

Practice Pointer: Roadmap to Alternative Wage Surveys for LCAs and PWDs¹

The recently published Department of Labor (DOL) Interim Final Rule (IFR)² resulted in a significant increase to the Bureau of Labor Statistics (BLS)-administered Occupational Employment Statistics (OES)-based prevailing wages for each prevailing wage level across all occupations. While AILA is challenging the IFR and its substance via litigation, AILA's DOL Liaison Committee³ is committed to assisting AILA members in dealing with the new wage levels. We previously published a practice alert on using less common SOC's in O*NET.⁴ This practice pointer explores a second alternative of using an alternative wage survey and provides a roadmap for using alternative wage surveys in compliance with DOL's regulatory requirements.

1. How to Pick an Alternative Wage Survey

OFLC regulations found at 20 CFR §656.40(g) offer an employer the opportunity to use an "independent authoritative source," such as an alternative wage survey, to determine the applicable prevailing wage in both the Form ETA-9035 (Labor Condition Application) and Form ETA-9141 (Application for Prevailing Wage Determination) contexts.⁵

20 CFR Section 656.40(g) provides the regulatory requirements for the National Prevailing Wage Center (NPWC) to accept an employer-provided wage survey in making a prevailing wage determination (PWD). The Office of Foreign Labor Certification (OFLC) has provided additional guidance in its FAQs and memoranda⁶ regarding requirements for alternative wage surveys. Specifically, the requirements consist of the following:

- **Sufficient information about the survey methodology:** The employer must provide the NPWC with sufficient information about the survey methodology, including the sample size and source, sample selection procedures, and survey job descriptions.⁷ The purpose of this information is to allow the NPWC to evaluate the statistical methodology used in conducting the survey.
- **Recently collected data:** A published survey must have been published within 24 months of the date of submission to the NPWC and must be based on data collected within 24

¹ Special thanks to AILA DOL Liaison Committee members Christian Park, Troy Palmer, and Kevin Lashus for their work on this advisory.

² See Practice Alert: DOL Interim Final Rule Advance Copy Indicates Changes to Computation of Prevailing Wage Effective October 8, 2020 (AILA Doc. No. 20100601), available here: <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/dol-ifr-changes-computation-prevailing-wage>

³ See AILA's DOS Liaison Committee page (AILA Doc. No. 16072815), available here: <https://www.aila.org/about/leadership/national-committees/agency-liaison/dol-liaison-committee>

⁴ See Practice Pointer: Proceed with Caution – Using Less Common SOC Occupations in O*Net (AILA Doc. No. 20102136), available here: <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-pointer-proceed-with-caution-using-less>

⁵ See 20 CFR 656.40(b)(2); 20 CFR 656.731(a)(2)(ii)(B).

⁶ See Employment and Training Administration Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs Revised November 2009, available here: https://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf, last visited October 22, 2020.

⁷ See 20 CFR 656.40(g)(2).

months of the date of publication of the survey. The submitted survey must be the most current edition of the survey.⁸

- **Arithmetic Mean or Median:** The wage requested must be the arithmetic mean, meaning the average of the wages of employers similarly employed in the area of intended employment.⁹ If the alternative wage survey provides only a median and not an arithmetic mean, the median, which is the middle value in the range of wages of workers in similar positions in the area of intended employment, can be used.¹⁰
- **Cross-industry wage data:** The wage data must have been collected across industries that employ workers in the occupation unless it is an ACWIA-compliant employer.¹¹
- **Area of intended employment:** As with all wage surveys, the wage must be for the beneficiary's area of intended employment. The "area of intended employment" is typically "the area within normal commuting distance" of the address of intended employment.¹² The area surveyed can be expanded if the employer can show that there is an insufficient number of workers (less than 30) in the original area.¹³
- **Aligned job descriptions:** The job description in the employer-provided wage survey must match the job being offered and not have differences that would place the job into a different occupation.¹⁴ The NPWC will compare each element of the employer's job description with each element of the alternative wage survey and will reject the survey if those elements do not match.¹⁵ This usually leads to a default to the OES wage levels.¹⁶ If an employer's job description includes restrictive or non-normal requirements, then the alternative wage survey should have multi-tiered wages. The NPWC may then be able to accept the alternative wage survey and may raise the wage level by one level for each atypical or restrictive requirement.¹⁷

⁸ See 20 CFR 656.40(g)(3)(i) and (ii).

⁹ See 20 CFR 656.40(b)(2).

¹⁰ See 20 CFR 656.40(b)(3). See also DOL Supplements FAQs With Information on Supervised Recruitment at 24, available here: <https://www.aila.org/infonet/dol-supplements-faqs-supervised-recruitment> at 24. The DOL has also posted all of its FAQs online at: <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile7>.

¹¹ See DOL ETA Prevailing Wage Determination Policy Guidance, November 2009, AILA Doc. No. 10010468 at 34, available here: <https://www.aila.org/infonet/dol-eta-prevailing-wage-determination-policy>

¹² *Id.* at 33

¹³ *Id.* The borders of Primary Metropolitan Statistical Area (PMSA), Metropolitan Statistical Area (MSA), or Consolidated Metropolitan Statistical Area (CMSA) are not controlling for determining a normal commuting area. An employer location just outside those boundaries may still be considered "within normal commuting distance."

¹⁴ See DOL Updated FAQs on Prevailing Wage Program (AILA Doc No. 13022844) at 3, available here: <https://www.aila.org/infonet/dol-updates-faqs-prevailing-wage-program-02-28-13>

¹⁵ See Minutes from DOL Stakeholder Meeting (12/12/13) (AILA Doc No. 14011449), at 5, available here: <https://www.aila.org/infonet/dol-liaison-minutes-12-12-13>.

¹⁶ See DOL Open Forum Notes from AILA's Annual Conference (6/20/14) (AILA Doc No. 14082542) at 3, available here: <https://www.aila.org/infonet/dol-liaison-minutes-06-20-14> and Minutes from DOL Stakeholder Meeting (12/12/13) (AILA Doc No. 14011449), at 5, available here: <https://www.aila.org/infonet/dol-liaison-minutes-12-12-13>.

¹⁷ See DOL Updated FAQs on Prevailing Wage Program, (AILA Doc No. 13022844), at 3, available here: <https://www.aila.org/infonet/dol-updates-faqs-prevailing-wage-program-02-28-13>.

- **Number of those surveyed:** The alternative wage source should have surveyed at least three employers and at least 30 workers.¹⁸

2. How to Use an Alternative Wage Survey

Please see below for a review of how to utilize an alternative wage survey in LCAs and PWDs. See below.

With Form ETA-9035/ETA-9035E¹⁹

An employer using an alternative wage survey on the Form ETA-9035/9035E, Labor Condition Application, must select option F.14 under the “Employment and Wage Information” section. Once F.14 is selected, a box will pop-up asking the practitioner to complete the following fields:

- F.14a: Choose “Other/PW Survey”
- F.14b: Select the “Source Year” from a drop-down menu (please remember that the wage information must have been collected within 24 months of the publication of the survey)
- F.14c. Enter the name of the survey producer or publisher
- F.14d. Enter the title or name of the survey

If the complete survey producer or publisher name and the complete survey title do not fit into the available space, the employer should enter as much information as possible to clearly identify the survey producer or publisher and the title of the exact survey used. While an employer may abbreviate words to fit the space provided in Items F.14, the information provided by the employer must be sufficient to ensure that both the survey publisher or producer and the survey title are obviously identifiable.

For benchmarking purposes, members may refer to LCAs and PWDs data available at the Education and Training Administration’s (ETA) Performance Data page²⁰. Note that neither DOL nor AILA endorses any specific surveys, and members should conduct their own due diligence as to whether the surveys meet the DOL’s criteria.

With Form ETA-9141

When using alternative wage surveys with Form ETA-9141, Application for Prevailing Wage Determination, the employer may either upload it with the initial submission to the NPWC or after the wage determination derived from the OES wages is issued. Please note however that if it is submitted after the NPWC has already issued the determination, the submission of the alternative wage survey will be deemed a new prevailing wage request submission.²¹

The appropriate section to enter the alternative wage survey information is under Section D, Wage Processing Information, Question 4, “Is the employer requesting consideration of a survey

¹⁸ DOL ETA Prevailing Wage Determination Policy Guidance, November 2009, (AILA Doc. No. 10010468), at 34, available here: <https://www.aila.org/infonet/dol-eta-prevailing-wage-determination-policy>.

¹⁹ DOL Practice Pointer: LCA Wage Survey Naming Conventions for the Form ETA 9035 (AILA Doc. No. 15121608), available here: <https://www.aila.org/infonet/dol-liaison-committee-practice-pointer-wage-survey>.

²⁰ See <https://www.dol.gov/agencies/eta/foreign-labor/performance>

²¹ See 20 CFR 656.40(g)(l).

in determining the prevailing wage?” One you select “Yes” under Question D.4, a box will pop-up asking additional questions concerning the survey.

- D.4.a: Enter the survey name
- D.4.b: Enter the survey date of publication (which must be, as indicated above, the most current edition of the survey, and published within 24 months of the request).

After this point, the form requests that the alternative wage survey be uploaded. As a practical tip, practitioners should also include a letter that explains why the submitted alternative wage survey should be accepted. The letter should address each of the requirements required by NPWC. The letter should include the full name of the survey; list the publication date of the survey, including when the data was collected; clearly lay out how each element of the employer’s job description matches each element of the job description in the wage survey submitted; and provide a detailed description of the methodology used in the survey including a description of how the survey was conducted, a definition of the area covered by the survey, and the number of employers and employees surveyed. Practitioners should also upload the supporting evidence into the FLAG portal before filing the request to OFLC. Failure to provide supporting documentation may result either in a Request for Information (RFI) or a determination based on the OES survey result.

Regardless of whether it is an existing survey or a custom private wage survey, practitioners must maintain documentation of the survey methodology and how each of the DOL requirements are met. For PWD purposes, without documentation, DOL will reject your survey and issue a PWD based on OES wage data. For LCA purposes, documentation of the survey methodology is required for LCA public access files. Moreover, practitioners have reported receiving Requests for Evidence from the U.S. Citizenship and Immigration Services questioning the validity of the survey for the LCA.

Practical Considerations for Practitioners

Below, the DOL Liaison Committee provides some practical considerations for members and their clients when considering using an alternative wage survey.

- **Cost:** Securing an alternative wage survey will add cost to case processing. A good practice tip is to communicate the cost to the relevant stakeholders ahead of time.
- **Processing Time:** Interestingly, using an alternative wage survey ordinarily does not add additional time for processing at OFLC.
- **Existing Access to Alternative Wage Surveys:** Check with your client employers to see if they have access to usable surveys. Some mid- to large employers already subscribe to salary surveys for its own benchmarking for compensation purposes. Others may also be a part of professional organizations that conduct their own wage surveys that may meet DOL criteria. Some law firms also have access to published surveys.
- **Surveys:** There are numerous commercially available pre-existing published surveys (e.g., Towers Willis Watson, Radford, Mercer, Dietrich, AIA, AAMC), which have been successfully used by other members. That said, practitioners should carefully review the survey’s methodology and characteristics in each instance because many commercially

available published surveys have been conducted for purposes other than immigration benefit requests and do not comply with all of the requirements.

- **Private Wage Surveys:** Employers can also conduct private wage surveys that comply with the regulatory criteria.
- **Guidance on NPWC SOPs:** Practitioners should note that AILA secured through FOIA the “DOL’s FOIA Response on Prevailing Wage Policy Guidance” which offers valuable insight into the NPWC standard operating procedure and what elements its analysts review when choosing occupational classifications and wage levels and assessing alternative wage surveys.²² Specific sections within that resource concern alternative wage surveys (pp. 838-852) and the prevailing wage redetermination process (pp. 1078-1090 and 1237-1265).

3. How to Challenge a Determination Based on a Wage Survey

Obtaining a correct wage level within a targeted occupational code or one based on an alternative wage survey is now more important than ever considering the sizable increase in all wages resulting from the IFR. Where you believe an incorrect occupational category or wage level is selected by NPWC in its prevailing wage determination, or if an alternative survey was rejected erroneously, administrative remedies including a Redetermination Request, a Center Director Review Request, or a Request for Review by the Board of Alien Labor Certification Appeals (BALCA) may provide meaningful relief. The following are reminders and tips for seeking such remedies.

- **Redetermination Request:** Within 30 days of the original prevailing wage determination, employers are afforded one opportunity to supplement its prevailing wage application.²³ The Certifying Officer (CO) will then either affirm or modify the original determination.

A redetermination request is a key step to take when seeking relief because when a modification/affirmation is issued, it affords the employer the opportunity to (1) review the CO’s statement as to how the NPWC reached a particular wage level in a given occupational classification or why an alternative wage survey was insufficient, thereby providing a roadmap for possible counterarguments, and (2) supplement the record to preserve arguments for Center Director or BALCA review filings if those are later sought by the employer.²⁴

Practitioners should note that an alternative wage survey cannot be provided to the NPWC for the first time in a prevailing wage redetermination effort. (Regulations

²² See DOL FOIA Response on Prevailing Wage Policy Guidance (AILA Doc. No. 18010230), available here: <https://www.aila.org/infonet/dol-foia-response-on-prevailing-wage-policy>.

²³ See 20 CFR §656.40(h)(2).

²⁴ See 20 CFR §656.41(c) requires the Center Director to only review the record upon which the prevailing wage was issued, which includes any supplemental material/arguments submitted during the redetermination request stage. Similarly, 20 CFR §656.41(d)(1) requires BALCA to only consider evidence that was within the record upon which the Center Director made their determination.

indicate that if you submit the survey at this point, it will be considered a new application.) However, where the employer provided a survey in its original application, it may use a redetermination request to supplement that material with added survey documentation concerning the suitability of the data.

At the time of publication of this practice pointer, DOL is reporting that Redetermination Requests are taking about two months from the time of request and are usually are faster than filing a new PWD request. Additionally, OFLC takes the position that it is correctly issuing PWDs because most practitioners do not file these requests. In at least the experience of one of the authors, filing a request is always the preferred mechanism to challenge an PWD both because it alerts OFLC to its error and it is usually quicker than other options.

- **Center Director Review:** Within 30 days of the CO's affirmation or modification of the original PWD, employers may pursue Center Director Review (CDR).²⁵ The Center Director (CD) will either affirm or modify the earlier prevailing wage determination. CDR is an often-overlooked option. If employers have a common job which OFLC commonly misclassifies or levels, filing a CDR provides backup for future cases that the OFLC Center Director agrees on the correct SOC and leveling for a position. At the time of publication of this practice pointer, CDRs are taking about one month from the time of request.
- **BALCA Review:** Within 30 days of the Center Director's affirmation or modification, Employers may request review by BALCA. The Request for Review must be addressed to the CD. At the time of this Practice Alert, BALCA is taking about four months to issue determinations.

When filing Redetermination Requests and Center Director Review Requests, members are encouraged to do so through either FLAG.

4. Prevailing Wage Determination Review Standard and Guiding Principles

Prevailing wage determinations are subject to an abuse of discretion standard at the BALCA appeal stage. Even while this standard is highly deferential to the NPWC/CD, there are still scenarios where BALCA has found that the CD's lack of adherence to prevailing wage determination principles was an abuse of discretion. For example, when identifying an occupational category, the NPWC/CD must choose the job classification that is *most similar* to the employer's duties.²⁶ BALCA has held that it is an abuse of discretion to assign an SOC code with job duties that only superficially correspond to an employer's job duties when an SOC code with more substantive overlap to the job duties provided is available.²⁷ Consequently, where an employer can demonstrate to the CO, the CD, or BALCA that there is a substantial overlap of

²⁵ 20 CFR §§656.41(a) – (c).

²⁶ See *Quest Diagnostics, Inc.*, 2015-PWD-00002 (Feb. 2, 2015).

²⁷ See *Meltwater News, USI, Inc.*, 2014-PWD-00005 (July 16, 2014).

responsibilities with a targeted occupational category and only a superficial connection to an occupational category involving higher wage data, it places itself in a better position to succeed in obtaining the desired occupational category. The same approach may be employed in comparing the PWD job description to a job entry in an alternative wage survey. One method to reveal a substantial overlap is to use a table setting forth a comparison of the employer’s role and the occupational category selected by NPWC/CD or with the alternative wage survey description, as BALCA often does in its position analyses in PWD matters. As an example, consider the following:

PWD Position Tasks	Corresponding SOC/O*Net Task or Alternative Wage Survey Task
PWD task #1	Corresponding core or supplemental task(s) from O*Net occupation definition
PWD task #2	Corresponding core or supplemental task(s) from O*Net occupation definition
PWD task #3	Corresponding core or supplemental task(s) from O*Net occupation definition

Where applicable, that same method may then be used to demonstrate that an employer’s position shares little to no overlap with the occupational category or position description chosen by NPWC/CD.²⁸

5. Conclusion

While recent regulatory changes may have prompted practitioners to explore non-OES wage surveys to address prevailing wage issues, alternative wage surveys offer an alternate means of establishing the prevailing wage consistent with DOL requirements. Where warranted, these surveys should be considered as another tool in one’s arsenal when addressing prevailing wage issues.

²⁸ Many practitioners also use this comparative strategy in its initial prevailing wage application submission by submitting supplemental material with its application to demonstrate the relevant overlap/ with a targeted occupational category.