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Practice Pointer

New Form ETA 9141: Prevailing Wage Determinations to be Based on the Higher of the Prevailing Wage for Primary and Alternate Requirements

By AILA's Department of Labor Liaison Committee¹

On April 2, 2021, the Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) announced the implementation of a new Form ETA 9141, *Application for Prevailing Wage Determination*. The new Form ETA 9141 does not formally modify OFLC's November 2009 Prevailing Wage Determination Policy Guidance.² The form was implemented for prevailing wage determination requests submitted to the DOL beginning May 3, 2021. The procedural change discussed below will not apply to Forms ETA 9141 filed prior to May 3, 2021. Rather, this change will only impact those requests filed using the new form, which we expect OFLC to begin issuing prevailing wage determinations in approximately October 2021 based on current average processing times of 145 days.³

The new Form ETA 9141 includes a number of formatting changes. One significant change is how an employer provides primary and alternative requirements on the form and how OFLC will determine the prevailing wage under such situations. OFLC announced that it designed the new form to allow Certifying Officers (CO) to determine and assign prevailing wages more precisely when an employer presents primary and alternative requirements for an offered position. Specifically, with the new form, OFLC will now review *both* the primary and alternate requirements and issue two prevailing wages, one for the primary requirements and one for the alternative requirements. Employers will then be required to use the higher of the two prevailing wages as the prevailing wage determination on its Labor Condition Applications (LCAs) and PERM applications.⁴ Formerly, OFLC would provide a prevailing wage determination based on the wage level associated with the primary set of requirements only, i.e., what was listed first. The new form, which will consider both sets of requirements, will change this process.

To have a better sense of the impact of this change, consider the following example. An employer requires either a Master's degree and 3 years of experience as the primary requirement OR a Bachelor's degree and 5 years of experience as the alternative requirement for a SOC Code 15-1132 Software Developer, Applications⁵ position. SOC Code 15-1132 Software Developer,

¹ Special thanks to DOL Liaison Committee members Josiah Curtis, Bob White and Vincent Lau for their contributions to this practice resource.

² See https://www.flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

³ See <https://flag.dol.gov/processingtimes>.

⁴ OFLC National Prevailing Wage Center (NPWC) FAQs – Round 3: Implementation of the Revised Form ETA-9141 FAQs dated July 16, 2021, AILA InfoNet 21071634.

⁵ Please note that OFLC delayed the implementation of the 2018 SOC Codes and is continuing to use the 2010 SOC Codes until July 1, 2022. See AILA Doc. No. 21061035.

Applications is a Job Zone 4 occupation⁶ with a Bachelor's Degree as the normal education requirement for the position.

Using the previous Form ETA 9141, where wages were assigned only based on the primary requirement, a prevailing wage request with these requirements for a Software Developer, Applications position would yield a Level 3 prevailing wage assignment by OFLC for the primary requirement of a Master's degree and 3 years of experience. Based upon OFLC's November 2009 Prevailing Wage Determination Policy Guidance, the DOL Analyst at OFLC's National Prevailing Wage Center (NPWC) would assign one prevailing wage point for the Master's Degree and another point for the 3 years of experience resulting in two levels above Level 1, i.e., a Level 3 prevailing wage determination.

With the new Form ETA 9141, DOL Analyst will assign two prevailing wages when the position requires primary requirements and alternative requirements. The DOL Analyst will first assign the Level 3 prevailing wage, as discussed above, for the primary requirements. For the alternative requirements, based upon OFLC's November 2009 Prevailing Wage Determination Policy Guidance, the DOL Analyst would assign three prevailing wage points for the 5 years of experience resulting in three levels above Level 1, i.e., a Level 4 prevailing wage. When the new Form ETA 9141 assigns two prevailing wages, the employer is required to use the higher of the two prevailing wages as the prevailing wage determination, which in the above example would be the Level 4 prevailing wage.

In the case of Software Developers, Applications in Seattle, Washington, the resulting wage difference is significant:

- Previous Form ETA 9141 - Level 3 - \$140,920
- New Form ETA 9141 - Level 4 - \$162,510

In just this one example, for Forms ETA 9141 submitted after May 3, 2021 (with the new form) with the minor procedural change implemented by OFLC as part of a form change yields an increase in the prevailing wage of more than \$20,000 per year based on the same requirements.

Please note that this procedural change also applies to LCAs where the employer determines its own prevailing wage based upon the OES prevailing wage system. Although the employer is not requesting a prevailing wage determination from OFLC on Form ETA 9141, the revised alternative requirement wage system applies to LCAs filed on or after May 3, 2021, when the procedural change became effective. If the employer fails to use the revised system when determining the prevailing wage, the employer may be liable for back wages during a DOL Wage and Hour Division (WHD) LCA investigation.

If an employer would like to use a private wage survey in either the PERM or LCA process instead of the OES prevailing wage, OFLC released an FAQ⁷ confirming that the survey must provide salary information matching both the primary requirements and alternative requirements. If the

⁶ Detailed information about the O*Net Job Zones is available at <https://www.onetonline.org/help/online/zones>.

⁷ OFLC National Prevailing Wage Center (NPWC) FAQs – Round 3: Implementation of the Revised Form ETA-9141 FAQs dated July 16, 2021, AILA InfoNet 21071634.

survey only matches one of the two sets of requirements, OFLC indicated that it will assign the OES prevailing wage and not use the survey. It is assumed that OFLC will not issue a Request for Information (RFI) prior to issuing the prevailing wage determination based upon the OES prevailing wage, instead of the private survey wage.

For employers that frequently utilize alternate wage requirements, this is a significant change that may increase the assigned prevailing wages. The AILA DOL Liaison Committee urges members who work with clients that accept alternate requirements for their offered positions in the PERM and/or LCA process to engage with their clients to discuss the very real financial impact that this procedural change may have.

The AILA DOL Liaison Committee will continue to monitor and publish any additional information that OFLC provides related to the new Form ETA 9141 in the future.