble, the Department of Labor amends part 656 of chapter V, title 20, Code of Federal Regulations, as follows:

#### PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

■ 1. The authority citation for part 656 is revised to read as follows:

**Authority:** 8 U.S.C. 1182(a)(5)(A), 1182(p); sec.122, Pub. L. 101–649, 109 Stat. 4978 (8 U.S.C. 1182 note); and Title IV, Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note).

■ 2. Amend § 656.40 by revising paragraphs (a) and (b)(2) and (3) to read as follows:

#### § 656.40 Determination of prevailing wage for labor certification purposes.

(a) *Application process.* The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. The NPC shall receive and process prevailing wage determination requests in accordance with this section and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(p) of the INA. Unless the employer chooses to appeal the center’s PWD under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) \* \* \*

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be based on the wages of workers similarly employed using the wage component of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey (OES) in accordance with paragraph (b)(2)(i) of this section, unless the employer provides an acceptable survey under paragraphs (b)(3) and (g) of this section or elects to utilize a wage

permitted under paragraph (b)(4) of this section.

(i) The BLS shall provide the OFLC Administrator with the OES wage data by occupational classification and geographic area, which is computed and assigned at levels set commensurate with the education, experience, and level of supervision of similarly employed workers, as determined by the Department.

(ii) Except as provided under paragraph (b)(2)(iii) of this section, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(A) The Level I Wage shall be computed as the 35th percentile of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(B) The Level II Wage shall be determined by first dividing the difference between Levels I and IV by three and then adding the quotient to the computed value for Level I and assigned for the most specific occupation and geographic area available.

(C) The Level III Wage shall be determined by first dividing the difference between Levels I and IV by three and then subtracting the quotient from the computed value for Level IV and assigned for the most specific occupation and geographic area available.

(D) The Level IV Wage shall be computed as the 90th percentile of the OES wage distribution and assigned for the most specific occupation and geographic area available. Where the Level IV Wage cannot be computed due to wage values exceeding the uppermost interval of the OES wage interval methodology, the OFLC Administrator shall determine the Level IV Wage using the current hourly wage rate applicable to the highest OES wage interval for the specific occupation and geographic area, or the arithmetic mean of the wages of all workers for the most specific occupation and geographic area available, whichever is highest.

(iii) Transition wage rates are as follows:

(A) For the period from November 14, 2022 through December 31, 2022, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(1) The Level I Wage shall be computed as the arithmetic mean of the lower one-third of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(2) The Level IV Wage shall be computed as the arithmetic mean of the

upper two-thirds of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(3) The Level II Wage and Level III Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the Level I and Level IV values in paragraphs (b)(2)(iii)(A)(1) and (2) of this section.

(B) For the period from January 1, 2023, through December 31, 2023, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(1) The Level I Wage shall be 90 percent of the wage provided under paragraph (b)(2)(ii)(A) of this section, or the wage provided under paragraph (b)(2)(iii)(A)(1) of this section, whichever is higher.

(2) The Level IV Wage shall be 90 percent of the wage provided under paragraph (b)(2)(ii)(D) of this section, or the wage provided under paragraph (b)(2)(iii)(A)(2) of this section, whichever is higher.

(3) The Level II Wage and Level III Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the wages established under paragraphs (b)(2)(iii)(B)(1) and (3) of this section.

(C) Notwithstanding any other provision of this section, if the employer submitting the Form ETA-9035/9035E, *Labor Condition Application for Nonimmigrant Workers* and, as applicable, the Form ETA-9141, *Application for Prevailing Wage Determination*, will employ an H-1B nonimmigrant in the job opportunity subject to the *Labor Condition Application for Nonimmigrant Workers* who was, as of October 8, 2020, the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or is eligible for an extension of his or her H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273 (2002), and the H-1B nonimmigrant is eligible to be granted immigrant status but for application of the per country limitations applicable to immigrants under paragraphs 203(b)(1), (2), and (3) of the INA, or remains eligible for an extension of the H-1B status at the time the *Labor Condition Application for Nonimmigrant Workers* is filed:

(1) For the period from January 1, 2023, through December 31, 2023, the prevailing wage shall be provided by the

OFLC Administrator at the following four levels:

(i) The Level I Wage shall be 85 percent of the wage provided under paragraph (b)(2)(ii)(A) of this section, or the wage provided under paragraph (b)(2)(iii)(A)(1) of this section, whichever is higher.

(ii) The Level IV Wage shall be 85 percent of the wage provided under paragraph (b)(2)(ii)(D) of this section, or the wage provided under paragraph (b)(2)(iii)(A)(2) of this section, whichever is higher.

(iii) The Level II Wage and Level III Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the wages established under paragraphs (b)(2)(iii)(C)(1)(i) and (ii) of this section.

(2) For the period from January 1, 2024, through December 31, 2024, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(i) The Level I Wage shall be 90 percent of the wage provided under paragraph (b)(2)(ii)(A) of this section, or the wage provided under paragraph (b)(2)(iii)(C)(1)(i) of this section, whichever is higher.

(ii) The Level IV Wage shall be 90 percent of the wage established under paragraph (b)(2)(ii)(D) of this section, or the wage established under paragraph (b)(2)(iii)(C)(1)(ii) of this section, whichever is higher.

(iii) The Level II Wage and Level III Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the wages established under paragraphs (b)(2)(iii)(C)(2)(i) and (ii) of this section.

(3) For the period from January 1, 2025, through December 31, 2025, the prevailing wage shall be provided by the OFLC Administrator at the following four levels:

(i) The Level I Wage shall be 95 percent of the wage provided under paragraph (b)(2)(ii)(A) of this section, or the wage provided under paragraph (b)(2)(iii)(C)(2)(i) of this section, whichever is higher.

(ii) The Level IV Wage shall be 95 percent of the wage provided under paragraph (b)(2)(ii)(D) of this section, or the wage provided under paragraph (b)(2)(iii)(C)(2)(ii) of this section, whichever is higher.

(iii) The Level II Wage and III Wage shall be determined by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section to the wages established under paragraphs (b)(2)(iii)(C)(3)(i) and (ii) of this section.

(4) Beginning January 1, 2026, the prevailing wage shall be provided by the OFLC Administrator in accordance with

the computations under paragraph (b)(2)(ii) of this section.

(5) Where the Level I Wage or Level IV Wage provided under paragraphs (b)(2)(iii)(C)(1) through (3) of this section exceeds the Level I Wage or Level IV Wage provided under paragraph (b)(2)(ii) of this section in a given period, the Level I Wage or Level IV Wage for that period shall be the wage provided under paragraph (b)(2)(ii) of this section, and the Level II Wage and Level III Wage for that period shall be adjusted by applying the formulae provided in paragraphs (b)(2)(ii)(B) and (C) of this section.

(D) Where a Level IV Wage provided under paragraph (b)(2)(iii) of this section cannot be computed due to wage values exceeding the uppermost interval of the OES wage interval methodology, the OFLC Administrator shall determine the Level IV Wage using the current hourly wage rate applicable to the highest OES wage interval for the specific occupation and geographic area or the arithmetic mean of the wages of all workers for the most specific occupation and geographic area available, whichever is highest.

(iv) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the prevailing wage levels under paragraphs (b)(2)(ii) and (iii) of this section as a notice posted on the OFLC website.

(3) If the employer provides a survey acceptable under paragraph (g) of this section, the prevailing wage for labor certification purposes shall be the arithmetic mean of the wages of workers similarly employed in the area of intended employment. If an otherwise acceptable survey provides a median and 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.

\* \* \* \* \*

**Suzan G. LeVine,**

*Principal Deputy Assistant Secretary for Employment and Training, Labor.*

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**BILLING CODE 4510-FP-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2021-0069; FRL-10023-62-Region 3]

#### Air Plan Approval; Delaware; Nonattainment New Source Review Requirements for 2015 8-Hour Ozone National Ambient Air Quality Standard

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the Delaware Department of Natural Resources and Environmental Control (DNREC). The revision fulfills Delaware's nonattainment new source review (NNSR) SIP element requirement for the 2015 8-hour ozone National Ambient Air Quality Standard (NAAQS). EPA is approving these revisions to the Delaware SIP in accordance with the requirements of the Clean Air Act (CAA).

**DATES:** This final rule is effective on June 14, 2021.

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2021-0069. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:** Amy Johansen, Permits Branch (3AD10), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2156. Ms. Johansen can also be reached via electronic mail at [johansen.amy@epa.gov](mailto:johansen.amy@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On March 24, 2021 (86 FR 15634), EPA published a notice of proposed rulemaking (NPRM) for the State of

Delaware. In the NPRM, EPA proposed approval of Delaware's certification that its existing NNSR program, covering the Delaware portion of the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE (Philadelphia Area) nonattainment area (which includes New Castle County) for the 2015 8-hour ozone NAAQS, is at least as stringent as the requirements at 40 Code of Federal Regulations (CFR) 51.165, as amended by the final rule titled "Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements" (SIP Requirements Rule), for ozone and its precursors. See 83 FR 62998 (December 6, 2018). The formal SIP revision was submitted by Delaware on August 3, 2020.

##### II. Summary of SIP Revision and EPA Analysis

Delaware's SIP approved NNSR program, established in Title 7 Delaware Administrative Code (DE Admin Code) 1125 (*Requirements for Preconstruction Review*), applies to the construction and modification of major stationary sources in nonattainment areas. In its August 3, 2020 SIP revision, Delaware certifies that the version of Title 7 DE Admin Code Section 1125 approved in the SIP is at least as stringent as the Federal NNSR requirements for the Philadelphia Area.<sup>1</sup> EPA last approved Delaware's major NNSR program as being consistent with Federal NNSR requirements on August 12, 2019. 84 FR 39758 (August 12, 2019). In that action, EPA approved DNREC's 2008 Ozone Certification SIP revision for NNSR.

Delaware has chosen not to include certain optional NNSR provisions that EPA could approve, pertaining to emissions change of VOC in extreme nonattainment areas and emission reduction credits. Delaware's choice not to include these provisions does not affect EPA's determination regarding the approvability of its August 3, 2020 submittal, and they were not discussed in this rule.<sup>2</sup>

<sup>1</sup> On October 20, 2016, EPA disapproved a proposed SIP revision that sought to include additional ERC provisions, adopted by Delaware on December 11, 2016, into the Delaware SIP, specifically, 7 DE Admin Code 1125 Sections 2.5.5 and 2.5.6. 81 FR 72529. Since EPA disapproved these provisions, the previously approved provisions that EPA approved into Delaware's SIP on October 2, 2012 remain applicable Federal requirements. 77 FR 60053.

<sup>2</sup> DNREC provided information regarding anti-backsliding in its August 3, 2020 SIP submittal to EPA, which was not a requirement of EPA's 2015 Ozone SIP Requirements Rule. See 83 FR 62998 (December 6, 2018). EPA noted in the 2015 Ozone SIP Requirements Rule that it would address anti-