



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: Proposed Delay of Effective and Transition Dates

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Proposed delay of effective and transition dates; request for comments.

SUMMARY: On March 12, 2021, the Department of Labor (Department or DOL) published a final rule delaying the effective date of the rule entitled *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States* (the rule or Final Rule), published in the **Federal Register** on January 14, 2021, from March 15, 2021 until May 14, 2021. This action proposes to further delay the effective date of the rule by eighteen months or until November 14, 2022, along with corresponding proposed delays to the rule's transition dates. This additional delay will 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 separate 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. This proposed delay will also 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.

DATES: The Department invites written comments on the proposed delayed effective date and transition dates from interested parties. Written comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit written comments electronically by the following method:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions on the Web site for submitting comments.

Instructions. Include the docket number ETA-2020-0006 in your comments. All comments received will be posted without change to <http://www.regulations.gov>. Please do not include any personally identifiable or confidential business information you do not want publicly disclosed.

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 transition periods under which adjustments to the new wage levels will 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 (NPRM) 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 directs 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.

II. Basis for Proposed Delay of Effective and Transition Dates

The Department is now proposing 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 proposes 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. The Department is proposing this delay for several reasons, as discussed in turn below.

First, the Department is proposing 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. Some commenters raised concerns, for example, over the lack of a proper notice and comment period for the public to comment on provisions in the Final Rule, including the transition date provisions, and the Department's failure to make available technical studies and data it employed in reaching decisions in that rule. Commenters believed the Final Rule did not adequately consider and respond to issues raised by public comments to the IFR, including the methodology employed by the Department, and that the Department had allegedly ignored data and information contrary to its position. This led to broader concerns that

the Department did not fully consider available data. These concerns call 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. For example, assuming that the commenters are correct and that the public was not provided a full and complete opportunity to comment on the transition provisions then the Department did not have the benefit of receiving and considering comments that could have caused it to adopt longer or shorter transition periods, higher or lower transition rates, or to ultimately not include transition provisions in the rule. Commenters also noted that sources of authority cited as a basis for the rulemaking, or for key assumptions in the rulemaking, have since been revoked or rescinded, such as Executive Order (E.O.) 13788 (Buy American and Hire American).

Many of these same concerns have been raised in the ongoing litigation concerning the IFR and the Final Rule. 86 FR 3608, 3612 (discussing lawsuits and court orders setting aside the IFR). For example, plaintiffs have recently raised claims in the pending litigation 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 ¶ 89, *Stellar IT, et al. v. Stewart, et al.*, No. 20-cv-3175 (Feb. 26, 2021); *see also* First Amended Complaint at ¶ 147, *Purdue University, et al. v. Stewart, et al.*, No. 20-cv-3006 (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."). The Department's ongoing review of the Final Rule has also identified potential issues surrounding the rulemaking record. *See, e.g.*, Unopposed Motion to Extend Defendants' Time to Respond to the Amended Complaint, *Stellar IT, et al. v. Stewart, et al.*, No. 20-cv-3175 (Mar. 9, 2021). Accordingly, the Department believes this proposed delay, in conjunction with the additional actions discussed below, will best inform the Department's comprehensive review of the Final Rule and consideration of alternate paths, and

provide it a meaningful opportunity to do so, particularly given the uncertainty inherent in continued litigation.

Moreover, other commenters suggested approaches that the Department should take as it reviews this rulemaking. For example, one commenter not only recommended that the Department conduct a full legal review and consider and respond to previously submitted comments, but that it also explore ways to ensure that wages reflect different types of common compensation structures, noting that many employers compensate their professional employees through a combination of base wages, bonuses, and other benefits. Another commenter suggested the Department do due diligence in research, data collection and analysis.

The Department is committed to conducting a thorough and transparent review of this rulemaking. Based on the Department's review to date, additional time is needed to comprehensively review the record relied upon to support this 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 3608, 3639. In light of these claims and the comments received on the 60-day NPRM, which highlight very serious concerns with the substance of the Final Rule and the process through which it was promulgated, the Department believes additional action is needed and intends, through the issuance of a separate request for information (RFI), to solicit public input on other sources of data and/or methodologies to inform any potential new proposal(s) to amend its regulations governing prevailing wages for PERM, H-1B, H-1B1, and E-3 job opportunities. While the Department undertakes this review and solicits additional public input, it proposes to delay implementation of the revisions to the prevailing wage levels until it may determine they appropriately reflect the wages of workers in the United States similarly employed. The Department has considered

allowing the rule to take effect pending its review and the assessment of potential new rulemaking; however, the Department thinks the concerns discussed above call into question fundamental aspects of the rulemaking to such a degree that the fairest and most prudent approach is to propose this delay rather than allow the rule to take effect without seeking additional public input.

Second, and relatedly, the Department preliminarily believes that delaying the effective and transition dates, as proposed herein, will prevent confusion and uncertainty among the regulated community over the operative wage rates while the Department conducts its review. For example, a university commenter to the 60-day NPRM observed that the transition dates are confusing and complicated for employers who must ensure they are using the right set of prevailing wage data and maintaining accurate public inspection files depending on when their documentation is filed. Delaying the effective and transition dates of this rule while the Department undertakes its review, instead of allowing these dates to be implemented, will prevent this unnecessary confusion and uncertainty.

Third, this delay will allow BLS and ETA's Office of Foreign Labor Certification (OFLC) adequate time to compute and validate prevailing wage data covering all occupations and geographic areas, complete and thoroughly test modifications to the OFLC Foreign Labor Application Gateway (FLAG) system, train staff, and conduct sufficient public outreach to ensure an effective and orderly implementation by the time the initial transition wage rates become effective. Even after the Department has completed its review of this rule, BLS and OFLC will need sufficient time to plan and implement any changes associated with the computation of wage levels under the Department's four-tiered wage structure.

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.¹ 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 entity, nonprofit research organization, or governmental research agency. 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.

When the IFR was published, the necessary time was not provided to ensure the proper testing and implementation of the new methodology for computing the wage levels, which meant BLS and OFLC were unable to follow the implementation process described 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. 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 the Department allow it to take effect.

Specifically, after receiving the final prevailing wages for Levels I and IV, OFLC will need approximately one month to compute and review initial prevailing wage estimates for the two

¹ Amended Memorandum of Understanding executed by Mr. John Pallasch, Assistant Secretary, ETA, and Mr. William W. Beach, Commissioner, BLS (January 13, 2021).

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. The lengthy delay proposed in this action affords BLS and OFLC the opportunity to complete these necessary actions upon completion of the Department's review of this rule should it decide to implement the Final Rule as published.

To the extent employers and beneficiaries may have taken some preparatory steps to conform to the Final Rule, the Department believes such actions, if any, are limited given the short amount of time that has passed since the rule was published on January 14, 2021 and the publication of the 60-day NPRM on February 1, 2021. In addition, the Department believes such reliance interests do not outweigh the need for the Department to propose this delay. As indicated above, the issues raised by commenters to the 60-day NPRM and by parties in the related litigation cast serious concern over the Final Rule's determination on the prevailing wage levels needed to prevent adverse effect. Based on the concerns raised by these commenters and litigants, the Department believes it is imperative that it evaluate these concerns and, prior to implementing the Final Rule, evaluate whether new rulemaking is warranted to address these concerns such that the Department properly fulfills its mandate to prevent adverse effect. As part of this effort, the Department proposes this 18-month delay of the Final Rule's effective date of May 14, 2021, and transition date of July 1, 2021, respectively, and proposes corresponding one-year delays for subsequent transition dates.

The Department acknowledges that delaying the implementation of the Final Rule is likely to have an impact on the wages paid to workers, as some commenters on the 60-day NPRM suggested. However, commenters have also indicated that the Final Rule would negatively

impact workers in other ways. Commenters stated, for example, that the Final Rule would lead to an increase in companies outsourcing jobs, the potential bankruptcy of small businesses, and an inability to fill positions with qualified workers that would result in slower or incomplete research and development. In addition, implementing the Final Rule and subsequently amending the rule, if the Department determines that revisions are necessary, would lead to multiple changes to the wage structure over a short period of time and pose significant logistical challenges for FLS and OFLC to conduct the necessary testing and analysis to ensure an efficient and orderly implementation of prevailing wage updates. Consistent with comments received on the 60-day NPRM recommending the Department consider a further delay of the Final Rule's effective to avoid operational and logistical problems for stakeholders and the filing community, the proposed delay of the effective and transition dates would also prevent needless fluctuations in wages and unnecessary burdens imposed on employers as the Department conducts its review of the Final Rule. Lastly, given the uncertainty inherent in continued litigation, including uncertainty over the outcome and remedy should the Department receive an adverse decision, as well as the timing thereof, the Department's proposed delay will also limit the potential for significant disruptions to both BLS and OFLC processes and prevent confusion and uncertainty among the regulated community over the operative wage rates while the Department conducts its review. Therefore, the Department believes that the prudent and reasonable approach is to propose to delay the effective date, and thus the implementation of the Final Rule while it undertakes its review.

While the Department acknowledges that the proposed delay is significant, based on its initial review and given the concerns described above, it is clear that a significant amount of time is necessary to consider all aspects of this rulemaking, including the underlying methodology employed, and relevant studies and data. To that end, the Department intends, through the issuance of a separate RFI, to solicit public input on other sources of data and/or methodologies to inform any potential new proposal(s) to amend its regulations governing prevailing wages for

PERM, H-1B, H-1B1, and E-3 job opportunities. This proposed delay will allow the Department sufficient time to evaluate commenters' concerns, consider other regulatory actions (such as the RFI or additional rulemaking) and carefully review the comments that are submitted in response. It will also afford BLS and OFLC adequate time of at least eight months to implement changes to the prevailing wage structure should the Department decide to implement the Final Rule as published.

The Department seeks 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 is an appropriate length of time or whether other lengths of time may be more appropriate. The Department specifically seeks 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. The Department asks commenters to provide specific details and any available data regarding the specific challenges they face in complying with the Final Rule by the current transition date of July 1, 2021. The Department also invites the public to share 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. Lastly, the Department solicits comment on any other potential consequences of not delaying the effective date and transition dates of the Final Rule. All comments on the underlying rulemaking will be considered to be outside the scope of this rulemaking.

III. 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 Final Rule² updated the computation of wage levels under the Department’s four-tiered wage structure based on the OES wage survey administered by BLS. The 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 Final Rule’s transfer payments from employers to employees, the Department simulated wage impacts for historical certification data based on the Final Rule’s

² The Final Rule was published in the Federal Register on January 14, 2021. 86 FR 3608, 3608-3611.

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 Final Rule.

The Final Rule transition period allowed foreign workers and their employers time to adapt to the new wage rates. For most job opportunities, the 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 now proposing 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 proposes 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. The Department is proposing this delay for three primary reasons: (1) to allow the Department to have sufficient time to engage in its comprehensive review of the 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 by the time the initial transition wage rates become effective on July 1, 2021.

Under the proposed rule, current wage levels would be in effect through December 31, 2022, and wage impacts estimated in the 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 proposed 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 proposed 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 to be 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 Final Rule as the baseline and shifted them according to the proposed rule’s new transition effective dates. To shift transfer payments the Department used the average annual wage impacts from Exhibit 7 in the Final Rule’s E.O. 12866 section and applied them to the proposed rule transition period. Exhibit 1, below, presents the revised wage transition schedule under the two groups.

Exhibit 1: Proposed Rule Wage Transition for the Two Application Groups		
Year	Wage Transition	
	Two-step	Four-step
2021	<i>Baseline</i>	<i>Baseline</i>
2022	<i>Baseline</i>	<i>Baseline</i>
2023	90%	85%
2024	<i>Final Wage Level</i>	90%
2025	<i>Final Wage Level</i>	95%
2026-2030	<i>Final Wage Level</i>	<i>Final Wage Level</i>

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

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

Exhibit 2: Shifted Transfer Payments of the 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 proposed 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 proposed rule’s reduced transfer payments by differencing the shifted transfer payments in Exhibit 2 from the 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 Final Rule, the shifted transfer payments resulting from the proposed rule delay, and the resulting reduction of transfer payments by the proposed rule.³

Exhibit 3: Total Transfer Payments of the NPRM (2019\$ Millions)			
Year	Final Rule Transfer Payments	Shifted Final Rule Transfer Payments	Proposed 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
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, Pub. L. 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on

³ 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.

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 proposed rule will have a significant economic impact on a substantial number of small entities and is therefore publishing this Initial Regulatory Flexibility Analysis as required.

1. Why the Department is Considering Action

The Department is proposing to delay the effective date of the Final Rule for three primary reasons: (1) to allow the Department to have sufficient time to engage in its comprehensive review of the 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 by the time the initial transition wage rates become effective on July 1, 2021.

2. Objectives of and Legal Basis for the Proposed Rule

The Department is now proposing 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 proposes corresponding one-year delays for each of the remaining transitions dates, which would be 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 proposed 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. Number of Small Entities Affected by the Proposed Rule

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

4. Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

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

5. Calculating the Impact of the Proposed Rule on Small Entities

The small entity impacts are unchanged in magnitude from Exhibit 14 in the Final Rule's RFA section. However, under the proposed rule the small entity impacts represent wage savings to small businesses relative to the 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 proposed 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 Final Rule's RFA section. Therefore, the Department estimates that the proposed rule will have a significant economic impact on a substantial number of small entities.

6. Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Proposed Rule.

The Department is not aware of any relevant Federal rules that conflict with this proposed rule.

7. Alternative to the Proposed Rule

The RFA directs agencies to assess the impacts that various regulatory alternatives would have on small entities and to consider ways to minimize those impacts. The proposed rule results in wage savings to small entities and therefore has a beneficial impact on small entities. The Department invites public comments on alternatives to the proposed rule that would further benefit entities while remaining consistent with the objectives of 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.⁴

While this proposed 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.⁵ 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 voluntary Federal program applying for immigration status in the United States.⁶ This proposed 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 proposed 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 proposed 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

⁴ 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.

⁵ See 2 U.S.C. 658(6).

⁶ See 2 U.S.C. 658(7)(A)(ii).

of E.O. 13132, it is determined that this proposed 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 proposed 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 proposed 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 on the public, and how to minimize those burdens. This proposed 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 proposes to amend 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).

4. 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 [effective date of final rule] 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,

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