



Proposed Rule Would Bring Drastic Changes To H-1B Cap Process By Basing Selections On Highest Salary

Insights

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The Department of Homeland Security recently proposed changes to the H-1B Cap system that would significantly impact the existing process. The proposed rule, entitled “Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions” and revealed on November 2, aims to replace the current random selection process with a new salary-based ranking system that prioritizes selections to applicants that have received offers corresponding to the highest wage levels. This would be a dramatic change to the existing system, which has always been based on a random lottery process. If the rule goes through, it will be implemented in next year’s H-1B Cap for Fiscal Year 2022.

What Can You Expect?

A few months ago, [we published a blog post on planning for next year’s H-1B lottery](#) after a record-breaking H-1B Cap turnout with the implementation of a new online registration system. Rather than the usual process of submitting a full H-1B petition during the first week of April, the new registration process allowed employers to register their H-1B Cap beneficiaries online, which was followed by a computer-generated, random selection process. We anticipate this online registration process to continue next year, allowing employers to register their beneficiaries online with a \$10 registration fee per employee. In lieu of a random lottery, however, U.S. Citizenship & Immigration Services (USCIS) would rank the cap registrations based on prevailing wage levels, first selecting registrations that meet Level 4 prevailing wages and proceeding in descending order.

The order of selection between the regular cap and the advanced degree exemption will not be impacted. The wage level ranking would occur first for the regular cap selection and then for the advanced degree exemption. For those registrations that are selected by USCIS under this system, employers would then be able to file H-1B cap petitions with USCIS between April and June. If this proposed rule is finalized, we may not see a similar turnout next year despite the record-breaking number of registrations received earlier this year.

What Does This Mean for Employers?

If implemented, this proposed rule would undoubtedly have a significant effect on the H-1B program. Employers that are able to offer salaries at the top end of the prevailing wage levels will have an increased opportunity at being selected. As a result, employers may find themselves needing to pay significantly higher wages just to meet or exceed prevailing wage levels, or they could risk losing prospective talent to larger competitors in the field. With the economic downturn

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brought on by the pandemic, it would be especially difficult for small and even mid-sized companies to hire and maintain foreign talent. This rule would also impact employers' ability to hire recent graduates from universities at an appropriate wage for entry-level positions, as lower wage levels will substantially decrease their chances at selection.

Despite the purported intent to reserve H-1B visas for the "best and brightest workers," positions that inherently require extensive education and experience could be at a disadvantage if the new rule is implemented. For an occupation that requires a professional degree and several years of experience for even entry-level positions, a position that pays six figures and requires up to four years of professional experience may still result in a Level 1 wage based on Department of Labor guidance. Employees in entry-level positions in these occupations, including scientists, physicians, lawyers, etc., would have a lower likelihood of selection under the new system compared to jobs in other occupations that require an equal amount of experience and pay lower salaries.

Where Do We Go from Here?

With the New Year quickly approaching, now is a good time for employers to assess visa-dependent employees that may need H-1B sponsorship, determine their prevailing wage levels, and explore other immigration options to ensure continued work authorization, based on such potential changes coming soon.

Under the new ranking system, it is especially important for employers to work with counsel to evaluate how they will select individuals for sponsorship in next year's H-1B lottery, including assessing their specific positions, the respective prevailing wages for those occupations based on geographic location, and potentially the need to even consider increasing the wages offered to H-1B registrants, if possible.

Furthermore, it is critical that employers formulate a backup plan for employees, especially F-1 students. A number of alternatives may be available for individuals who are running up against the clock, including O-1s for individuals with extraordinary ability, TNs for Canadian or Mexican citizens, or even green card applications based on employment or marriage to a U.S. citizen.

Similar to the opposition received by the recent DHS and DOL changes to the general H-1B program, this proposed rule may also face legal challenges in federal court. Fisher Phillips will continue to monitor this and provide updates accordingly. Please contact [your Fisher Phillips immigration attorney](#) for more information about preparing for next year's H-1B cap registration process.

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