

**DETERMINING THE PREVAILING WAGE IN THE LABOR CONDITION  
APPLICATION PROCESS**

**1. REASON FOR ISSUE:** This Veterans Health Administration (VHA) directive maintains policy for determining the prevailing wage in the labor condition application process.

**2. SUMMARY OF MAJOR CHANGES:** This directive includes:

- a. Updated definitions of actual wage and prevailing wage (see paragraph 3).
- b. Updated responsibilities for the Department of Veterans Affairs (VA) medical facility Director (see paragraph 5).
- c. Additional responsibilities for the Workforce Management and Consulting Office Director (see paragraph 5).

**3. RELATED ISSUES:** VA Directive 5005, Staffing, dated April 15, 2002, and VHA Handbook 5005.1, Requests to Petition the United States Department of State for a Waiver of the 2-Year Home Residency Requirement on Behalf of an Exchange Visitor and Subsequent Employment Requirements, dated February 28, 2011.

**4. RESPONSIBLE OFFICE:** The VHA Workforce Management and Consulting Office, Human Resources Center of Expertise (106) is responsible for the contents of this directive. Questions may be directed to VHA Workforce Management and Consulting Office, Human Resources Center of Expertise (106) at (202) 461-7179.

**5. RESCISSIONS:** VHA Directive 2010-047, Determining the Prevailing Wage in the Labor Condition Application Process, dated October 4, 2010, is rescinded.

**6. RECERTIFICATION:** This VHA directive is scheduled for recertification on or before the last working day of October 2025. This VHA directive will continue to serve as national VHA policy until it is recertified or rescinded.

**BY DIRECTION OF THE OFFICE OF THE  
UNDER SECRETARY FOR HEALTH:**

/s/ Steven Lieberman, MD, MBA  
Acting Deputy Under Secretary for Health

October 7, 2020

VHA DIRECTIVE 5007.01

**NOTE:** *All references herein to VA and VHA documents incorporate by reference subsequent VA and VHA documents on the same or similar subject matter.*

**DISTRIBUTION:** Emailed to the VHA Publications Distribution List on October 8, 2020.

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## DETERMINING THE PREVAILING WAGE IN THE LABOR CONDITION APPLICATION PROCESS

### 1. PURPOSE

This Veterans Health Administration (VHA) directive provides policy for determining the required prevailing wage by filing Labor Condition Applications (LCA) with the United States Department of Labor (DOL) in connection with petitions for H-1B or other non-immigrant visas that require an LCA. **AUTHORITY:** Title 38 United States Code (U.S.C.) § 7301(b), § 742, § 7407; 20 Code of Federal Regulations (C.F.R.) § 655.700 et seq.

### 2. BACKGROUND

a. DOL regulations in 20 C.F.R. § 655.700 through § 760 set forth the requirements for filing and maintaining documentation related to the LCA process.

b. Pursuant to 20 C.F.R. § 655.731 in order for an employer to hire a non-immigrant on an H-1B visa into a specialty occupation, such as a physician, the employer must certify on a Labor Condition Application for Nonimmigrant Workers (DOL Form ETA 9035 or 9035E) that it will pay the H-1B non-immigrant the required wage rate. **NOTE:** *The required wage rate is to be the greater of the actual wage rate or the prevailing wage.*

### 3. DEFINITIONS

a. **Actual Wage.** Actual wage is the wage rate paid by the employer to all individuals with similar experience and qualifications for the specific employment in question at the place of employment. The actual wage established by the employer is not an average of the wage rates paid to all workers employed in the occupation. In determining the wage amount, the following factors may be considered: experience, qualifications, education, job responsibility and function, specialized knowledge and other legitimate business factors. Legitimate business factors, for purpose of this definition, means those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. For VHA physicians, dentists, and podiatrists, the wage rate includes the base and market pay components.

b. **Prevailing Wage.** Prevailing wage is a wage rate set for the occupational classification in the geographic area of intended employment as of the time of filing the LCA. This wage is set by the weighted average of wages paid to similarly employed workers (i.e., workers having substantially comparable jobs in the occupational classification) in the geographic area of employment.

### 4. POLICY

It is VHA policy that the necessary steps within the Department of Veterans Affairs (VA) to file an LCA in support of hiring a non-citizen on an H-1B visa or other status requiring an LCA are followed.

## 5. RESPONSIBILITIES

a. **Under Secretary for Health.** The Under Secretary for Health is responsible for ensuring overall VHA compliance with this directive.

b. **Deputy Under Secretary for Health.** The Deputy Under Secretary for Health is responsible for:

(1) Communicating the contents of this directive to each of the Veterans Integrated Service Networks (VISNs).

(2) Providing assistance to VISN Directors to resolve implementation and compliance challenges in all VA medical facilities within that VISN.

(3) Providing oversight of VISNs to assure compliance with this directive, relevant standards and applicable regulations.

c. **Chief, Human Capital Management.** The Chief, Human Capital Management is responsible for supporting the implementation and oversight of this directive.

d. **VHA Workforce Management and Consulting Office Director.** The VHA Workforce Management and Consulting Office Director is responsible for assisting management officials on the prevailing wage guidance in this directive.

e. **Veterans Integrated Service Network Director.** The VISN Director is responsible for ensuring that all VA medical facilities within the VISN comply with this directive and informing leadership when barriers to compliance are identified.

f. **VA Medical Facility Director.** The VA medical facility Director is responsible for:

(1) Filing a required LCA with DOL in connection with petitions for H-1B or other non-immigrant visas.

(2) Complying fully with all requirements set forth in 20 C.F.R. 655.700 through 655.760 when considering non-citizen physicians or other occupations for employment on H-1B visas.

(3) Following the procedures in Appendix A of this directive to make prevailing wage determinations.

(4) Ensuring potential VA medical facility employees who are preparing LCAs follow procedures as listed in Appendix A of this directive.

(5) Ensuring that staff submit a Prevailing Wage Determination (PWD) request when necessary by using ETA form 9141 (see Appendix A for additional information).

(6) Approving all LCA requests before filing with DOL.

(7) Ensuring that proper documentation is maintained to establish compliance, including:

(a) In accordance with 38 U.S.C. § 7402(c), § 7407(a) and 20 C.F.R. § 655.700 through § 655.760, not appointing non-citizens under 38 U.S.C. § 7405 when the VA medical facility is able to recruit qualified citizens to provide necessary services and fully documenting all determinations. These determinations are stored at the VA medical facility Human Resources.

(b) Not filing H-1B petitions in circumstances where the VA medical facility cannot meet all the LCA requirements.

## 6. TRAINING

There are no formal training requirements associated with this directive.

## 7. RECORDS MANAGEMENT

All records regardless of format (e.g., paper, electronic, electronic systems) created by this directive shall be managed per the National Archives and Records Administration (NARA) approved records schedules found in VA Records Control Schedule 10-1. Questions regarding any aspect of records management should be addressed to the appropriate Records Manager or Records Liaison.

## 8. REFERENCES

a. 38 U.S.C. § 7402(c), § 7405 and § 7407(a).

b. 20 C.F.R. § 655.700 through § 760.

c. VA Directive 5005, Staffing, dated April 15, 2002.

d. VHA Handbook 5005.1, Requests to Petition the United States Department of State for a Waiver of the 2-Year Home Residency Requirement on Behalf of an Exchange Visitor and Subsequent Employment Requirements, dated February 28, 2011.

e. Department of Labor, Employment and Training Administration, Foreign Labor Application Gateway (FLAG) portal: <https://flag.dol.gov/>.

f. Online Wage Library – Occupational Employment Statistics, Foreign Labor Certification (FLC) Data Center website: <https://www.flcdatcenter.com/OESWizardStart.aspx>.

g. O\*NET website: <https://www.onetonline.org/>.

**MANDATORY PROCEDURES FOR DETERMINING THE PREVAILING WAGE FOR AN OCCUPATION**

1. Department of Veterans Affairs (VA) medical facility employees who are preparing Labor Condition Applications (LCAs) must use the Online Wage Library – Occupational Employment Statistics (OWL-OES) search wizard found on the Foreign Labor Certification (FLC) Data Center website:

<https://www.flcdatacenter.com/OESWizardStart.aspx>.

2. The Department of Labor (DOL) Bureau of Labor Statistics (BLS) has provided wage data collected under the Occupational Employment Statistics (OES) program for use in the Foreign Labor Certification process since 1998. The FLC Data Center website requires the user to enter pertinent information into the search criteria, such as the State of intended employment and the occupational code or title of the occupation. The Standard Occupational Classification (SOC) system is used by the OES program to classify occupational wage information. The SOC provides a common language for categorizing occupations. It also serves as the framework for information being gathered through DOL's O\*NET. If users do not have the occupational code, they may go to the O\*NET website at <https://www.onetonline.org/> and obtain that code. That code can then be entered into the FLC data website in order to proceed with obtaining the associated prevailing wage data.

3. If the occupation being researched is not specifically listed, use the job category that most closely matches the occupation or specialty. **NOTE:** *Occupational code 29-1069, "Physicians and Surgeons, All Other," may be used to capture those specialties that are not specifically listed in the FLC database.*

4. DOL requirements specify that determinations using a government survey are to be made available for each occupation at four levels of wages which commensurate with experience, education, and the level of supervision. The levels specified in the FLC database and an explanation of how those levels compare to Veterans Health Administration (VHA) physician, dentist and podiatrist pay tier levels, are defined as follows:

a. **Level I (Entry).** Level I wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. This corresponds to a Tier 1 staff physician, dentist or podiatrist who has just completed a residency and has less than 3 years of experience or is not board certified in the assigned specialty, regardless of their years of experience.

b. **Level II (Qualified).** Level II wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. This corresponds to a Tier 1 staff physician, dentist, or podiatrist who has 3 or more years of experience and is Board certified in the assigned specialty.

c. **Level III (Experienced)**. Level III wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained either through education or experience special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. This would correspond to a Tier 2 physician, dentist, or podiatrist in a First Line Supervisor, Program Manager, or Section Chief role.

d. **Level IV (Fully Competent)**. Level IV wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. These employees use advanced skills and diversified knowledge to solve unusual and complex problems. They generally have management or high-level supervisory responsibilities. This category corresponds to a Tier 3 Service Chief physician, dentist, or podiatrist involved at a national program level.

## 5. EXCEPTION (WHEN NO WAGE DATA IS AVAILABLE)

There will be occasions when no wage data is available, but rather [insert document name or form] states, "No wage data are available in Area XXXXX for the occupation code 29-XXXX - Employers will need to provide an alternative wage source."

a. In this situation, staff must submit a Prevailing Wage Determination (PWD) request by using ETA Form 9141. This form must be completed and submitted directly to the National Prevailing Wage and Helpdesk Center (NPWHC).

(1) It is strongly recommended that this be submitted online through the Foreign Labor Application Gateway (FLAG) portal system website: <https://flag.dol.gov>.

(2) PWD requests can also be mailed to the following address: U.S. Department of Labor, Employment and Training Administration, National Prevailing Wage and Helpdesk Center, ATTN.: PWD Request, 200 Constitution Ave NW, Room N-5311, Washington, DC 20210.

b. The NPWHC will send the PWD electronically to the VA medical facility Director. Therefore, it is important to include the correct email address on the ETA Form 9141 under item B15.

c. Requests are reviewed on a first come, first serve basis. The NPWHC strongly encourages requestors to submit their requests at least 60 calendar days in advance of the employer's initial recruitment efforts. Once the employer receives the PWD, the agency may begin recruitment or file an application for FLC. In addition, the agency must then follow the procedures as outlined in the preceding, i.e., send the PWD and FLC forms to DOL with a copy to the VHA Workforce Management and Consulting Office for review. **NOTE:** *An individual's VA pay may not be lower than the NPWHC wage.*



6. The process of determining the prevailing wage is subject to audit and investigation. VA medical facilities must develop and maintain the documentation listed in this directive (in accordance with 20 C.F.R. 655.700 through 655.760) which meets the burden of proving the validity of the wage statement required and attested to on Form ETA 9035 or Form ETA 9035E. Documentation which meets this burden includes a copy of the prevailing wage finding from an employer survey or an independent authoritative source, which reflects wage data within the 24-month period immediately preceding the filing of the LCA. Documentation must be made available to DOL upon request; this includes the individual wage determination and a copy of the prevailing wage finding.

7. To ensure VA medical facilities are fully meeting the requirements of the LCA process, they are required to submit a copy of every Form ETA 9035 or 9035E to the Veterans Integrated Service Network Director at the same time they submit the form to DOL. In the case of physicians, the form must be accompanied by a copy of the approved market pay review and approval form, found here: <https://vaww.va.gov/vaforms/medical/pdf/A%20Form%2010-0432a%20Market%20Pay%20Review%20and%20Approval%20Form.pdf> showing the base and market pay that will be paid to the physician. **NOTE:** *This is an internal VA website that is not available to the public.* These forms are reviewed for compliance with DOL regulations and VA medical facilities will be notified of any deficiencies found, so appropriate corrective action can be taken.