any determination, the sponsor must provide that information within 30 days.

■ 11. Add § 77.12 to read as follows:

§ 77.12 Conditions and limitations requirements.

Except for structures that have received an FAA Determination of No Hazard to Air Navigation prior to the effective date of a final rule or any meteorological tower with the highest point of the structure at least 50 feet AGL up to and including 200 feet AGL at its site for which construction is complete prior to the effective date of a final rule, a sponsor must comply with the conditions and limitations contained in its Determination of No Hazard to Air Navigation.

■ 12. Amend § 77.15 by revising paragraph (e)(1) to read as follows:

§ 77.15 Scope.

* * * * *

(e) * * *

(1) Available for public use and is listed in the Chart Supplement U.S., Chart Supplement Alaska, or Chart Supplement Pacific of the U.S. Government Flight Information Publications; or

* * * * *

■ 13. Revise § 77.27 to read as follows:

§ 77.27 Initiation of studies.

The FAA will conduct an aeronautical study when:

(a) Notice is required under § 77.9 and has been received; or

(b) The FAA determines a study is necessary. All other Notices filed by the public outside of these parameters will be screened within the automated OE/AAA system and, if appropriate, provided an electronic letter response that indicates that no notice is required for the said proposal or alteration, and thus the FAA has no objections to the proposal at this time.

■ 14. Amend § 77.29 by revising paragraph (b) to read as follows:

§ 77.29 Evaluating aeronautical effect.

* * * * *

(b) If a sponsor withdraws the proposed construction or alteration or revises it so that it is no longer identified as an obstruction, or if no further aeronautical study is necessary, the FAA may terminate the study.

■ 15. Amend § 77.31 by revising paragraph (d)(4) to read as follows:

§ 77.31 Determinations.

* * * * *

(d) * * *

(4) Marking and lighting requirements, as appropriate.

* * * * *

■ 16. Add § 77.32 to read as follows:

§ 77.32 Marking and lighting requirements.

A sponsor may request a modification or deviation from the marking and lighting requirements in a determination by submitting FAA Form 7460–1, Notice of Proposed Construction or Alteration.

■ 17. Revise § 77.33 to read as follows:

§ 77.33 Effective period of determinations.

(a) The effective date of a determination not subject to discretionary review under § 77.37(b) is the date of issuance. The effective date of all other determinations for a proposed or existing structure is 40 days from the date of issuance, provided a valid petition for review has not been received by the FAA. If a valid petition for review is filed, the determination will not become final pending disposition of the petition.

(b) Except as provided in paragraphs (c) and (d) of this section, unless extended, revised, or terminated, each Determination of No Hazard to Air Navigation issued under this subpart expires 18 months after the effective date of the determination, or on the date the proposed construction or alteration is abandoned, whichever is earlier.

(c) Unless extended, revised, or terminated, each Determination of No Hazard to Air Navigation issued under this subpart regarding a proposed permanent wind energy system, including an airborne wind energy system and associated meteorological towers, expires 36 months after the effective date of the determination or on the date the proposed construction or alteration is abandoned, whichever is earlier. A meteorological tower is associated with a wind energy system when it is included in a wind energy systems project and is intended to be permanent. A meteorological tower is permanent when it is intended to remain in place for the duration of its lifecycle.

(d) A Determination of Hazard to Air Navigation has no expiration date.

■ 18. Amend § 77.35 by revising the introductory text of paragraph (a), and paragraphs (c)(1) through (3) to read as follows:

§ 77.35 Extensions, terminations, revisions, and corrections.

(a) A sponsor may petition the FAA to revise or reconsider the determination based on new facts or to extend the effective period of the determination, provided that:

* * * * *

(c) * * *

(1) The sponsor submits evidence that an application for a construction permit/license was filed with the FCC for the associated site within six months of issuance of the determination; and

(2) The sponsor submits evidence that additional time is warranted because of FCC requirements; and

(3) Where the FCC issues a construction permit, a final Determination of No Hazard to Air Navigation is effective until the date prescribed by the FCC for completion of the construction. If a sponsor needs to extend the original FCC completion date, they must also request an extension of the FAA determination.

* * * * *

■ 19. Revise § 77.37 to read as follows:

§ 77.37 General.

(a) A petition for a discretionary review of a determination, revision, or extension of a determination issued by the FAA may be made by:

(1) The sponsor;

(2) Any person that provided a substantive aeronautical comment on a proposal in an aeronautical study;

(3) Any person that provided a substantive aeronautical comment on the proposal but was not given an opportunity to state it.

(b) A petition for discretionary review for a Determination of No Hazard that is issued for a temporary structure, marking and lighting requirements, or when a proposed structure or alteration does not exceed obstruction standards contained in subpart C of this part may not be filed by any person.

Issued under authority provided by 49 U.S.C. 106(f), 44701(a)(5) and 44718 in Washington, DC.

Alyce Hood-Fleming,

Vice President, Mission Support Services, Air Traffic Organization.

[FR Doc. 2024–26741 Filed 11–15–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

[DOL Docket No. ETA–2024–0001]

RIN 1205–AC15

Employer-Provided Survey Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor (Department or DOL) proposes to amend

its regulations for employer-provided wage surveys for the H–2B temporary labor certification program. The regulations were published in the *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program* final rule (2015 Wage Rule). This notice of proposed rulemaking (NPRM or proposed rule) proposes to amend those regulations consistent with recent Federal litigation by clarifying existing requirements for employer-provided surveys for the H–2B program, proposing new requirements, and proposing to eliminate Form ETA–9165, *Employer-Provided Survey Attestations to Accompany H–2B Prevailing Wage Determination Request Based on a Non-OEWS Survey* (Form ETA–9165).

DATES: Interested persons are invited to submit written comments on the proposed rule on or before January 17, 2025.

ADDRESSES: You may submit comments electronically by the following method:

Federal eRulemaking Portal: https://www.regulations.gov/. Follow the instructions on the website for submitting comments.

Instructions: Include the agency's name and docket number ETA–2024–0001 in your comments. All comments received will become a matter of public record and may be posted without change to *https://www.regulations.gov/.* Comments submitted after the deadline for submission will not be considered. Please do not submit comments containing trade secrets, confidential or proprietary commercial or financial information, personal health information, sensitive personally identifiable information (for example, social security numbers, driver's license or state identification numbers, passport numbers, or financial account numbers), or other information that you do not want to be made available to the public. The agency reserves the right to redact or refrain from posting such information and libelous or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; or that contain hate speech directed at race, color, sex, sexual orientation, national origin, ethnicity, age, religion, or disability. Please note that depending on how information is submitted through *regulations.gov*, the agency may not be able to redact the information and instead reserves the right to refrain from posting the information or comment in such situations.

FOR FURTHER INFORMATION CONTACT: Michelle L. Paczynski, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5641, Washington, DC 20210, telephone: (202) 693–3700 (this is not a toll-free number). For persons with a hearing or speech disability who need assistance to use the telephone system, please dial 711 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

Preamble Table of Contents

I. Acronyms and Abbreviations

APA Administrative Procedure Act
BLS Bureau of Labor Statistics
CATA Comité de Apoyo a los Trabajadores Agrícolas
CBA collective bargaining agreement
DBA Davis-Bacon Act
DHS U.S. Department of Homeland Security
DOL U.S. Department of Labor
FAQ Frequently Asked Questions
FY fiscal year
GAL General Administration Letter
HR human resources
HSA Homeland Security Act of 2002
IFR interim final rule
INA Immigration and Nationality Act
MOU memorandum of understanding
NPRM notice of proposed rulemaking
NPWC National Prevailing Wage Center
OES Occupational Employment Statistics
OEWS Occupational Employment and Wage Statistics
OFLC Office of Foreign Labor Certification
OIRA Office of Information and Regulatory Affairs
OMB Office of Management and Budget
PRA Paperwork Reduction Act
PWD prevailing wage determination
SCA McNamara-O'Hara Service Contract Act
SESA State employment service agencies
SOC Standard Occupational Classification
UMRA Unfunded Mandates Reform Act of 1995

II. Background

A. The Statutory and Regulatory Framework

The Immigration and Nationality Act (INA), as amended, establishes the H–2B nonimmigrant classification for a non-agricultural temporary worker ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.'' 8 U.S.C. 1101(a)(15)(H)(ii)(b).[1] Employers must petition the Department of Homeland Security (DHS) for classification of a prospective temporary worker as an H–2B nonimmigrant. 8 U.S.C. 1184(c)(1). DHS must approve this petition before the beneficiary can be considered eligible for an H–2B visa or H–2B status. *Id.* In addition, the INA requires that ''[t]he question of importing any [foreign worker] as [an H–2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS] [2] after consultation with appropriate agencies of the Government.'' *Id.*

Pursuant to this statutory mandate to consult with ''appropriate agencies of the Government'' to determine eligibility for H–2B status, DHS (and the former Immigration and Naturalization Service) has long recognized that the most effective administration of the H–2B program requires consultation with

[1] For ease of reference, sections of the INA are referred to by their corresponding section in the U.S. Code.

[2] In accordance with sec. 1517 of title XV of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the INA describing functions that were transferred from the Attorney General or other Department of Justice official to DHS by the HSA ''shall be deemed to refer to the Secretary'' of Homeland Security. *See* 6 U.S.C. 557 (2002) (codifying HSA, title XV, sec. 1517); 6 U.S.C. 542; 8 U.S.C. 1551).

DOL to advise whether U.S. workers capable of performing the temporary services or labor are available.[3]

Accordingly, DHS regulations require that an H–2B petition for temporary employment in the United States must be accompanied by an approved temporary labor certification from DOL. 8 CFR 214.2(h)(6)(iii)(A) and (iv)(A). The temporary labor certification serves as DOL's advice to DHS with respect to whether a qualified U.S. worker is available to fill the petitioning H–2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* 8 CFR 214.2(h)(6)(iii)(A). In addition, as part of DOL's certification, DHS regulations require DOL to ''determine the prevailing wage applicable to an application for temporary labor certification in accordance with the Secretary of Labor's regulation at 20 CFR 655.10.'' 8 CFR 214.2(h)(6)(iii)(D). Section 655.10, in turn, requires that any prospective H–2B employer first obtain from DOL a prevailing wage determination (PWD) before filing its application with DOL for temporary labor certification. 20 CFR 655.10(a).

B. The 2008 Rule, the Related Litigation, and the Attempted 2011 Wage Rule

In 2008, DOL issued regulations related to its role in the H–2B temporary worker program, including a methodology for determining the minimum wage that a prospective H–2B employer must offer, advertise in recruitment, and pay. *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes* (2008 Rule), 73 FR 78020 (Dec. 19, 2008). The 2008 Rule provided, *inter alia,* that the prevailing wage would be the collective bargaining agreement (CBA) wage rate if the job opportunity was covered by an agreement negotiated at arms' length between a union and the employer; the Occupational Employment and Wage Statistics (OEWS)[4] survey wage rate if there was no CBA; a survey if an employer elected to provide an acceptable survey; or a wage rate under the Davis-Bacon Act (DBA) or the McNamara-O'Hara Service Contract Act (SCA), if one was available for the occupation in the area of intended employment. *Id.* at 78056. The 2008 Rule and the agency guidance implementing it required that when PWDs were based on the OEWS survey, the wage had to be structured to contain four tiers to reflect skill and experience.[5] *Id.* at 78056, 78068. While DOL subjected most provisions of the 2008 Rule to the Administrative Procedure Act's (APA) notice-and-comment requirements, because the agency had already been implementing the four-tier wage structure in the H–2B program pursuant to sub-regulatory guidance, DOL did not seek public comments on the use of the four-tier structure when promulgating the 2008 Rule. *See id.* at 78031.

In 2009, a lawsuit was filed under the APA challenging several aspects of the 2008 Rule. *See Comité de Apoyo a los Trabajadores Agrícolas (CATA)* v. *Solis,* No. 09–cv–240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (*CATA I*). Among the issues raised in that litigation was the use of the four-tier wage structure in the H–2B program. In its decision, the district court ruled that, substantively, DOL had violated the APA by failing to adequately explain its reasoning for adopting skill and experience levels as part of the H–2B PWD process. *Id.* at *19. The court also found that the four-tier wage structure was a legislative rule subject to the APA's notice-and-comment provision, and that DOL had failed to subject it to notice and comment. *Id.* The court ordered promulgation of ''new rules concerning the calculation of the prevailing wage rate in the H–2B program that are in compliance with the [APA]'' within 120 days. *Id.* at *27.

Consequently, after issuing an NPRM on October 5, 2010, DOL published a final rule on January 19, 2011. *See Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program,* 75 FR 61578 (Oct. 5, 2010); *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program* (2011 Wage Rule), 76 FR 3452, 3465–3467 (Jan. 19, 2011). The 2011 Wage Rule eliminated the four-tier structure. *Id.* at 3458–3461. The 2011 Wage Rule set the prevailing wage as the highest of the OEWS arithmetic mean for each occupational category in the area of intended employment; the applicable SCA or DBA wage rate; or the CBA wage. The use of employer-provided surveys was eliminated except when the job opportunity: (1) was in a geographic location not included in the Bureau of Labor Statistics' (BLS) data collection for the OEWS (*e.g.,* the Commonwealth of the Northern Mariana Islands); or (2) was not ''accurately represented'' within the OEWS job classification used in those surveys. *Id.* at 3466–3467. In deciding to so limit the submission and use of employer-provided surveys, the Department stated that the OEWS wage survey was ''the most consistent, efficient, and accurate means of determining the prevailing wage rate for the H–2B program.'' *Id.* at 3465.

The effective date of the 2011 Wage Rule was originally set for January 1, 2012—a date the *CATA* plaintiffs challenged, seeking an earlier one—but Congress ultimately short-circuited the dispute by an enacting an appropriations rider prohibiting the Department from implementing the 2011 Wage Rule. Public Law 112–55, 125 Stat. 552, Div. B, title V, sec. 546 (Nov. 18, 2011). DOL therefore extended the effective date to October 1, 2012. 76 FR 82115 (Dec. 30, 2011). Subsequent appropriations contained the same restriction prohibiting DOL's use of appropriated funds to implement, administer, or enforce the 2011 Wage Rule, necessitating additional rulemaking to further delay the effective date of the 2011 Wage Rule.[6] 77 FR 60040 (Oct. 2, 2012) (extending the effective date to March 27, 2013); 78 FR

[3] *See, e.g., Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,* 55 FR 2606, 2617 (Jan. 26, 1990) (''The Service must seek advice from the Department of Labor under the H–2B classification because the statute requires a showing that unemployed U.S. workers are not available to perform the services before a petition can be approved. The Department of Labor is the appropriate agency of the Government to make such a labor market finding. The Service supports the process that the Department of Labor uses for testing the labor market and assuring that wages and working conditions of U.S. workers will not be adversely affected by employment of alien workers.'').

[4] Prior to March 31, 2021, this survey—conducted by the Department's Bureau of Labor Statistics (BLS)—was known as the Occupational Employment Statistics (OES) survey. For the sake of consistency, however, the Department uses the term OEWS throughout.

[5] Because the OEWS survey does not capture information on the skills or responsibilities of the workers whose wages are being reported, the four-tiered wage structure, adapted from the statutorily required four tiers applicable to the H–1B visa program under 8 U.S.C. 1182(p), was derived by mathematical formula to reflect ''entry level,'' ''qualified,'' ''experienced,'' and ''fully competent'' workers. *See id.* at 78068; Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised (revised Nov. 2009) (2009 Prevailing Wage Guidance), *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.*

[6] These include the Consolidated Appropriations Act of 2012, Public Law 112–74, 125 Stat. 786 (Dec. 23, 2011); Continuing Appropriations Resolution, 2013, Public Law 112–175, 126 Stat. 1313 (Sept. 28, 2012); Consolidated and Further Continuing Appropriations Act, 2013, Public Law 113–6, 127 Stat. 198 (Mar. 26, 2013); Continuing Appropriations Act, 2014, Public Law 113–46, 127 Stat. 558 (Oct. 17, 2013); and Joint Resolution Making Further Continuing Appropriations for Fiscal Year 2014, Public Law 113–73, 128 Stat. 3 (Jan. 15, 2014).

19098 (Mar. 29, 2013) (extending the effective date to October 1, 2013).

Given Congress's prohibition against implementation of the 2011 Wage Rule, the Department continued to operate the H–2B program under the 2008 Rule, which *CATA I* had invalidated but not vacated. The *CATA* plaintiffs, however, sued again and on March 31, 2013, obtained a permanent injunction against application and vacatur of the four-tier OEWS structure in the 2008 Rule. *CATA* v. *Solis,* 933 F. Supp. 2d 700, 716 (E.D. Pa. 2013) (*CATA II*). In particular, the court vacated and remanded 20 CFR 655.10(b)(2), giving DOL 30 days to come into compliance with its ruling finding invalid the four-tier OEWS skill level and wage structure. *Id.* In the interim, DOL was unable to issue the vast majority of H–2B PWDs, which were based on the OEWS survey.

C. The 2013 Interim Final Rule

In compliance with the *CATA II* court's ruling, DOL published an interim final rule (IFR). *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047 (Apr. 24, 2013) (2013 IFR).[7] The 2013 IFR became effective on the date of publication, with the agencies asserting that they had ''good cause'' for an immediate effective date pursuant to 5 U.S.C. 553(d)(3). Given the vacatur of the 2008 Rule, the agencies would have been forced to cease processing employers' requests for PWDs and temporary labor certifications without an immediate effective date and thus unable to continue to provide the advice that DHS had determined to be necessary under 8 U.S.C. 1184(c)(1)—as implemented in the DHS regulation at 8 CFR 214.2(h)(6)—for DHS to fulfill its statutory responsibility to adjudicate H–2B petitions. *Id.* at 24050.

The 2013 IFR did not revise or amend 20 CFR 655.10(f) of the 2008 Rule, leaving intact the permitted use of employer-provided surveys. *Id.* at 24054–24055. Noting that ''DOL still has the concerns expressed in the 2011 rule about the consistency, reliability and validity'' of employer-provided surveys, the 2013 IFR stated that DOL and DHS invited comment on ''whether to permit the continued use of employer-submitted surveys.'' *Id.* at 24055. The 2013 IFR invited comment on the following: all aspects of the prevailing wage methodology of 20 CFR 655.10, including, among other things, whether the OEWS mean was the appropriate basis for determining the prevailing wage; whether wages based on the DBA or the SCA should be used to determine the prevailing wage and if so, to what extent; comments on the accuracy and reliability of private surveys, including ''state-developed'' surveys; and whether the continued use of employer-provided surveys should be permitted and if so, how to better ensure their methodological soundness. *Id.*[8]

The comment period closed on June 10, 2013, and the agencies received over 300 comments on all aspects of the H–2B wage methodology from interested parties.[9] Meanwhile, because Congress continued to prohibit the use of funds to implement the 2011 Wage Rule, DOL indefinitely delayed its effective date. *See Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program; Delay of Effective Date* (Indefinite Delay Rule), 78 FR 53643, 53645 (Aug. 30, 2013). Although the appropriations prohibition was removed as part of the Department's fiscal year (FY) 2014 appropriation, Consolidated Appropriations Act, 2014, Public Law 113–76, 128 Stat. 5, DOL has not since revisited the Indefinite Delay Rule.

D. Vacatur of the 2013 Interim Final Rule

In 2014, the *CATA* plaintiffs sued for the third time, challenging the 2013 IFR's continued allowance of employer-provided surveys to set the prevailing wage under 20 CFR 655.10(f). *See CATA* v. *Perez,* No. 2:14–02657, 2014 WL 4100708 (E.D. Pa. Jul. 23, 2014). In addition, the *CATA* plaintiffs challenged DOL's ongoing use under the 2013 IFR of the 2009 Prevailing Wage Guidance,[10] which continued to permit surveys to incorporate skill levels at least with respect to employer-provided surveys. *Id.* The district court dismissed the case on procedural grounds. On December 5, 2014, however, the Court of Appeals for the Third Circuit reversed, vacating both 20 CFR 655.10(f) and the 2009 Prevailing Wage Guidance. *CATA* v. *Perez,* 774 F.3d 173, 191 (3d Cir. 2014) (*CATA III*).

The *CATA III* court invalidated the use of employer-provided surveys in the H–2B program on both substantive and procedural grounds. First, the court held that DOL's failure to explain the broad acceptance of employer-provided surveys where an OEWS wage is available was procedurally invalid, particularly because this decision was a policy change from the 2011 Wage Rule's prohibition of most employer-provided surveys as an alternative to the OEWS. *Id.* at 187–88. Next, the court held that the employer-provided survey provision of the 2013 IFR, § 655.10(f), was arbitrary, and therefore substantively invalid under the APA, given DOL's findings in the 2011 Wage Rule, 76 FR 3465 (Jan. 19, 2011), that the OEWS is the ''most consistent, efficient, and accurate means of determining the prevailing wage rate for the H–2B program.'' *CATA III,* 774 F.3d 173 at 189. Further, the court held that § 655.10(f) was substantively invalid under the APA because it permitted wealthy employers to commission surveys that resulted in a lower prevailing wage than those paid by less affluent employers without means to produce such surveys and resulted in significant variations in the prevailing wage within a single occupation in the same geographic location. *Id.* at 189–90. Finally, the court held that the 2009 Prevailing Wage Guidance violated the APA because it allowed employer-provided surveys containing tiered wages based on skill levels. This, the court held, conflicted with the *CATA II* order, which invalidated the four-tier OEWS structure. *Id.* at 190–91.

The *CATA III* court ultimately ''direct[ed] that private surveys no longer be used in determining the mean rate of wage for occupations except where an otherwise applicable OE[W]S survey does not provide any data for an

[7] DOL and DHS published the 2013 IFR jointly in light of a then-recent court decision indicating DOL lacked authority to promulgate H–2B rules. *See Bayou Lawn & Landscape Servs.* v. *DOL,* 713 F.3d 1080, 1085 (11th Cir. 2013) (affirming preliminary injunction based in part on plaintiffs' likelihood of succeeding on their claim that DOL lacked authority to promulgate H–2B rules). Subsequent courts, reviewing the matter on the merits, reached the opposite conclusion. *See Outdoor Amusement Bus. Ass'n* v. *DHS,* 983 F.3d 671, 685 (4th Cir. 2020) (DOL has authority to promulgate H–2B rules); *La. Forestry Ass'n* v. *DOL,* 745 F.3d 653, 675 (3d Cir. 2014) (same).

[8] Specifically, the 2013 IFR invited comment on the following questions with respect to employer-provided surveys: ''Are there methodological standards that can or should be included in the regulation that would ensure consistency, validity and reliability of employer-provided surveys? Are there industries in which employers historically and routinely rely on employer-submitted surveys that should be permitted to do so because of the well-developed, historical, industry-wide practice, or for other reasons? Are there state-developed wage surveys, such as state agricultural surveys, or surveys from other agencies, such as maritime agencies, that could provide data that would be useful in setting prevailing wages? Should employer surveys that include data based on wages paid to H–2B or other nonimmigrant workers be permitted in establishing a prevailing wage that does not adversely affect U.S. workers? If so, under what circumstances?'' 78 FR 24055 (Apr. 24, 2013).

[9] A substantial number of comments on the 2013 IFR repeated, to a great extent, the same arguments that had been raised in connection with the 2011 rulemaking. *See* 76 FR 3458–3463 (Jan. 19, 2011).

[10] The 2009 Prevailing Wage Guidance governed the methodology for employer-provided surveys across DOL-administered wage programs. *See* 2009 Prevailing Wage Guidance, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.*

occupation in a specific geographical location, or where the OE[W]S survey does not accurately represent the relevant job classification.'' *Id.* DOL immediately ceased accepting employer-provided wage surveys. 80 FR at 24151 (Apr. 29, 2015).

E. The 2015 Wage Rule, the 2016 Appropriations Rider, and DOL's Guidance Regarding the Rider's Effect on the Rule

Soon after the *CATA III* decision, the court in *Perez* v. *Perez,* No. 14–cv–682 (N.D. Fla. Mar. 4, 2015), vacated the 2008 Rule and permanently enjoined DOL from applying or enforcing it, thus creating a regulatory void. DOL had to cease operating the H–2B program briefly until it obtained a temporary stay of the *Perez* court's order until May 15, 2015. 80 FR at 24151 (Apr. 29, 2015). On April 29, 2015, DOL and DHS jointly published two rules: the *Temporary Non-Agricultural Employment of H–2B Aliens in the United States* IFR, 80 FR 24042 (Apr. 29, 2015), and the 2015 Wage Rule, *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program,* 80 FR 24146 (Apr. 29, 2015). The 2015 Wage Rule acknowledged the *CATA III* court's substantive concerns regarding the validity of employer-provided surveys in the H–2B program and stated that ''DOL's options for accepting such surveys under this final rule are now necessarily more limited than under the 2013 IFR.'' *Id.* at 24151. Referring to the questions presented to the public in the 2013 IFR for any ''additional data on the accuracy and reliability of private surveys covering traditional H–2B occupations to allow for further factual findings on the sufficiency of private surveys for setting prevailing wage rates,'' the 2015 Wage Rule discussed the comments submitted by worker advocacy groups, employers and employer associations, and associations of seafood processing employers, among others. *Id.* at 24166–24169.

After reviewing the comments provided, and recognizing the concerns underscored by the *CATA III* decision, the 2015 Wage Rule reiterated DOL's position in the 2011 Wage Rule, stating ''DOL experience reviewing employer-provided surveys since 2011 has not provided any demonstrable evidence that the wage information produced from nongovernment surveys is any more consistent or reliable than DOL determined was the case four years ago.'' *Id.* at 24168. The 2015 Wage Rule went on to state that, given DOL's administrative experience regarding employer-provided surveys, the comments received following the 2013 IFR, and the court's decision in *CATA III,* ''the Departments have decided to allow the submission of employer-provided surveys to set the prevailing wage in H–2B in limited circumstances.'' *Id.* The first two such circumstances tracked those endorsed by the court in *CATA III,* permitting ''the use of a nongovernmental employer-provided survey to set the prevailing wage only where the OE[W]S survey does not provide any data for an occupation in a specific geographical location, or where the OE[W]S survey does not accurately represent the relevant job classification.'' *Id.*

When submitting such a wage survey, an employer was required to include ''specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey.'' 20 CFR 655.10(f)(4). Further, the employer was required to attest, via Form ETA–9165, that the survey was not conducted by the employer or its agents, that the surveyor either contacted a randomized sample of relevant employers or attempted to contact them all, and, among other things, that the ''survey includes wage data from at least 30 workers and three employers.'' *Id.* at § 655.10(f)(4)(i) through (iii).

Additionally, the 2015 Wage Rule included a ''third, limited category of acceptable employer-provided surveys, even where the occupation is sufficiently represented in the OE[W]S.'' 80 FR 24169–24170 (Apr. 29, 2015). In reaching this conclusion, the Departments quoted the preamble to the 2011 Wage Rule, which stated ''the prevailing wage rate is best determined through reliable Government surveys of wage rates, rather than employer-provided surveys that employ varying methods, statistics, and surveys.'' *Id.* at 24170 (citing 76 FR 3465, Jan. 19, 2011). The Departments stated that, consistent with their assessment that government surveys are reliable, ''surveys conducted and issued by a state represent an additional category of reliable government surveys.'' *Id.* at 24170. The preamble to the 2015 Wage Rule further reasoned that as the State-conducted surveys were capable of meeting the methodological standards included in the rule, and if issued without regard to the interest of any employer in the outcome of the wage reported from the survey, such surveys would be ''generally reliable and an adequate substitute for the OE[W]S.'' *Id.*

Shortly after promulgation of the 2015 Wage Rule, however, Congress included in the Department's FY 2016 appropriation a provision that mandated broader use of employer-provided surveys:

> The determination of prevailing wage for the purposes of the H–2B program shall be the greater of—(1) the actual wage level paid by the employer to other employees with similar experience and qualifications for such position in the same location; or (2) the prevailing wage level for the occupational classification of the position in the geographic area in which the H–2B nonimmigrant will be employed, based on the best information available at the time of filing the petition. In the determination of prevailing wage for the purposes of the H–2B program, the Secretary shall accept private wage surveys even in instances where Occupational Employment Statistics survey data are available unless the Secretary determines that the methodology and data in the provided survey are not statistically supported.

Consol. Appropriations Act, 2016, Public Law 114–113, sec. 112, 129 Stat. 2242, 2599 (Dec. 18, 2015). Every subsequent Appropriations Act has included the same provision.[11] Shortly after the first of the appropriations riders, DOL published a Frequently Asked Questions (FAQ) on its website stating that it would use the criteria in the 2015 Wage Rule to determine whether an employer-provided survey was ''statistically supported'' within the meaning of the appropriations rider.[12]

F. Invalidation of the 2015 Wage Rule

The United States District Court for the District of Columbia issued a decision on December 23, 2022, holding the 2015 Wage Rule—specifically 20 CFR 655.10(f)(2) and (f)(4)—to be procedurally invalid for failure to comply with the notice-and-comment requirement of the APA, and further

[11] This language has been included in each subsequent appropriation. *See* Further Consol. Appropriations Act, 2024, Public Law 118–47, Div. D, title I, sec. 110, 138 Stat. 460, 646 (2024); Consol. Appropriations Act, 2023, Public Law 117–328, Div. H, title I, sec. 110, 136 Stat. 4459, 4852 (2023); Consol. Appropriations Act, 2022, Public Law 117–103, sec. 110, 136 Stat. 49, 439 (2022); Consol. Appropriations Act, 2021, Public Law 116–260, sec. 110, 134 Stat. 1182, 1564–65 (2020); Further Consol. Appropriations Act, 2020, Public Law 116–94, sec. 110, 133 Stat. 2534, 2554 (2019); Dep't of Defense, Labor, Health and Hum. Serv., and Educ. Appropriations Act, 2019, and Continuing Appropriations Act, 2019, Public Law 115–245, sec. 111, 132 Stat. 2981, 3065 (2018); Consol. Appropriations Act, 2018, Public Law 115–141, sec. 112, 132 Stat. 348, 712 (2018); Consol. Appropriations Act, 2017, Public Law 115–31, sec. 112, 131 Stat. 135, 518–19 (2017).

[12] *See* DOL, Emp't & Training Admin., Effects of the 2016 Dep't of Labor Appropriations Act at 4 (Dec. 29, 2015), *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H2B_Prevailing_Wage_FAQs_DOL_Appropriations_Act.pdf.*

holding that DOL's application of the 2015 Wage Rule—specifically paragraph (f)(3)—to PWDs accepting a 2021 employer-provided wage survey was unlawful. *Williams, et al.* v. *Walsh, et al.,* 648 F.Supp.3d 70, 75 (D.D.C. 2022). Regarding the first holding, the court reasoned that although the 2015 Wage Rule purported to finalize the 2013 IFR, the *CATA III* decision had vacated the 2013 IFR. *Id.* at 91. As a result of the *CATA III* vacatur, the *Williams* court concluded that the agencies were required to either engage in a new notice-and-comment procedure or invoke the APA's good-cause exception to promulgate the 2015 Wage Rule as an IFR. *Id.* Because the agencies did neither, the court ruled that the 2015 Wage Rule was procedurally deficient, specifically invalidating paragraphs (f)(2) and (f)(4). *Id.* Having reached this conclusion with respect to the 2015 Wage Rule's procedural defects, the Court did not reach Plaintiffs' substantive facial challenges to the 2015 Wage Rule.

Regarding the Plaintiffs' as-applied challenge to the rule, the Court held that DOL erred in accepting the 2021 wage survey that had been submitted by some twenty employers because the survey had been expanded beyond the area of intended employment for stated reasons that did not meet the requirements of paragraph (f)(3). *Id.* at 95–96.

The Court remanded the case to the agencies for further consideration consistent with its opinion. *Id.* at 97–99. This rulemaking is being undertaken consistent with the court's order.

G. The Department's Authority To Promulgate This Rule

As discussed above, the INA obligates DHS to consult with ''appropriate agencies of the Government'' in considering an employer's petition for visas for nonimmigrant workers. 8 U.S.C. 1184(c)(1). DHS regulations designate the Secretary of Labor as an appropriate consultant regarding the H–2B program, specify that the Secretary shall establish procedures for administering the labor certification program, and require an employer's petition to employ H–2B workers to be accompanied by an approved temporary labor certification from the Secretary. 8 CFR 214.2(h)(6)(iii)(D), (iv); *see also* 20 CFR 655.1. The Department's authority to promulgate regulations to structure and administer the H–2B temporary labor certification process, including the determination of the prevailing wage, has been judicially upheld. *Outdoor Amusement Bus. Ass'n* v. *DHS,* 983 F.3d 671, 684–89 (4th Cir. 2020) (DOL possesses independent H–2B rulemaking authority); *La. Forestry Ass'n* v. *DOL,* 745 F.3d 653, 669 (3d Cir. 2014) (same).[13]

In addition, the language in the appropriations riders discussed in Section II.E, above, specifically authorizes the Secretary of Labor to determine whether the ''methodology and data'' used in an employer-provided wage survey is ''statistically supported.'' *See, e.g.,* Further Consol. Appropriations Act, 2024, Public Law 118–47, Div. D, title I, sec. 110, 138 Stat. 460, 646 (2024); Consol. Appropriations Act, 2023, Public Law 117–328, Div. H, title I, sec. 110, 136 Stat. 4459, 4852 (2023). The methodological and data criteria proposed here implement that statutory requirement. Accordingly, as part of its consultative role and based on the language in recent appropriations riders, the Department possesses clear authority to promulgate the proposed rule.

III. Summary of Proposed Revisions to 20 CFR Part 655; Subpart A; 20 CFR 655.10

In compliance with the *Williams* ruling, the Department hereby provides notice and an opportunity to comment on the proposed employer-provided wage survey provisions of 20 CFR 655.10(f). The Department proposes to allow employers to submit wage surveys in the same limited circumstances as the 2015 Wage Rule, the current rule, does. Specifically, if the job opportunity is not covered by a CBA or a professional sports league's rules or regulations, an employer would be permitted to submit a survey only if: (1) the survey was independently conducted and issued by a State, including any State agency, State college, or State university; (2) the survey is submitted for a geographic area where the BLS does not collect OEWS survey data, or in a geographic area where the OEWS survey provides an arithmetic mean only at a national level for workers employed in the Standard Occupational Classification (SOC); or (3) the job opportunity is within an occupational classification of the SOC system designated as an ''All Other'' classification.[14] The proposed rule, however, would eliminate the option that such a survey could report the median wages of workers performing the same or substantially similar job duties in the area of intended employment. Rather, the proposed rule would only allow the submission of a survey that includes the arithmetic mean of the wages of those workers.

The proposed rule, like the current rule, would require an employer-provided survey to contain specific information about the survey methodology, such as sample size and source, sample selection procedures, and survey job descriptions, to allow the National Prevailing Wage Center (NPWC) to determine the adequacy of the survey data and validity of the methodology used to conduct the survey. The proposed rule, however, would eliminate the standard survey attestation form, Form ETA–9165, *Employer-Provided Survey Attestations to Accompany H–2B Prevailing Wage Determination Request Based on a Non-OES Survey* (Form ETA–9165), which H–2B employers must complete and submit under the current rule when they request a survey-based prevailing wage. Instead, the proposed rule would require the employer to submit the survey to the NPWC for evaluation at the same time the employer submits its Form ETA–9141 requesting a PWD from the NPWC.

Additionally, the proposed rule would include new requirements to follow-up at least three times with non-respondents and to keep the survey open for accepting responses for at least 14 calendar days after the issuance of the third follow-up. The follow-up requirement would reduce sampling bias, and the additional 14-calendar day period would maximize the amount of wage data collected. Together, these two new requirements would result in more accurate surveys. The proposed rule would, like the current rule, provide that if the minimum sample size of 3 employers and 30 workers is not met,

[13] Although other courts have reached a different conclusion at the preliminary injunction stage of litigation challenging the Department's authority to issue regulations, *Bayou Lawn & Landscape Servs.,* 713 F.3d 1080, 1085 (11th Cir. 2013) (affirming preliminary injunction, holding the plaintiffs were likely to succeed on claim that DOL lacked authority to promulgate H–2B rules), or under a separate theory of rulemaking authority, *G.H. Daniels* v. *Perez,* 626 F. Appx. 205 (10th Cir. 2015) (DHS's 2008 H–2B rule improperly sub-delegated certification authority to DOL), the Department disagrees with the conclusions reached in those cases—which were either not merits decisions or non-precedential—regarding its rulemaking authority for the reasons explained in this NPRM.

[14] As discussed further in Section III.B, below, the Department recognizes that the language contained in every appropriations act since 2016 supersedes these limitations and requires acceptance of any employer-provided wage survey unless it determines that the methodology and data in the survey are not ''statistically supported.'' *See* n.11, above. The Department proposes to retain the same limitations as in the current rule in the event that the language is eliminated from or modified in future appropriations acts. When Congress annually reenacts a provision in appropriations acts, ''common sense suggests—and courts are free to presume—that Congress did not consider the language as creating permanent law.'' *Atlantic Fish Spotters Ass'n* v. *Evans,* 321 F.3d 220, 227 (1st Cir. 2003) (citing *U.S.* v. *Vulte,* 233 U.S. 509, 514 (1914)).

the geographic area of the survey may be expanded beyond the area of intended employment to other contiguous geographic areas in order to meet the minimum sample size requirement.

The Department seeks public comment on all aspects of this proposed rule discussed in Sections III.A through III.F below, especially the proposed revisions to the current § 655.10(f).

A. Discussion of Proposed Technical Changes to 20 CFR 655.10

Consistent with the 2015 Wage Rule, the Department proposes the following technical changes. First, the proposed rule would retain § 655.10(a) with a technical change to spell out the phrase ''prevailing wage determination'' and placing ''PWD'' in parentheses.

Second, this proposed rule would retain § 655.10(a) and (b), with three technical changes in § 655.10(b) by inserting the word ''Wage'' between the words ''and Statistics'' and inserting a ''W'' into ''OES'' in the parenthetical ''(OES).'' Also, the proposed rule would replace the term ''OFLC'' with ''the NPWC'' in § 655.10(b)(2). These technical changes are for consistency with other sections of this proposed rule.

Third, this proposed rule would retain § 655.10(e) with technical changes to: (1) replace the word ''provide'' with the word ''determine''; (2) change the placement of ''Form'' in the parenthetical ''(ETA Form-9141)'' to precede ''ETA''; and (3) replace ''its'' with the phrase ''the determination and the NPWC's'' for clarity and to be consistent with other sections of this proposed rule.

B. Discussion of Proposed Revisions to 20 CFR 655.10(f)(1)

The Department proposes to allow employers to submit wage surveys in the same three circumstances as the current rule does. The first two circumstances would remain unchanged, and the third would be revised as discussed in Sections III.B.1 through III.B.3, below. The Department, however, does not intend to apply or enforce these limitations on wage surveys as long as the language contained in the appropriations acts discussed above remains in effect. That language requires the Secretary to ''accept private wage surveys even in instances where Occupational Employment Statistics survey data are available unless the Secretary determines that the methodology and data in the provided survey are not statistically supported.'' [15] This language supersedes the current § 655.10(f)(1) and would supersede the proposed § 655.10(f)(1) as long as that language remains in effect. The Department would apply and enforce the proposed § 655.10(f)(1) only if and when Congress eliminates that language.

1. State Conducted Survey

Consistent with current § 655.10(f)(1)(i), this proposal would permit employers to submit prevailing wage surveys that are independently conducted and issued by a State, including any State agency, State college, or State university. As stated in the preamble to the 2015 Wage Rule, the Department continues to believe that surveys that are independently conducted and issued by a State are as reliable as ''Government'' surveys.[16] Since a ''state must independently conduct and issue the survey, [this requirement] means that the state must design and implement the survey without regard to the interest of any employer in the outcome of the wage reported from the survey.'' [17] In addition, a State would have to satisfy the proposed rule's methodological and data requirements to be used to establish a PWD.[18] The Department considers State agencies to generally be neutral third parties that are free from bias and have no self-interest or motivation with respect to the result of the survey. Based on its ''substantial experience with wage surveys conducted by the states,'' the Department continues to think that surveys conducted by a State agency are appropriate as a wage source for the H–2B program provided they meet the methodological standards described below.[19]

Where a State conducts a survey that meets the methodological and data requirements in this proposed rule, an employer may attach the State-conducted wage survey to a prevailing wage request for consideration as a wage source for its job opportunity. While there may be concerns about undue influence over the development and administration of a survey, the Department proposes to allow the use of surveys conducted by State agencies, such as State agriculture or maritime agencies, or State colleges and universities. These entities must design and implement the survey without regard to the interest of any employer in the outcome of the wage reported from the survey. In addition, to satisfy this requirement, a State official must approve the survey.[20]

2. OEWS Data Limitation in Certain Geographic Areas

Consistent with current § 655.10(f)(1)(ii), the Department proposes that employers may submit surveys where the OEWS survey does not collect data in a geographic area, or where the OEWS reports a wage for the SOC based only on national data. For geographic areas where the OEWS does not collect data or does not collect enough data to report a wage (*e.g.,* because the sample size is too small), wage surveys could provide the Department with access to data it simply would not otherwise have. For geographic areas where only an OEWS national wage is available, a wage survey could provide data for the geographic area in which the job opportunity exists. Thus, this proposed rule reflects the Department's view that employers should be permitted to submit wage surveys where the Department does not have readily available or appropriate OEWS data to issue a prevailing wage for the occupation in the area of intended employment where the job opportunity will be performed. Acceptance of private wage surveys in these circumstances was expressly endorsed by the court in *CATA III*.[21]

3. OEWS Data Limitation in Certain SOC Codes

According to the BLS, the SOC system is used ''to classify workers and jobs into occupational categories for the purpose of collecting, calculating, analyzing, or disseminating data.'' [22] Occupations that have similar job duties, and in some cases, similar skills, education, and/or training, are classified in a distinct detailed SOC code.[23] Under the SOC system, occupations are assigned an SOC code based on the worker's job duties, not the worker's job title(s).[24] When workers do not perform job duties described in any distinct detailed occupation, the SOC system classifies the occupation as one contained within an ''All Other'' SOC code.[25] For example, according to the BLS, an ''All Other'' SOC code is 49–9099, Installation, Maintenance, and

[15] *See* n.11, above.

[16] *See* 80 FR 24146, 24170 (Apr. 29, 2015).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] 80 FR 24146, 24170 (Apr. 29, 2015).

[21] 774 F.3d at 191 (private surveys may be used ''where an otherwise applicable OE[W]S survey does not provide any data for an occupation in a specific geographic location'').

[22] *See* 2018 SOC Manual, *available at https://www.bls.gov/soc/2018/soc_2018_manual.pdf,* at 1.

[23] *Id.*

[24] *Id.* at 23.

[25] *Id.*

Repair Workers, All Other. The BLS provides these examples of occupational titles that would fall under this SOC code: Bowling Alley Mechanic, Fabric Awning Repairer, Fire Extinguisher Installer, Gasoline Pump Installer, Gunsmith, Parachute Repairer, Sail Repairer.[26]

Consistent with the 2015 Wage Rule, this proposed rule would continue to permit employers to submit surveys where the job opportunity is within an ''All Other'' SOC code. This situation, similar to the one described in the preceding section, is one in which a wage survey could provide the Department access to information that it either simply does not have or is more sufficiently tailored to the specific occupation in the employer's job opportunity. To meet this requirement, which is currently in § 655.10(f)(1)(iii)(B), an employer's job opportunity, as entered on the employer's prevailing wage application, must entail job duties requiring ''knowledge, skills, abilities, and work tasks that are significantly different than those in any SOC classification other than [an] 'all other' category.'' [27]

The Department proposes to delete the current § 655.10(f)(1)(iii)(A) and redesignate current § 655.10(f)(1)(iii)(B) as § 655.10(f)(1)(iii). Under the current § 655.10(f)(1)(iii)(A), the Department accepts an employer-provided survey when the employer's job opportunity is not included in an occupational classification of the SOC system; and under the current § 655.10(f)(1)(iii)(B), the Department accepts an employer-provided survey when the job opportunity is within an ''All Other'' SOC code. The Department proposes to delete subordinate paragraph (A) because, in the Department's experience, a more specific SOC code is invariably applicable. In assigning an SOC code, the Department may consider the employer's prior filing history.[28] Acceptance of private wage surveys when the job opportunity falls within an ''All Other'' SOC code is consistent with the court's decision in *CATA III.*[29]

C. Discussion of Proposed Revisions to 20 CFR 655.10(f)(2)

The proposed rule would require that employer-provided wage surveys provide the arithmetic mean of the wages of all workers performing the same or substantially similar job duties. This proposed rule uses the phrase ''substantially similar,'' which is derived from the Department's permanent labor certification regulation at 20 CFR 656.40(d).[30] For purposes of this proposed rule, ''workers performing the same or substantially similar job duties'' refers to workers that are similarly employed in the area of intended employment. The proposed rule would eliminate the exception in the current rule that ''if the survey provides a median but does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.'' [31] Under this proposed rule, if an employer submits a survey that provides only the median wage, the NPWC would issue an OEWS wage for such a PWD request.

The Department proposes this change to be consistent with the methodology applied when the OEWS survey is the wage source used to determine the prevailing wage rate. As stated in the preamble to the 2015 Wage Rule, ''[t]he mean is the average of all wages surveyed in an occupation in the geographic area, and in the . . . [occupations in the H–2B program], the mean represents the average wage paid to [workers] to perform that job. If the prevailing wage is set below the mean, the average wage of workers in the occupation would be drawn down, resulting in a depressive effect on U.S. workers' wages overall.'' [32] The preamble went on to note that ''the Department has set the wage rate at the mean rather than at the median because the mean provides equal weight to the wage rate received by each worker in the occupation across the wage spectrum and maintaining the OE[W]S mean provides regulatory continuity. As a result, when the prevailing wage is based on the OE[W]S survey, the Department will set it at the mean because it is the most appropriate wage to use in order to avoid immigration induced labor market distortions inconsistent with the requirements of INA.'' [33]

The Department's experience since the introduction of the 2015 Wage Rule is that H–2B employers have generally submitted surveys with the arithmetic mean of the wages of all workers performing the same or substantially similarly job duties in the area of intended employment for establishing an H–2B survey-based prevailing wage. As a result, the Department does not believe that elimination of the option to provide a survey using a median wage will have a significant practical effect because the NPWC rarely receives surveys that only include a median wage. Moreover, the Department continues to think that setting the wage below the mean would have a depressive effect on wages, and therefore this proposed change is consistent with the Department's obligation to ensure that U.S. workers' wages are not adversely affected when setting a prevailing wage for workers employed in the H–2B program.[34]

Under this proposed paragraph, the Department would continue to require that surveys provide the arithmetic mean of the wages of all workers similarly employed without regard to the immigration status of the workers surveyed. Doing so remains consistent with the Department's historical practice in the H–2B program [35] and would continue to promote consistency with the OEWS survey, which includes wage data from all workers without regard to their immigration status.[36] Further, commercial wage surveys generally do not exclude workers from the survey based on their immigration status, and, where the OEWS does not provide adequate information for the occupation or geographic location, the Department is concerned that requiring the exclusion of nonimmigrant workers would effectively bar employers from using such surveys—thus potentially leaving the Department without a reliable basis on which to set a prevailing wage. Therefore, as stated in the 2015 Wage Rule and continued in this proposed rule, the Department ''will not accept wage surveys that exclude the wages of U.S. workers or exclude the wages of nonimmigrant workers.'' [37]

D. Discussion of 20 CFR 655.10(f)(3)

Consistent with the 2015 Wage Rule, the Department would continue to allow, under proposed § 655.10(f)(3), employer-provided surveys to cover a geographic area beyond the area of intended employment only if: (1) the expansion is limited to geographic areas that are contiguous to the area of

[26] *Id.* at 181. Please note this example is based on the 2018 SOC codes, which are subject to future updates.

[27] 80 FR 24146, 24169 (Apr. 29, 2015).

[28] *See generally* 2018 SOC Manual, *available at https://www.bls.gov/soc/2018/soc_2018_manual.pdf.*

[29] 774 F.3d at 191 (private surveys may be used ''where the OE[W]S survey does not accurately represent the relevant job classification'').

[30] *See* 20 CFR 656.40(d) (''similarly employed'' means ''having substantially comparable jobs in the occupational category in the area of intended employment'').

[31] 20 CFR 655.10(f)(2).

[32] 80 FR 24146, 24159 (Apr. 29, 2015).

[33] *Id.*

[34] *See* 8 U.S.C. 1182(a)(5)(A)(i), (p).

[35] *Id.* at 24172.

[36] *Id.*

[37] *Id.*

intended employment; (2) the expansion is required to meet either the 30-worker or 3-employer minimum; and (3) the geographic area is expanded no more than necessary to meet these minimum requirements.

Consistent with the 2015 Wage Rule, a geographic area may be expanded in two ways. First, if an employer contracts with a surveyor familiar with the area of employment, the surveyor may determine before beginning the survey that the survey will not elicit a sufficient response to meet the regulatory requirements—for example, if there are not enough employers or workers in the local area of employment. In those cases, the surveyor may elect, at the outset, to survey a geographic area larger than the area of employment. In its submission to the NPWC, the survey must explain the decision to expand the survey area at the outset, and describe the extent of the expansion and the reason why the expansion was needed to meet the regulatory requirements.[38]

Second, a survey may be expanded incrementally. Expansion would be permitted only if the survey of the area of intended employment did not yield sufficient wage data to meet the minimum sample size requirements. In such circumstances, consistent with current guidance, ''the geographic area of consideration should not be expanded more than is necessary'' to meet either the 30-worker or 3-employer, or both, requirements of § 655.10(f)(4)(ii).[39] For example, as noted in the guidance, it would be ''appropriate to survey cities and counties that are in close proximity to the area of intended employment rather than using a State-wide average wage rate.'' [40] In all cases where an area larger than the area of intended employment is surveyed, the survey would have to establish that the expansion was necessary to meet either the 30-worker or 3-employer requirements of § 655.10(f)(4)(ii).[41]

Further, consistent with current practice, incremental geographic area expansion beyond the area of intended employment must be consistent with OEWS survey methodology,[42] meaning that a ''survey's expansion may take place across state lines, as long as the new area(s) added to the survey [is] contiguous to the area of intended employment in which the job opportunity is located and the expansion extends only as much as is necessary to satisfy the minimum sample size requirement.'' [43] Any such expansion is limited to geographic areas that are contiguous to the area of intended employment because the NPWC's ''experience demonstrates that some employers have submitted surveys that expanded the survey area using remote geographic areas located far from the job opportunity. [The Department] see[s] no reason for a survey to ignore areas immediately surrounding the job opportunity in favor of geographic areas located large distances from the job.'' [44] For example, in *Williams,* the surveyor expanded the geographic area of the survey without explaining why a statewide survey was needed instead of a ''more incremental approach.'' [45] Thus, the Department continues to believe that areas contiguous to the area of intended employment, which are closest to the area of intended employment, better reflect the wages in the area of intended employment. As such, this proposal seeks to guard against the potential for wage depression that may result when a survey is expanded to geographic areas that are remote from the location of the job opportunity and where wages may be lower.

The Department is proposing clarifying guidance on the steps for conducting geographic area expansion if the area of intended employment surveyed area does not meet the 30-worker and 3-employer requirements under proposed § 655.10(f)(4)(ii). In particular, if a survey is incrementally expanded beyond the area of intended employment to meet the minimum sample size requirements, the surveyor would have to survey the newly added area using the same method used to survey the original area of intended employment for consistency.[46]

Under this proposed rule, if the NPWC determines that the geographic area of an employer-provided survey appears to be broader than permitted by § 655.10(f)(3), the NPWC will review the survey for the reason(s) why and how the geographic area was expanded, as it does under current practice. Then, the NPWC may issue a request for information for an explanation for the reason(s) why and how the geographic area was expanded, if needed. An example of such an explanation, or a part of such an explanation, could be that the expansion was needed to meet the regulatory requirements because there were not enough workers or employers in the area of intended employment and the area of intended employment was fully surveyed (*i.e.,* all geographic components such as counties and townships, etc.). Consistent with current practice, if the NPWC determines the geographic area was improperly expanded, the NPWC would reject the survey and issue an OEWS wage for the employer's job opportunity.

E. Discussion of Proposed Revisions to 20 CFR 655.10(f)(4)

Under the current rule, when an employer requests a PWD based on a survey, the Department requires the employer to submit the Form ETA–9165, *Employer-Provided Survey Attestations to Accompany H–2B Prevailing Wage Determination Request Based on a Non-OES Survey* (''Form ETA–9165''), with the Form ETA–9141, *Application for Prevailing Wage Determination* (''Form ETA–9141''). This proposed rule would eliminate the Form ETA–9165, which was intended to streamline the Department's analysis of employer-provided surveys and yield

[38] *See id.*

[39] *See* General Administration Letter (GAL) 4–95, Interim Prevailing Wage Policy for Nonagricultural Immigration Programs (May 18, 1995) at p. 4, *available at https://www.dol.gov/sites/dolgov/files/ETA/advisories/GAL/1995/GAL4-95_attach.pdf. See infra* n.42.

[40] *Id.*

[41] *See* GAL 2–98, Prevailing Wage Policy for Nonagricultural Immigration Programs (Oct. 31, 1997) at p. 8, *available at https://oui.doleta.gov/dmstree/gal/gal98/gal_0298a.pdf.*

[42] 80 FR 24146, 24174 (Apr. 29, 2015).

[43] *See* OFLC Frequently Asked Questions and Answers, #32 (Sep. 1, 2016), *available at https://foreignlaborcert.doleta.gov/faqsanswers.cfm* (Question: ''The surveyor has not been able to elicit a response to the survey in the occupation and area of intended employment that meets the minimum sample size requirements (*i.e.,* at least 3 employers and 30 workers) of the 2015 H–2B Wage Final Rule. May the surveyor expand the geographic area surveyed?'') and (Answer: ''Yes, under certain limited conditions, the geographic area surveyed may be expanded incrementally until employer-provided survey sample size requirement is met (*i.e.,* at least 3 employers and 30 workers). A survey may be expanded to cover a geographic area larger than the area of intended employment in which the job opportunity is located only where that area of intended employment does not generate a sufficient sample to meet minimum size requirements. Under that condition, the survey may only be expanded to geographic areas that are contiguous to the area of intended employment only to the extent necessary to generate a sample size sufficient to satisfy the minimum sample size requirement. The survey's expansion may take place across state lines, as long as the new area(s) added to the survey are contiguous to the area of intended employment in which the job opportunity is located and the expansion extends only as much as is necessary to satisfy the minimum sample size requirement. If the surveyor determines after surveying the area of intended employment that the survey does not meet minimum sample size requirements, it must either conduct a new random sample of the expanded area (including the area of intended employment) or make a reasonable, good faith effort to survey all employers employing workers in the occupation and expanded area surveyed.'').

[44] 80 FR 24146, 24174 (Apr. 29, 2015).

[45] *Williams,* 648 F. Supp. 3d at 96 (holding DOL erred in accepting a statewide survey where the justification for expansion of the geographic area required by § 655.10(f)(3) had not been provided).

[46] *Id.*

consistent results. In the Department's experience, however, using the current Form ETA–9165 has proven inadequate to determine whether the survey meets the data and methodological requirements of the current rule. The Form ETA–9165 is based on an employer's attestations regarding an independently conducted survey but in practice, the NPWC has requested the survey itself for nearly all survey-based H–2B prevailing wage requests to evaluate whether the survey satisfied the data and methodological requirements of the regulation. The current regulation does not explicitly require that the survey be submitted concurrently with the Form ETA–9141. This has necessitated that the NPWC contact the employer to submit the actual survey instrument. Thus, to align the regulation with the NPWC's practice of reviewing the actual survey instrument alongside the submitted Form ETA–9141, the Department proposes to require the employer to submit the survey simultaneously with the Form ETA–9141 when an employer requests a survey-based H–2B prevailing wage from the NPWC.

The Department therefore proposes to discontinue the Form ETA–9165. Doing so would benefit PWD applicants by eliminating the burden of completing a form, and would benefit the Department by simplifying the survey-based H–2B prevailing wage process. This simplified process, in turn, would assist the Department in maintaining the integrity of the wage determination process for the H–2B program because the Department would have a copy of the survey itself during its review of the employer's Form ETA–9141, without needing to rely on the Form ETA–9165 and without needing to separately request the survey, potentially speeding up the determination process. Consequently, the proposal would better protect U.S. worker wages against the potential adverse effects that the employment of H–2B workers could have as the Department would have all necessary information available to make a determination about the use of the survey.

The elimination of the Form ETA–9165 would not affect how employers complete the Form ETA–9141. The Department does not propose any changes to the Form ETA–9141. Employers would continue to complete the Form ETA–9141 as they have been doing. However, the Department proposes to revise the General Instructions for the Form ETA–9141 by including in the Wage Source Information section instructions to submit the survey concurrently with the Form ETA–9141 when an employer seeks a survey-based PWD.

Also, the proposed rule would replace the phrase ''the adequacy of the data provided and validity of the statistical methodology used in conducting the survey'' in paragraph (f)(4) with ''whether the survey meets all of the requirements of this section, including the following.'' This change is intended to clarify that the survey would have to meet the requirements of proposed § 655.10(f)(4)(i) through (v), in addition to containing specific information about the survey methodology, such as the sample size, sample selection procedures, and survey job descriptions.

1. Discussion of Proposed Revisions to 20 CFR 655.10(f)(4)(i)

Initially, the Department proposes a technical change to the regulatory text at § 655.10(f)(4)(i) to clarify that the ''good faith'' requirement applies to both methods of conducting surveys permitted. That is, the surveyor would have to make a reasonable, good faith attempt to either: (1) contact all employers of workers performing the same or substantially similar job duties in the geographic area surveyed; or (2) conduct a randomized sampling of such employers. The Department continues to believe, as it noted in the preamble of the 2015 Wage Rule, that ''[p]roper randomization requires the surveyor to determine the appropriate 'universe' of employers to be surveyed before beginning the survey and to select randomly a sufficient number of employers to survey to meet the minimum criteria pertaining to the number of employers and workers who must be sampled.'' [47] This proposed provision additionally explains what a good faith attempt consists of, as discussed below.

The proposed rule would make two substantive changes to the current § 655.10(f)(4)(i). First, it would replace the phrase ''in the occupation'' with ''performing the same or substantially similar job duties.'' This change would reflect the reality that the survey is conducted before the employer submits its PWD application and the NPWC assigns an SOC code (identifying the occupation) based on the description of job duties contained in the PWD application. Consequently, a survey conducted based on an occupational classification would necessarily require speculation about which SOC code the NPWC will subsequently assign. As explained in the 2015 Wage Rule preamble, to assess whether workers are performing the ''same or substantially similar'' job duties, ''the surveyor would take into account the nature and duties of the job opportunity, and contact a large enough sample of employers to yield usable data for at least three employers and 30 workers similarly employed'' [48] in the geographic area surveyed.

Second, the proposed rule would add a new requirement to § 655.10(f)(4)(i) that at least three follow-up attempts be made to contact non-respondents. The contact must be made using the same method of contact initially used, and at least two other active methods of contact—such as email, telephone, or site visit—across different business days and times that are most likely to receive the most response. This proposed requirement would reduce sampling bias and therefore yield more accurate and representative survey results.

2. Discussion of Proposed Revisions to 20 CFR 655.10(f)(4)(ii)

Consistent with the 2015 Wage Rule, this proposed rule in § 655.10(f)(4)(ii) would require surveys submitted under this paragraph to include wage data from at least 30 workers and 3 employers. These minimums are based, as they were in the 2015 Wage Rule, on criteria that BLS OEWS itself uses to provide Office of Foreign Labor Certification (OFLC) with wage data not only for the H–2B program, but also for other foreign labor certification programs, such as the H–1B program and the permanent labor certification program. The OEWS survey data has been used by OFLC to produce prevailing wage data for those programs since 1998. In October 2020, this arrangement was formalized in a memorandum of understanding (MOU) between BLS and OFLC, which was amended in January 2021 and runs for 5 years. The MOU describes the standards and procedures BLS uses to provide wage data to OFLC, stating that BLS will ''report wages'' to OFLC for each occupational classification and geographic area ''that pass BLS confidentiality criteria and include a minimum of three (3) establishments . . . representing no fewer than 30 employees reported across the entire wage distribution.'' [49]

These minimum criteria and the other proposed requirements in § 655.10(f) also satisfy the Appropriations Acts' requirement that employer-provided

[47] *Id.*

[48] 80 FR 24146, 24173 (Apr. 29, 2015).

[49] Amended MOU Between the DOL's Employment and Training Administration Office of Foreign Labor Certification and Bureau of Labor Statistics for the Sharing of Occupational Wage Information; *see* 80 FR 24146, 24173 (Apr. 29, 2015).

wage surveys be ''statistically supported.'' *See* Further Consol. Appropriations Act, 2024, Public Law 118–47, Div. D, title I, sec. 110, 138 Stat. 460, 646 (2024). Elsewhere, Congress has used more precise terms of art, the meanings of which are widely accepted by statisticians, such as ''statistically significant'' and ''statistically valid'' (which appears in the INA itself [50]).[51] Here, however, Congress chose to use the term ''statistically supported,'' which does not appear in the U.S. Code. Immediately after Congress first enacted the ''statistically supported'' requirement, the Department published guidance on its website stating that ''[w]e interpret the requirement of the 2016 DOL Appropriations Act that the 'methodology and data' in a private survey be 'statistically supported' to be those methodological criteria for surveys set out in the 2015 Wage Rule.'' [52] Congress subsequently re-enacted the same language in every DOL Appropriations Act since 2016. *See* n.11, *supra.* Congress is ''presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without substantive change.'' [53] DOL continues to believe that surveys that meet the proposed 3-and-30 minimums BLS has used for 25 years to provide OEWS survey data to OFLC, along with the other criteria BLS uses to provide OEWS survey data to OFLC, and the additional survey requirements proposed in § 655.10(f) and explained in this preamble, are ''statistically supported'' as required by the provision in the Department's appropriation.

Under the proposed rule, as a new requirement in paragraph (f)(4)(ii), surveyors would have to continue accepting employer responses for at least 14 calendar days from the date the third notification in proposed paragraph (f)(4)(i) is sent even if responses have been received from 3 employers including the wages of 30 workers. This additional 14-calendar day period would maximize the opportunity to include as much data as possible in the survey so that it is as accurate and representative as possible. Also, the additional 14-day calendar period seeks to prevent the skewing of results by an employer that could occur should the survey conclude as soon as the minimum number of responses are received. If the minimum sample size requirements are not met, the geographic area of the survey may be extended beyond the area of intended employment under proposed § 655.10(f)(3).

Consistent with the 2015 Wage Rule, a survey may not report wages selectively, include responses that are based on only a portion of the workers performing the same or substantially similar job duties or limit the wage survey data to include only enough data to meet the minimum 30-worker threshold. The survey would have to include wage data for all workers performing the same or substantially similar job duties regardless of their level of skill, education, seniority, experience, or immigration status.[54] If, after following-up with non-respondents as described above, a surveyor could not collect wage data from at least 3 employers for at least 30 workers, the surveyor would be permitted to expand the survey beyond the area of intended employment as discussed above in the section on § 655.10(f)(3) of this proposed regulation.

3. Discussion of Proposed Revisions to 20 CFR 655.10(f)(4)(iii)

Consistent with the 2015 Wage Rule, in § 655.10(f)(4)(iii), bona fide third parties would have to conduct any employer-provided surveys submitted under proposed § 655.10(f)(1)(ii) or (iii). This proposed rule clarifies that not only would the H–2B employer, its agent, and its representative be prohibited from conducting the employer's survey, but so would any of the employer's employees and their attorney. The proposed rule would exclude these non-bona fide third parties to prevent their personal self-interests from affecting the reliability of employer-provided surveys, and in the case of employees, prevent an employer from placing any undue pressure on the employee conducting the survey. As the Department stated in the preamble of the 2015 Wage Rule and affirms here, ''[e]ven H–2B employers, representatives, agents, and attorneys who are not directly involved in the application for which the survey is submitted are barred from conducting a wage survey . . . because we conclude that H–2B employers and the entities that represent them are likely to share common interests and biases that may affect the reliability of such surveys.'' [55] The preamble also explained that requiring a bona fide third party to conduct an employer-provided survey would ''not bar an employer from paying an otherwise bona fide third party to conduct the survey. In addition, employers who are eligible to submit a survey under proposed § 655.10(f)(1)(ii) or (iii) would be permitted to submit a survey conducted and issued by a state.'' [56]

4. Discussion of Proposed Revisions to 20 CFR 655.10(f)(4)(iv)

Consistent with the 2015 Wage Rule, the proposed rule would require employer-provided surveys under proposed § 655.10(f)(1) be conducted across industries, which means surveying employers in all industries employing workers performing the same or substantially similar job duties as those contained in the job opportunity in the area of intended employment.[57] This requirement, the purpose of which is to cast as wide a net as possible to obtain the most representative data available, would be consistent with the Department's criteria for review of employer-provided surveys in the H–1B temporary program and permanent labor certification program. Surveying across industries provides a broader representation of wage data for jobs requiring the same or substantially similar duties, irrespective of the sector or segment of the economy where the job duties are being performed. Thus, the proposed rule would clarify that ''across industries'' means all industries that employ workers performing similar or substantially similar job duties. For example, a wage survey for a Landscaping and Groundskeeping Workers job opportunity that surveyed only hotels would not satisfy the ''across industries'' requirements because industries other than hotels employ such workers. Surveying workers performing these job duties not only at hotels, but also workers performing similar or substantially similar job duties at hospitals, schools, country clubs, golf courses, and other outdoor sports venues, among others, would provide a better representation of wages within that occupation.

[50] 8 U.S.C. 1153(b)(5)(E)(iii)(I), (v)(I), (v)(II)(aa), (v)(II)(cc), (F)(i)(II).

[51] For ''statistically significant,'' *see, e.g.,* 29 U.S.C. 1303(a); 20 U.S.C. 6303a; 43 U.S.C. 1748a–2(b)(3); 21 U.S.C. 2109(a)(3); 47 U.S.C. 1303(c)(1); 34 U.S.C. 10554(4)(A), 40101(f)(1). For ''statistically valid,'' *see, e.g.,* 38 U.S.C. 7731(c)(2)(A); 19 U.S.C. 1677f–1(a)(1), (b), (c)(2)(A), (e)(2)(A)(i); 42 U.S.C. 1395(f)(5)(C)(ii)(I), (f)(5)(D); 38 U.S.C. 3122(a)(1). 7731(c)(2)(A); 19 U.S.C. 1677f–1(a)(1), (b), (c)(2)(A), (e)(2)(A)(i); 42 U.S.C. 1395(f)(5)(C)(ii)(I), (f)(5)(D); 38 U.S.C. 3122(a)(1).

[52] Effects of the 2016 Department of Labor Appropriations Act (Dec. 29, 2015), *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Prevailing_Wage_FAQs_DOL_Appropriations_Act.pdf.*

[53] *Forest Grove School District* v. *T.A.,* 557 U.S. 230, 239–40 (2009).

[54] *Id.*

[55] *Id.* at 24174.

[56] *Id.*

[57] *Id.* at 24171.

5. Discussion of Proposed Revisions to 20 CFR 655.10(f)(4)(v)

This proposed rule would continue the requirement under the current rule that all types of pay be included in employer-provided wage surveys. As stated in the preamble of the 2015 Wage Rule, all types of pay include ''the base rate of pay, commissions, cost-of-living allowances, deadheading pay, guaranteed pay, hazard pay, incentive pay, longevity pay, piece rate, portal-to-portal rate, production bonuses, and tips.'' [58] For example, if an employer guarantees a minimum hourly wage, but pays other types of monetary compensation, including tips, commissions, or piece rates, in excess of this minimum hourly wage, the total of the minimum hourly wage and these additional types of compensation would have to be included in the hourly wage paid reported in the survey. This proposal remains consistent with the methodology of the OEWS survey.[59] The Department continues to think that, as explained in the preamble to the 2015 Wage Rule, ''[i]f we did not require inclusion in the survey wage reported of all of the types of pay reported to the OE[W]S, those limited surveys permitted by [the rule] would necessarily undercut the OE[W]S by not reporting the complete wage paid. We understand that employers ordinarily calculate the wage paid for OE[W]S purposes by consulting payroll records.'' [60] While the Department recognizes that this requirement will impose some burden on employers, given that the requirement is consistent with how the OEWS is administered, and given the importance of the Department having a complete picture of the compensation paid, the Department does not think that the burden outweighs the benefit of this requirement.

F. Discussion of Proposed Regulatory Revisions to 20 CFR 655.10(f)(5)

The current rule requires an employer-provided survey to be: (1) the most current edition of the survey; and (2) based on wages paid to workers no more than 24 months before the survey was submitted to the NPWC. The proposed rule would maintain these same two requirements, but the language regarding the second requirement would be changed to reflect the proposed new requirement in paragraph (f)(4) that the survey must be submitted to the NPWC together with the employer's Form ETA–9141.[61] In addition, the proposed rule would eliminate the first sentence currently in § 655.10(f)(5), which states that ''[t]he survey must be based upon recently collected data,'' [62] because the remaining sentence specifies the two components of ''recently collected data,'' as mentioned above. Therefore, the introductory sentence is unnecessary.

The requirement that the survey be based on wages paid to workers in the prior 24 months was originally codified in the 2008 Rule, *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes,* 73 FR 78020 (Dec. 19, 2008), and retained in the 2015 Wage Rule. The 24-month and most-current-edition standards would, together, continue to protect both U.S. and H–2B workers' wages by ensuring that employer-provided surveys are based on the most recent wage information available.

IV. Administrative Information

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 14094: Modernizing Regulatory Review; and Executive Order 13563: Improving Regulation and Regulatory Review

Under 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 (Oct. 4, 1993). Section 3(f) of E.O. 12866, as amended by E.O. 14094, 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 $200 million or more, or adversely affects in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal Governments or communities; (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 legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. 88 FR 21879 (Apr. 11, 2023). OIRA has designated this NPRM as ''not significant'' per E.O. 12866 and waived review.

E.O. 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some costs and benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Outline of the Analysis

Section IV.A.1 describes the need for the proposed rule, and Section IV.A.2 describes the process used to estimate the costs of the rule and the general inputs used, such as wages and number of affected entities. Section IV.A.3 explains how the provisions of the proposed rule would result in costs and cost savings and presents the calculations the Department used to estimate them. In addition, Section IV.A.4 provides a description of qualitative benefits. Section IV.A.5 summarizes the estimated 1st-year and 10-year total and annualized costs and cost savings of the proposed rule.

Summary of the Analysis

The Department estimates that the proposed rule would result in costs and cost savings. As shown in Exhibit 1, the proposed rule is expected to have an annualized cost of $1,285, an annualized cost savings of $5,466, and a net cost savings of $4,535 at a discount rate of 2 percent.[63]

[58] *Id.* at 24175.

[59] *See* ''How are 'wages' defined by the OEWS survey?'' OEWS, Frequently Asked Questions, *available at https://www.bls.gov/oes/oes_ques.htm.*

[60] 80 FR 24146, 24175 (Apr. 29, 2015).

[61] For purposes of comparison, OEWS estimates are based on data collected over a 3-year period, with the survey updated every 6 months based on more recent data. The May 2022 estimates are based on responses from six semiannual panels collected over a 3-year period: May 2022, November 2021, May 2021, November 2020, May 2020, and November 2019. *See* Technical Notes for May 2022 OEWS Estimates (bls.gov), *available at https://www.bls.gov/oes/current/oes_tec.htm.* In addition, in the 1990s, the DOL recommended that State employment service agencies (SESAs) use their in-house wage surveys for only 2 years. *See* GAL 4–95 at pp. 9–10 (''SESA Conducted Prevailing Wage Surveys . . . Length of Time Survey Results are Valid . . . SESAs may use survey results for up to 2 years after the data are collected. After 2 years, the results of a new survey should be implemented.'').

[62] 20 CFR 655.10(f)(5).

[63] The proposed rule is expected to have an undiscounted annual cost of $1,369, an

Continued

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND COST SAVINGS OF THE PROPOSED RULE

[2023 $]

	Costs	Cost savings	Net cost savings
1st Year	$12,850	$5,359	−$7,492
Undiscounted Annual	1,285	5,359	4,074
Annualized with at a Discount Rate of 2%	1,431	5,359	4,535

The total cost of the proposed rule is associated with rule familiarization and the new requirements that the surveyor must continue to accept responses for at least 14 calendar days after receiving the third employer response to the survey request. In addition, the surveyor must include no fewer than three contacts with non-respondents, using the same method of contact initially used, and at least two other active methods of contact across different business days and times that are most likely to receive the most response. Cost savings are the results of the elimination of the Form ETA–9165, *Employer-Provided Survey Attestations to Accompany H–2B Prevailing Wage Determination Request Based on a Non-OES Survey.* See the costs and cost savings subsections of Section IV.A.3 (Subject-by-Subject Analysis).

1. Need for Regulation

As discussed further in Section II.F, *supra,* this NPRM is required by a court ruling that, in promulgating the 2015 Wage Rule, the agencies failed to comply with the APA's notice-and-comment requirements. *Williams* v. *Walsh,* 648 F. Supp. 3d 70 (D.D.C. 2022). Consequently, the court remanded the rule ''for further consideration consistent with'' its opinion. *Id.* at 99. Additionally, in light of issues raised (although not decided) in that litigation, OFLC is proposing to revise the data and methodological criteria for employer-provided wage surveys.

2. Analysis Considerations

The Department estimated the costs and the cost savings of the proposed rule relative to the existing baseline (*i.e.,* the current practices for complying, at a minimum, with the H–2B program as currently codified at 20 CFR part 655).

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the proposed rule (*i.e.,* costs, cost savings, and qualitative benefits). The analysis covers 10 years (from 2025 through 2034) to ensure it captures major costs, cost savings, and qualitative benefits that accrue over time. The Department expresses all quantified impacts in 2023 dollars and uses undiscounted annuals and a discount rate of 2 percent, pursuant to Circular A–4.

Exhibit 2 shows the total number of H–2B PWD requests and the number of submissions requesting a survey wage for FYs 2020—2023. The Department used this information to estimate the costs and cost savings of the proposed rule.

EXHIBIT 2—NUMBER OF UNIQUE SUBMISSIONS FOR H–2B SURVEY REQUESTS *

FY	Number of H–2B PWD requests	Number of H–2B wage survey requests	% of total submissions requesting survey wage
2020	11,629	77	0.7
2021	14,748	161	1.1
2022	24,914	378	1.5
2023	24,715	267	1.1
Average	19,002	221	1.1

* Data source: OFLC performance data for FY2020–2023.

a. Compensation Rates

In Section IV.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of the proposed rule. Exhibit 3 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the proposed rule. The Department used the mean hourly wage rate for private sector human resources (HR) specialists (SOC code 13–1071).[64] Wage rates are adjusted to reflect total compensation, which includes nonwage factors such as overhead and fringe benefits (*e.g.,* health and retirement benefits). We use an overhead rate of 17 percent [65] and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2023. For private sector employees, we use a fringe benefits rate of 42 percent.[66] We then multiply the loaded wage factor and the overhead rate by the wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Exhibit 3 throughout this analysis to estimate the labor costs for each provision.

undiscounted annual cost savings of $4,861, and an undiscounted annual net cost savings of $3,492 in 2023 dollars.

[64] BLS. (2024). May 2023 National Occupational Employment and Wage Estimates: 13–1071—Human Resources Specialists. Retrieved from: *https://www.bls.gov/oes/current/oes131071.htm.*

[65] Cody Rice, U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program,'' June 10, 2002, *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[66] BLS. (Mar. 2024). ''Employer Costs for Employee Compensation.'' Retrieved from: *https://www.bls.gov/news.release/ecec.nr0.htm.*

EXHIBIT 3—COMPENSATION RATES

[2023 Dollars]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate (d) = a + b + c
HR Specialist	N/A	$36.573	$15.36 ($36.57 × 0.42)	$6.22 ($36.57 × 0.17)	$58.15

3. Subject-by-Subject Analysis

The Department's analysis below covers the costs, cost savings, and qualitative benefits of the proposed rule. This proposed rule includes the quantified cost of rule familiarization, the unquantified cost of additional survey requirements, and the quantified cost savings of elimination of the Form ETA–9165, and qualitative discussion of benefits.

a. Costs

The following section describes the quantified and unquantified costs of the proposed rule.

i. Rule Familiarization

If the proposed rule takes effect, H–2B employers who are submitting an employer-provided survey would need to familiarize themselves with the new regulations. Consequently, this would impose a one-time cost in the 1st year.

To estimate the 1st-year cost of rule familiarization, the number of unique H–2B employers who are submitting an employer-provided survey (221) was multiplied by the estimated amount of time required to review the rule (1 hour). The Department requests public comments and inputs regarding this estimate. This number was then multiplied by the hourly compensation rate of HR specialists ($58.15 per hour). This calculation results in a one-time undiscounted cost of $12,850 in the 1st year after the proposed rule takes effect. The annualized cost over the 10-year period is $1,431 at a discount rate of 2 percent. An undiscounted annual cost over the 10-year period is $1,285.

ii. Additional Survey Requirements

The Department proposes in the NPRM to revise the data and methodological criteria for employer-provided wage surveys to require that a survey must continue to accept responses for at least 14 calendar days after receiving the minimum number of required responses from at least 3 employers that together include wages for at least 30 workers. In addition, the surveyor must include no fewer than three contacts with non-respondents, using the same method of contact initially used, and at least two other active methods of contact across different business days and times that are most likely to generate responses. The Department expects these new requirements may add a small compliance cost to surveyors, but we cannot quantify it due to the data limitations. The Department seeks public comments and inputs that will help us to quantify this cost impact to surveyors.

b. Cost Savings

The following section describes the cost savings of the proposed rule.

i. Elimination of the Form ETA–9165

The Department proposes to eliminate the Form ETA–9165, *Employer-Provided Survey Attestations to Accompany H–2B Prevailing Wage Determination Request Based on a Non-OES Survey*. Each employer would have spent 25 minutes to fill out the attestation form if it had not been eliminated. To estimate the cost savings per year, the number of unique H–2B employers who are expected to submit an employer-provided survey (221) was multiplied by the estimated amount of time required to fill out the attestation form (25 minutes or 0.417 hours). This number was then multiplied by the hourly compensation rate of HR specialists ($58.15 per hour). This calculation results in an annual cost savings of $5,359 after the proposed rule takes effect. The annualized cost savings over the 10-year period is $5,359 at a discount rate of 2 percent and undiscounted annual cost savings at $5,359.

c. Qualitative Benefits Discussion

The following section describes the benefits of the proposed rule.

i. Improved Accuracy in Prevailing Wage Data

The Department's proposal would benefit H–2B workers and workers in corresponding employment by adding a new condition to § 655.10(f)(4)(i) that at least three follow-up attempts be made to contact non-respondents. This proposed requirement that the surveyor make no fewer than three contacts with non-respondents, first using the same method of contact initially used, and subsequently two other active methods of contact across different business days and times that are most likely to generate responses, is intended to reduce sampling bias and, therefore, yield more accurate survey results.

Additionally, under the proposed rule, as a new requirement, surveyors would have to continue accepting employer responses for at least 14 calendar days from the date the third notification in proposed paragraph (f)(4)(i) is sent, even after receiving responses from 3 employers including the wages of 30 workers. This additional 14-calendar day period would maximize the opportunity to include as much data as possible in the survey so that it is as accurate and representative as possible. Also, the additional 14-day calendar period would prevent: (1) the skewing of results that could occur should the survey conclude as soon as the minimum number of responses are received; and (2) the exclusion of available data from the survey.

ii. Greater Efficiency in Employer-Provided Survey Process

An additional benefit of this proposal would be an increase in efficiency in the employer-provided survey process. Employers would be required to submit the survey with the Form ETA–9141 when an employer requests a survey-based H–2B prevailing wage from the NPWC and such survey should contain the necessary information about the survey methodology (*e.g.,* sample size and source, sample selection procedures, and survey job descriptions). This would reduce the need for the NPWC to routinely issue Requests for Information in most cases involving employer-provided surveys. Efficiency is inherently valuable as a principle of good government and provides benefits to the public at large, including reducing the need to routinely issue Requests for Information necessary for the Department's analyses.

4. Summary of the Analysis

Exhibit 4 summarizes the estimated total costs and cost savings of the proposed rule over the 10-year analysis period. The Department estimates the

annualized costs of the proposed rule at $1,431 for rule familiarization, the annualized cost savings at $5,359 for eliminating the Form ETA–9165 and the annualized net cost savings at $4,535, each at a discount rate of 2 percent. Unquantified costs include the new requirements that the surveyor must continue to accept responses for at least 14 calendar days from the date the third notification is sent even if responses have been received from 3 employers including the wages of 30 workers. The surveyor must also include no fewer than three contacts with non-respondents, using the same method of contact initially used, and at least two other active methods of contact across different business days and times that are most likely to receive the most response. Unquantified benefits include improved accuracy in prevailing wage surveys due to permitting employer-provided surveys in instances where OEWS data is unavailable or insufficient, and increased transparency in the employer survey process.

EXHIBIT 4—ESTIMATED MONETIZED COSTS AND COST SAVINGS OF THE PROPOSED RULE

[2023 $]

Year	Costs	Cost savings	Net cost savings
2025	$12,850	$5,359	$7,492
2026	.....	5,359	5,359
2027	.....	5,359	5,359
2028	.....	5,359	5,359
2029	.....	5,359	5,359
2030	.....	5,359	5,359
2031	.....	5,359	5,359
2032	.....	5,359	5,359
2033	.....	5,359	5,359
2034	.....	5,359	5,359
Undiscounted annual	1,285	5,359	4,074
Annualized with a Discount Rate of 2%	1,431	5,359	4,535

B. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires agencies to determine whether regulations will have a significant economic impact on a substantial number of small entities. Pursuant to 5 U.S.C. 605(b), the head of the agency (*i.e.,* the undersigned Assistant Secretary for Employment and Training), certifies that the proposed rule does not have a significant economic impact on a substantial number of small entities. On average, small employers who are submitting an employer-provided survey will incur a net cost saving of $20.52 per year at a discount rate of 2 percent.[67] This will be far less than 1 percent of the revenue for the smallest of small H–2B employers. For example, the average annual revenue for firms in the landscaping industry (North American Industry Classification System code 561730) with fewer than five employees is $238,877.[68] $20.52 is about 0.009 percent of the average revenue of $238,877. The Department therefore certifies that the proposed rule does not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The INA, as amended, assigns responsibilities to the Secretary of Labor relating to the entry and employment of certain categories of immigrant and nonimmigrant foreign workers under the permanent labor certification (PERM), H–2B, H–1B, H–1B1, and E–3 programs. The INA requires the Secretary of Labor to certify that the employment of foreign workers under certain visa classifications will not adversely affect the wages and working conditions of similarly employed workers in the United States. To render this certification, the Secretary of Labor determines the prevailing wage for the occupational classification and area of intended employment and ensures the employer offers a wage to the foreign worker that equals at least the prevailing wage. The Department uses Form ETA–9141 to collect information necessary to determine the prevailing wage for the applicable occupation and area of intended employment. This information collection is subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless OMB approves it under the PRA and it displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person will generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a), 1320.6. The Department obtained OMB approval for this information collection under Control Number 1205–0508. The Department seeks PRA authorization for this information collection for 3 years.

This information collection request, concerning OMB Control No. 1205–0508, includes the collection of information related to the Department's PWDs. Prior to submitting applications for most labor certifications or a labor condition application to the Secretary of Labor, employers must obtain a prevailing wage for the job opportunity based on the place and type of employment in order to ensure that the employment of foreign workers does not adversely affect the wages and working conditions of U.S. workers similarly employed. Form ETA–9141, *Application for Prevailing Wage Determination,* is used to collect the necessary information from employers to enable the Department to issue a prevailing wage for the occupation and location of the job opportunity. The Form ETA–9141 is used in the PERM, H–2B, H–1B, H–1B1, and E–3 programs administered by the Department. In order to meet its statutory responsibilities under the INA, the Department must request information from employers seeking to hire and import foreign labor. The Department uses the information collected to

[67] $4,535÷221 = $20.52.

[68] 2017 Statistics of U.S. Businesses Annual Data Tables by Establishment Industry, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html.*

determine the minimum wage that must be offered, advertised in recruitment, and paid by an employer to foreign workers in most programs.

The collection of information under the current OMB Control No. 1205–0508 was approved by OMB on September 8, 2022, and was implemented into OFLC systems on February 6, 2024.

The Department now proposes revisions to this information collection, covered under OMB Control No. 1205–0508, to further revise the information collection tools based on regulatory changes in this proposed rule. As noted above, the current regulations do not explicitly require that the survey be submitted concurrently with the Form ETA–9141, but the proposed rule, as well as the Form ETA–9141, *General Instruction,* would require that the survey be filed at the same time as submission of the Form ETA–9141. Further, the Department proposes to eliminate the use of the Form ETA–9165, *Employer-Provided Survey Attestations to Accompany H–2B Prevailing Wage Determination Request Based on a Non-OEWS Survey.* The Department proposes to revise the Form ETA–9141 to conform with the proposed rule's requirement that employers, when seeking a survey-based prevailing wage, submit the survey to the Department with the Form ETA–9141 for consideration, rather than complete the Form ETA–9165.

The proposed revisions to the Form ETA–9141, *General Instructions,* and the proposed elimination of Form ETA–9165 and its instructions will align information collection requirements with the Department's proposed regulatory framework and continue the ongoing efforts to provide greater clarity to employers on regulatory requirements greater accuracy in PWDs, and greater standardizing and streamlining this information collection to reduce employer time and burden in preparing applications. The proposed changes will also promote greater efficiency and transparency in the review and issuance of PWDs for the Department's employment-based foreign labor certification and labor condition programs. The information collection includes the Form ETA–9141, *Application for Prevailing Wage Determination* (''Form ETA–9141''); Form ETA–9141, *General Instructions* (''General Instructions''); and Form ETA–9141, Appendix A, *Request for Additional Worksite(s)* (''Appendix A'').

Overview of Information Collection Proposed by This NPRM

Title: Application for Prevailing Wage Determination.

Type of Review: Revision of a Currently Approved Information Collection.

OMB Control Number: 1205–0508.

Affected Public: Private Sector—Businesses or other for-profits, not-for profit institutions, and farms.

Total Estimated Number of Respondents: 120,042.

Total Estimated Number of Responses: 462,470.

Total Estimated Annual Time Burden: 211,425 hours.

Total Estimated Annual Other Costs Burden: $191,769.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4, codified at 2 U.S.C. 1501 *et seq.*) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal Governments. UMRA requires Federal agencies to assess a regulation's effects on State, local, and Tribal Governments, as well as on the private sector, except to the extent the regulation incorporates requirements specifically set forth in law. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any regulation that includes any Federal mandate in a proposed or final agency rule that may result in $100 million or more expenditure (adjusted annually for inflation) in any 1 year by State, local, and Tribal Governments, in the aggregate, or by the private sector. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or Tribal Governments, or upon the private sector, except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

This proposed rule does not result in unfunded mandates for the public or private sector because private employers' participation in the program is voluntary, and State governments are reimbursed for performing activities required under the program. The requirements of title II of the UMRA, therefore, do not apply, and the Department has not prepared a statement under the UMRA.

E. Executive Order 13132 (Federalism)

This proposed 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 sec. 6 of E.O. 13132,[69] it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

The Department has reviewed this proposed rule in accordance with E.O. 13175 [70] and has determined that it does not have Tribal implications. This proposed rule 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 Tribal Governments.

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons discussed in the preamble, the Department of Labor proposes to amend 20 CFR part 655 as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for § 655.0 of part 655 is revised and the authority citation for subpart A continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806); div. D, title I, sec. 110, Pub. L. 118–47, 138 Stat. 460, 646; and 8 CFR 214.2(h)(4)(i) and (h)(6)(iii).

[69] E.O. 13132, *Federalism,* 64 FR 43255 (Aug. 10, 1999).

[70] E.O. 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 9, 2000).

Subpart A issued under 8 CFR 214.2(h).

* * * * *

■ 2. Amend § 655.10 by revising paragraphs (a), (b)(2), (e), and (f) to read as follows:

§ 655.10 Determination of prevailing wage for temporary labor certification purposes.

(a) *Offered wage.* The employer must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State, or local minimum wage, whichever is highest. The employer must offer and pay this wage (or higher) to both its H–2B workers and its workers in corresponding employment. The issuance of a prevailing wage determination (PWD) under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local law.

(b) * * *

(1) * * *

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean of the wages of workers similarly employed in the area of intended employment using the wage component of the BLS Occupational Employment and Wage Statistics (OEWS) survey, unless the employer provides a survey acceptable to the NPWC under paragraph (f) of this section.

* * * * *

(e) *NPWC action.* The NPWC will determine the PWD, indicate the source, and return the Application for Prevailing Wage Determination (Form ETA–9141) with the determination and the NPWC's endorsement to the employer.

(f) *Employer-provided survey.* (1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the NPWC will consider a survey provided by the employer in making a PWD only if the employer's submission demonstrates that the survey falls into one of the following categories:

(i) The survey was independently conducted and issued by a State, including any State agency, State college, or State university;

(ii) The survey is submitted for a geographic area where the OEWS does not collect data, or in a geographic area where the OEWS provides an arithmetic mean only at a national level for workers employed in the SOC; or

(iii) The job opportunity is within an occupational classification of the SOC system designated as an ''All Other'' classification.

(2) Any such survey must provide the arithmetic mean of the wages of all workers performing the same or substantially similar job duties in the area of intended employment.

(3) Notwithstanding paragraph (f)(2) of this section, the geographic area surveyed may be expanded beyond the area of intended employment, but only as necessary to meet the requirements of paragraph (f)(4)(ii) of this section. Any geographic expansion beyond the area of intended employment must include only those geographic areas that are contiguous to the area of intended employment.

(4) In each case where the employer submits a survey under paragraph (f)(1) of this section, the employer must submit, concurrently with the Form ETA–9141, a copy of the survey containing specific information about the survey methodology, including sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of whether the survey meets all the requirements of this section, in addition to the following:

(i) The surveyor made a reasonable, good faith attempt to either contact all employers of workers performing the same or substantially similar job duties in the geographic area surveyed or conduct a randomized sampling of such employers. No fewer than three contacts with non-respondents must be made, first using the same method of contact initially used, and subsequently two other active methods of contact across different business days and times that are most likely to generate survey responses;

(ii) The survey must include wage data from at least 30 workers performing the same or substantially similar job duties and at least 3 employers of such workers. The survey must continue to remain open to accept responses for at least 14 calendar days from the date the third notification in paragraph (f)(4)(i) of this section was sent to non-respondents;

(iii) If the survey is submitted under paragraph (f)(1)(ii) or (iii) of this section, the survey must be administered by a bona fide third party. Any H–2B employer or H–2B employer's agent, representative, employee, or attorney are not bona fide third parties;

(iv) The survey must be conducted across industries that employ workers performing the same or substantially similar job duties; and

(v) The wage reported in the survey must include all types of pay.

(5) The survey must be the most current edition of the survey and must be based on wages paid not more than 24 months before the date the PWD request is submitted to the NPWC.

* * * * *

José Javier Rodríguez,

Assistant Secretary for Employment and Training, Labor.

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