



## Immigration Practice Group

## U.S. District Court Sets Aside the DHS and DOL Wage Rules

Syracuse ♦ Ithaca ♦ New York City

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The U.S. District Court in California has set aside the DOL interim final rule, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, significantly increasing the prevailing wages to be paid to certain temporary and permanent foreign workers ("DOL Rule") and the DHS interim final rule, *Strengthening the H-1B Nonimmigrant Visa Classification Program*, restricting the eligibility criteria for H-1B qualification ("DHS Rule") (our legal alert on the DHS and DOL Rules can be viewed at this link: <https://bhlawpllc.com/publication/new-dol-and-dhs-rules-significantly-impact-h-1b-program/>). In setting aside both Rules, the court, in particular, noted that the DOL and DHS could not rely on the good cause exemption that would justify bypassing the required notice and comment period in the rulemaking process because neither agency took any action for six months from the start of the COVID-19 pandemic. The court's order is effective immediately, though the government may appeal this decision which could affect implementation of the court order.

*Background on the Challenged Rules*

The DOL Rule which took effect on October 8, 2020, significantly increased the required wage employers must pay to H-1B, H-1B1, and E-3 non-immigrant workers, as well as EB-2 and EB-3 immigrant workers. As a result of the DOL Rule, the prevailing wages across various occupational categories increased by more than 40%, regardless of the actual prevailing wage labor market data. The DHS Rule scheduled to take effect on December 7, 2020, introduced stricter H-1B eligibility requirements, including a revision to the definition of a "specialty occupation", "employer-employee" relationship, limiting approval validity period from three years to one year for H-1B workers performing duties at a third-party worksite, and other changes, described in our initial [alert](#).

*What's Next*

In response to the court's order, USCIS announced that it will "fully comply with the court's decision". This means that USCIS will have to adjudicate H-1B filings under the existing regulatory framework currently in place and will not apply the revised definition of "specialty occupation" and other restrictions provided by the DHS Rule. Similarly, the DOL announced that it will update its system to incorporate the pre-DOL Rule wage data. Therefore, unless the court ruling is successfully appealed, employers may pay their temporary and permanent foreign workers the wages that were in place prior to the introduction of the DOL Rule. According to the DOL's timeline, employers may submit new requests for a prevailing wage determination at any time and will be able to file Labor Condition Applications (LCAs) using the pre-DOL Rule OES survey wage data starting at 8:30am EST on December 9, 2020. For those prevailing wage determinations issued using the DOL Rule wage data, employers may seek a redetermination before January 4, 2021.



The Bousquet Holstein immigration group is closely monitoring these developments and will provide updates on these important issues. For questions and/or additional information, please contact:

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