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Labor Dept. Hikes Wages For High-Skilled Work Visas

By **Suzanne Monyak**

Law360 (January 12, 2021, 11:42 AM EST) -- The U.S. Department of Labor is taking another stab at raising the required wages for foreign workers on high-skilled visas, announcing a new rule Tuesday that will raise the four salary levels and be phased in over time.

The U.S. Department of Labor announced a new rule Tuesday that will raise the required wages for foreign workers on high-skilled visas. (Law360)

The new final rule comes after three federal judges struck down the department's first attempt to raise the prevailing wage rates, which set the baseline salary for foreign workers to avoid suppressing U.S. workers' salaries, following outcry from the technology industry and business associations that they were out of whack with market rates.

Labor Secretary Eugene Scalia praised the rule, which targets employment-based green cards, the H-1B specialty occupation visa and other high-skilled work visas, in a call with reporters Tuesday as a "culmination of many hours of extensive research and thought."

"It reflects an even-handed approach to a complex problem, and we're proud to put in place this long overdue reform," he said.

Labor officials told reporters the new final rule will raise the entry-level salary tier from the current 17th percentile to the 35th percentile. From there, the wage levels will be set at the 53rd, 72nd and 90th percentiles, up from the current top three levels at the 34th, 50th and 67th percentiles.

These levels, while higher than the current structure, are lower than the wage tiers previously issued by the department in an interim final rule that was swiftly struck down in court last year. That rule had attempted to start entry-level salaries at the 45th percentile, followed by tiers at the 62nd, 78th and 95th percentiles.

The department acknowledged in the new filing that the majority of individuals who commented on the prior rule had opposed the change and warned the higher wage levels would negatively impact the U.S.

economy, including by hurting small businesses and nonprofits who can't afford to pay such high salaries.

The new version's provisions "appropriately address commenters' concerns and will ensure that, going forward, the prevailing wage rates provided by the department fully protect the wages and job opportunities of U.S. workers," the DOL said.

Additionally, unlike the previous rule, which took effect immediately upon publication and threw businesses for a loop, the new rule will be phased in.

Wages will start increasing in July 2021, and take full effect for some employees one year later. For visa holders extending their visa statuses to wait for an available green card, the rule will take full effect in July 2024, officials said.

As a result, the new rule will largely be implemented during the Biden administration. A senior Labor Department official said Tuesday that officials "expect and hope that future administrations will see the value and the intent in the rule, and they will support the rule going forward."

A spokesperson for President-elect Joe Biden's transition team didn't return a request for comment Tuesday on how the incoming administration would handle the rule.

The previous version of the rule, issued in October, drew fast opposition from the tech and business community as well as from universities, which filed several lawsuits in federal courts across the country.

A California federal judge was the first to rule against the policy following a legal challenge brought by the U.S. Chamber of Commerce and others. That judge found the administration had skipped key procedural steps without good cause, and two other federal judges in D.C. and New Jersey followed suit soon after.

On Tuesday's call, a senior DOL official said the department believes it has "fully complied" with administrative procedures for its new rule, which takes into account public comments received in response to the stricken version.

David Bier, an immigration policy analyst at the Cato Institute, a libertarian think tank, told Law360 on Tuesday that while the new final rule "corrected the most glaring problems" in the earlier version, he still took issue with the department's methodology of calculating the new tiers, particularly at the higher wage levels.

He added that the "core premise" of the rule itself is "flawed," since existing laws and regulations already require employers to pay their foreign workers comparably to U.S. workers in the area and industry when the prevailing wage rate is too low.

"At the end of the day, they basically ignored so many comments, so much evidence that what they were doing is contrary to the law, contrary to the economic reality," Bier said.

Eleanor Pelta, a partner at Morgan Lewis who advises employers on immigration matters, also questioned the regulation's core basis that foreign workers undermine American employees. She said her clients often tell her, when requesting to sponsor a foreign employee, that they were unable to find a U.S. citizen with the skills necessary for the role.

"I still think, and this is after 30-plus years doing this work, that most employers of foreign nationals, highly skilled talent, are going through the immigration process for those workers because they can't find the skill in the U.S. labor market. And I don't see how this rule is going to change that," she said.

She also raised concerns that the higher wage tiers could hurt smaller businesses and startups.

The new rule marks the latest attempt by Trump administration officials to restrict foreign work programs in their final days in office.

Earlier this month, the U.S. Department of Homeland Security finalized changes that would overhaul how H-1B visas are allocated, prioritizing candidates offered the highest salaries rather than handing them out in a random lottery. H-1B visas, generally reserved for foreign professionals with university degrees, are capped at 65,000 annually, with another 20,000 for those with advanced degrees for U.S. schools.

That visa rule also won't take effect until Biden has taken office, similarly giving the new administration time to intervene.

--Editing by Marygrace Murphy.
