



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 Date

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Final rule; delay of effective date.

SUMMARY: On February 1, 2021, the Department of Labor (DOL or Department) proposed to delay the effective date of the final rule entitled “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States,” published in the Federal Register on January 14, 2021, for a period of 60 days. The Department proposed to delay the effective date of the final rule until May 14, 2021, in accordance with 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.” As stated in the proposal, the 60-day delay would allow agency officials the opportunity to review any questions of fact, law, or policy. The Department invited written comments from the public for 15 days on the proposed delay of effective date. All comments had to be received by February 16, 2021. The Department received 57 comments from the stakeholder community. 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 60 days.

DATES: As of [insert date of publication in the Federal Register], the effective date of the final rule published on January 14, 2021, at 86 FR 3608, is delayed until May 14, 2021.

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 and Basis for Proposed Delay

On January 14, 2021, the Department published a final rule in the Federal Register, which adopted with changes an Interim Final Rule (IFR) that amended Employment and Training Administration (ETA) regulations governing the prevailing wages for 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 non-immigrant 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). 86 FR 3608. Although the final rule contained an effective date of March 15, 2021, the Department also included a delayed implementation period under which adjustments to the new wage levels will not begin until July 1, 2021. 86 FR 3608, 3642. 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.

On February 1, 2021, the Department published a notice in the *Federal Register* proposing to delay the effective date of the final rule for 60 days from March 15, 2021, until May 14, 2021. The Department based this 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. Accordingly, ETA proposed to delay the effective date for the final rule entitled “*Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*” to May 14, 2021, given the complexity of the regulation.

II. Public Comments Received

The Department invited written comment in its February 1, 2021 notice on its proposal to delay the effective date of the final rule, including the proposed delay’s impact on any legal, factual, or policy issues raised by the underlying final rule and whether further review of those issues warrants such a delay. The Department further stated that all other comments on the underlying final rule would be considered to be outside the scope of this rulemaking. The February 1, 2021 notice provided a 15-day comment period on the proposed delay, with comments to be submitted electronically at <http://www.regulations.gov/> using docket number ETA-2020-0006.

ETA received 57 unique comments on its proposal to delay the effective date by 60 days to May 14, 2021. Of the 57 comments, 36 were reviewed and determined out of scope either because they were comments exclusively on the final rule and did not address the proposed delay, concerned another agency’s rule, or were general statements. The remaining 21 comments were reviewed and determined within the scope of the request for comments. Of these, 17 commenters supported the delay. Four commenters opposed the delay based on their overall support of the final rule.

A. Comments Supporting a Delayed Effective Date

Seventeen commenters supported the proposed delay of the effective date of the final rule, citing disapproval of the final rule overall, concerns that the process in adopting the final rule was rushed, fears that the wage data supporting the final rule was inaccurate, and the need to

more thoroughly review the final rule. One commenter stated it is in favor of the proposed delay of effective date and provided a policy report to assist the agency in evaluating the “proposed delay’s impact on any legal, factual, or policy issues raised by the underlying rule.” Several commenters expressed strong support of the Department’s proposal, and a few commenters encouraged the agency to conduct a full legal review and “consider and meaningfully respond” to the issues raised in the IFR comments before implementing any changes to wage requirements.

The Department received two comments stating the delay of effective date is needed because the final rule is not reflective of the policy objectives of the Biden Administration. The two commenters, a trade organization and a trade association, supported the proposed effective date delay, reasoning that, consistent with the Biden Administration’s “Regulatory Freeze Pending Review” memorandum, it would provide time to evaluate questions of fact, law, and policy raised in the final rule. One of the commenters argued that events and developments that have occurred since the Department published the final rule on January 14, 2021, should be reviewed as relevant questions of fact, law, and policy. Two universities supported the effective date delay stating the delay will give the Department more time to evaluate policy and substantive issues of the final rule, including determining the needs of the U.S. economy in light of the current context of the pandemic and the Biden Administration’s priorities. Two trade associations supported postponing implementation of the final rule, with one association stating this delay would allow for proper stakeholder input while maintaining the status quo for employers.

In addition, the Department received five comments stating the proposed delay is needed for the Department to address legal concerns raised by stakeholders and litigants in litigation related to the IFR and final rule. For example, a professional association asserted the final rule violated the Administrative Procedure Act’s (APA) notice-and-comment requirements and argued that the final rule must be delayed in order to provide a proper notice-and-comment period. Another professional association and a trade association argued, for instance, that the final rule did not

address concerns they raised in prior comments on the IFR and supported delaying the final rule's effective date and compliance dates to allow time for review and reconsideration of the final rule's "legal and policy shortcomings" and issues raised by the stakeholder community. The Department also received three comments supporting a delay of the effective date to allow the agency an opportunity to review decisions issued by multiple courts in litigation related to the rulemaking. For example, a trade association explained the proposed 60-day delay will enable the agency to review the final rule and determine it is "unjustified, ignores labor market realities, and would harm the country's economic recovery." The commenter stated in the event the Department does not make such a determination, the delay is needed for courts to render final decisions in related litigation.

Several comments supported the proposed delay on the basis that the additional time will allow the Department to review more thoroughly the final rule and its financial implications for affected industries, including businesses and institutions of higher education, and its impact on the economy. One commenter in this category urged the agency to begin rulemaking to withdraw the final rule.

Lastly, a few comments requested the Department consider further delay of the effective date and/or the compliance dates of the final rule. For example, a trade association stated that given the profound changes in the Department's final rule, a May 14, 2021 effective date is unlikely to avoid significant operational disruptions for many businesses that rely upon various immigrant and non-immigrant workers. Other comments requested the Department delay the July 1, 2021 transition period to afford the regulated community adequate time to adopt necessary changes and to allow the agency enough time to properly implement forms and electronic filing system changes, as needed.

The Department appreciates the comments received. After carefully reviewing the comments, the Department acknowledges the substantive concerns raised by these commenters, including concerns regarding the Department's methodology in the final rule and notice and comment

procedures related to the rulemaking, and the commenters' suggestion that the Department should delay the effective date of this rule to review the rulemaking. Given these concerns, the complexity of the regulation, and the issues raised in the litigation challenging the rulemaking, the Department has determined that a 60-day delay of the effective date is needed to provide the Department time to continue its review of the final rule, including evaluating the concerns raised by the commenters and taking additional action as necessary.

B. Comments Opposing a Delayed Effective Date

The Department received four comments that directly addressed and subsequently opposed the proposed delay of the effective date of the final rule. Four commenters stated they generally support the substance of the final rule, and reiterated reasons why the final rule should be implemented. One of the commenters stated it believes the reforms to the Department's wage levels are long overdue and a delay would prevent protections for workers being implemented and reduce job opportunities and wages. It noted that the current wage methodology is in conflict with the INA and further explained that, while it generally supported the final rule as a step in the right direction, the final rule still conflicts with the INA. A commenter opposed the delay because it supports the methodology used in the final rule and believes a delay could cause uncertainty in hiring processes as well as reduce the amount of time employers have to prepare for compliance. This commenter further stated that the current methodology is on "shaky legal ground."

The Department appreciates the comments provided. In response to comments concerning the impact of the Department's proposed delay of effective date of the final rule on U.S. workers, the delay of the effective date should not reduce any potential benefits to, or otherwise harm, qualified American or H-1B workers. Under the final rule, the new methodology and attendant changes to the wage level computations will not begin to be implemented until July 1, 2021; before July 1, the current wage methodology remains the same. Rather, as noted in the proposal and above, delaying the effective date for 60 days would provide the Department an opportunity

to review questions of fact, law, and policy raised by the final rule. As noted above, one commenter stated the final rule was a step in the right direction but nonetheless “continues to conflict” with the INA, providing an example as to why review at this stage is crucial. The 60-day delay announced in this final rule provides the Department time to begin a meaningful review without affecting workers. Finally, the Department may need to propose a further delay of the effective date and accompanying implementation periods due to the complexity of the final rule, as discussed in the Conclusion below, and aims to provide clarity and sufficient time for employers to comply with the regulations.

C. Out of Scope Comments

Thirty-six comments were beyond the scope of this action. Most of the comments related to the content of the final rule and the final rule’s methodology rather than the narrow issue of the proposed delay of the effective date. Of particular note, three commenters simply stated they disagreed but it is unclear with what they disagreed. To the extent that they refer only to the proposed extension of the effective date these comments do not alter DOL’s conclusion given their lack of rationale and the reasons noted above for extending the effective date. Two comments appeared to be directed at a proposed rule from U.S. Citizenship and Immigration Services, and are therefore out of scope. Finally one commenter submitted a resume, and nothing else.

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 both impracticable and unnecessary. 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 March 15, 2021, before the delay in this rulemaking would begin.

Accordingly, a 30-day period would undermine the purpose for which this rule is being promulgated and result in additional confusion for regulated entities. As such, the Department finds that it has good cause to make this rule effective immediately upon publication.

E. Conclusion

Many of the comments specifically addressed substantive concerns related to the Department’s publication of the final rule and the methodology or computations contained therein. The Department acknowledges these public comments as well as concerns that have been raised by the commenters and in pending litigation challenging the Department’s IFR, *see* 86 FR 3608, 3612 (discussing lawsuits and court orders setting aside the IFR), and, subsequently, the final rule published on January 14, 2021. The Department has already begun its comprehensive review of this rulemaking and may need to take additional action as necessary to complete such a review. In particular, the comments raised thus far suggest that it may be helpful for the Department to issue a request for information soliciting public input on other sources of information and/or methodologies that could be used to inform any new proposal(s) to further amend ETA’s regulations governing the prevailing wages for PERM, H-1B, H-1B1, and E-3 job opportunities as the comments raised thus far suggest that additional information and data may be useful in the Department’s review. In addition, in light of the complexity of this issue, the Department is considering whether to propose a further delay of the final rule’s effective date and accompanying implementation periods that are currently scheduled to take effect on May 14, 2021, and July 1, 2021, respectively. Before further delaying the effective date and implementation periods, the Department will provide the public an opportunity to comment.

III. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review)

Under Executive Order (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 not a significant regulatory action. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has determined that this rule is not a “major rule,” as defined by 5 U.S.C. 804(2).

B. 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.¹

¹ 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

This rulemaking is not a “Federal mandate” as defined for UMRA purposes.² 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.³ 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.

C. Congressional Review Act

OIRA has determined that this final rule is not 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.*

D. 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.

E. 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.

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.

² See 2 U.S.C. 658(6).

³ See 2 U.S.C. 658(7)(A)(ii).

F. 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.

G. 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 final rule does not require a collection of information subject to approval by OMB under the PRA, or affect any existing collections of information.

Suzan G. LeVine,

Principal Deputy Assistant Secretary for Employment and Training, Labor.

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