

DOL Stakeholders Teleconference - March 25, 2010

NAFSA Summary of Department of Labor Responses

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1. Erroneous use of “all industry” wages instead of “ACWIA”

NAFSA members are reporting that more than 50% of the national PWDs assigned to positions at colleges and universities are being assigned “all industry” wages as opposed to “ACWIA” wages regardless of whether the special language suggested by DOL *****This employer is an institution of higher education or a research entity under 20 CFR 656.40(e)***** was included on the 9141.

- 1) Is there additional training DOL can provide to certifying officers to ensure an ACWIA PWD?
- 2) Is there any other way NAFSA members can alert officers at the NPWHC about the need for an ACWIA PWD in the system to make certain to receive an ACWIA wage?
- 3) What can NAFSA members do to request corrections to PWDs that were assigned “all industry” wages? How long would it take DOL to process such corrections? Also, see next question.

NAFSA summary of DOL response: DOL is aware that there have been some erroneous “all industry” wage assignments to occupations at educational institutions, and has trained NPWHC officers again to pay closer attention to the employer name field to recognize college, university etc. However, since there are many laboratories and affiliated research institutes with names that are not obvious, it is important that all institutions qualifying for an ACWIA wage add the suggested language surrounded by three asterisks under Section 6 job duties on every 9141 to assist the NPWHC.

NAFSA requested that DOL consider modifying the 9141 to include a more obvious question/data field to better self identify and request an ACWIA wage. DOL indicated they would place this request on their suggestion list for form revisions but that form revisions require OMB approval and system revisions that may be addressed with other relevant changes at a later date. In the meantime, educational institutions etc who

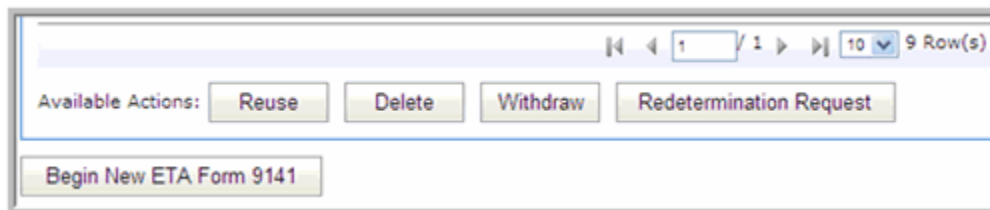
have received an erroneous "all industry" wage determination should request an official redetermination through iCERT. Also, See next question:

2. Requesting a redetermination of an NWPHC prevailing wage determination

Members report requesting redeterminations through iCERT on the same day they have received a PWD with an all-industry wage. However, there was no confirmation email received for the redetermination request and the requests do not appear in the redetermination queue.

- 1) Could DOL please explain the redetermination process?
- 2) How long can users expect to receive a formal redetermination?
- 3) How will users receive official notification of a redetermination?
- 4) Is this the best way to address issues of all industry wage assignments or should be seeking correction through stakeholder liaison?

NAFSA summary of DOL response: At the bottom of the Prevailing Wage: Case Details screen in iCERT, there is a Redetermination Request button.



Users seeking a redetermination should:

- Select the specific PWD for which they wish to request a redetermination
- Select a reason for redetermination from the drop-down list and then offer a brief explanation of why a different occupation, wage level, survey, etc. should be considered, and
- Submit the request.

After submitting, the PWD should now show up as "Pending Redetermination" in the case status list in iCERT. Users will receive an email only *after* DOL adjudicates the redetermination request.

DOL also confirmed that this was the best way for users to address PWDs where DOL erroneously used the "all industry" data set instead of the "ACWIA" data set. NAFSA asked DOL to update its iCERT user manuals to provide instruction in how to use the redetermination function.

Redeterminations will be reviewed on a first-in first-out basis. DOL could not offer specific processing times, but indicated that there is currently a queue that officers are working to reduce and that they hope that redeterminations will be processed "fairly quickly" in the future.

Users wishing to challenge a *redetermination* should follow official mail-in procedures outlined in [73 Fed. Reg. 78020](#) published on December 19, 2008. NAFSA recommended that DOL publish a notice clarifying the procedures to request: 1) NWPHC redetermination, (2) CO review, and (3) BALCA review.

3. Prevailing wage determination processing times

Some members are reporting that PWDs are taking more than the 60 days, which is longer than the DOL period that DOL recommended in its PW FAQs. We are concerned that we will be forced to use USCIS Premium Processing to expedite petitions where we would not normally have to, due to the protracted PW processing times, since LCAs cannot be filed more than 180 days prior to the effective start date and the NPWHC is taking longer than 60 days. While we have alerted hiring departments to plan ahead, research employment at educational institutions is difficult to predict (i.e. stimulus or other federal funding is suddenly available to start or extend a research project with required research start dates) The delay in processing due to the lengthy national PWDs has threatened the ability to maintain the lawful status of faculty and researchers and/or the ability to commence or continue the funded research project.

- 1) Is there a method that stakeholders could use to request expedited processing through liaison channels for cases pending longer than 60 days?
- 2) Could DOL comment on the current staffing levels of certifying officers at the NPWHC? Assuming DOL is still adding and training new staff, does DOL expect that an increase in staffing will result in faster PWDs?
- 3) Can DOL indicate when (if at all) they anticipate a faster PWD response?

NAFSA summary of DOL response: DOL indicated that they would like to decrease processing times in the future (possibly as quickly as the H2B 30-day standard) but that users should expect a 60 days processing time frame as described in their FAQs, while they continue to work through the backlog and hire/train NPWHC staff and contractors. DOL stated that they are not aware of any cases pending longer than 60 days and encouraged users to report such anomalies through stakeholder liaison. NAFSA members should report any such examples with the date submitted and iCERT case number through Issuenet.

4. Work hours and sites of employment on Form 9141

There are some new data collection fields on the ETA 9141 that did not exist on most previous state SWA PWD request forms, referencing travel, work hours and multiple sites of employment. Hours and exact locations of employment for researchers and professors often vary depending on laboratory experiments, required classroom teaching, evening seminars, student counseling hours etc.

- 1) Section D: A Job description: Can colleges and universities enter 35-40 hours in Question 3 list a standard 9am-5pm schedule in Question 3a for full-time faculty and researchers whose hours vary from week given the reality of teaching and research occupations?
- 2) Section D: C Place of Employment: Can College and universities list the main address of employment in Question 1 given that there are multiple classroom locations and research laboratories within a specific campus that are well within the reported MSA?
- 3) Section D: A Job description: Since occasional travel to professional meetings, conferences and scientific research meetings/collaborations is inherent to academic teaching and research, is it sufficient for educational institutions to respond yes to Question 7 and then list a standard response in Questions 7a of "Occasional travel to attend professional conferences and/or academic meetings".

- 4) Can educational institutions assume that these standard responses will not impact or alter a PWD?

NAFSA summary of DOL response: "Yes" to all the above questions.

5. Technical issues with iCERT prevailing wage request functionality

Members have reported experienced technical system issues. There still seems to be problems between the level of functionality between primary account holder and associate account holders. Members report that associate account holders are either unable or seriously delayed in loading the prevailing wage tab in iCERT to submit prevailing wage requests although the primary account holder granted full associate account access to submit prevailing wage requests. E-mail communication with OFLC has returned blanket answers about using Internet Explorer 6.0 or higher and clearing the cache in browsers. Although users have the correct browser to access iCERT and have cleared the cache, they continue to experience the problem. In addition, some users report that PW requests have disappeared from the pending cases queue, while the primary account holder is not experiencing these issues.

- 1) How should members and stakeholders alert DOL to technical issues?

NAFSA summary of DOL response: Users should report technical difficulties with the system to DOL via email through the oflc.portal@dol.gov. NAFSA members are also encouraged to also submit technical issues to NAFSA via Issuenet to request liaison assistance.

- 2) Some members have received rejections after a considerable period of time due to incorrect or missing data entry. While we appreciate that it will take some time to train users on a new system, is there some expedite assistance that DOL could provide to members to adjudicate PW requests that are resubmitted after a rejection due to insufficient/incomplete information to keep users from having to wait another 60 days for a new PWD?

NAFSA summary of DOL response: DOL suggested that users carefully follow DOL instructions and recent DOL FAQs to complete forms in iCERT as once a case has been submitted, it cannot be updated or modified. NAFSA wishes to remind members not to leave blank fields on the forms as DOL may consider the form incomplete. DOL indicated that users who receive denials should submit the form again but indicated that these requests will be assigned new case numbers and entered into the standard queue and processed first-in first-out as a new submission.

- 3) Some members have received email responses with an "error message" that states "an exception has occurred" with a request to contact the help desk. Members have followed the instructions but still await case resolution. Can DOL offer assistance on these types of cases through stakeholder liaison?

NAFSA summary of DOL response: Users should contact DOL via email to report technical problems and seek resolution at oflc.portal@dol.gov

6. Future liaison with the Department of Labor

Quarterly stakeholder meetings and FAQs are appreciated, but are not enough given the current delays and problems with the new PW portal of the iCERT system.

- 1) Will DOL agree to more frequent stakeholder conference calls contacts to resolve urgent issues surrounding the implementation the PW portal?
- 2) Will DOL agree to arrange a case resolution mechanism through liaison until initial implementation problems are addressed?
- 3) Will DOL set-up a telephone customer service center or establish a person contact to answer employer questions and resolve case discrepancies?
- 4) Does DOL have any other plans to expand their outreach at this time?

NAFSA summary of DOL response: DOL encouraged users to pay close attention to the new 3/24/20101 DOL FAQs on filing the Form 9141 posted on the NAFSA website at <http://www.nafsa.org/resourcelibrary/default.aspx?id=17581>. They are already considering additional technical assistance and will take the suggestions above under review.

7. Problems with PWDs for physicians and medical residents

Many academic institutions that offer medical training have certain prevailing wage issues of immediate concern, involving physicians and medical residents which are unique to our community. The national residency "Match" of medical school graduates occurs in mid March which is just 98 days before new residents must report for duty. This unique deadline is made all the more difficult by the new process in place. Unfortunately, there is no OES prevailing wage for medical residents. Like postdoctoral fellow, these trainees are physicians but are participating in supervised clinical training and not practicing physicians. The American Association of Medical Colleges has been the best source for prevailing wages. The AAMC publishes statewide surveys of medical residents by post graduate year (PGY) which has historically been accepted by local SWAs.

- 1) Please confirm whether the statewide AAMC surveys by PGY Year are acceptable for prevailing wage purposes if more localized data is not available.

NAFSA summary of DOL response: Yes

- 2) Please confirm that the localized AAMC survey is acceptable for prevailing wage purposes when there is sufficient data.

NAFSA summary of DOL response: Yes

- 3) Please advise what DOL considers to be the OES category most appropriate for medical residents in (a) internal medicine, and (b) other medical specialties

NAFSA summary of DOL response: DOL recognized that the occupation of medical resident does not exist on the list of occupations. They recognized that these are training positions but that the PWD depends on the description of job duties and field of specialty.

- 4) Various localities around the country had commissioned surveys of many institutions in the MSA for purposes of post doc prevailing wages. These surveys, which comply with GAL, were routinely accepted for more than a decade by SWAs. They have not been accepted since January 1, 2010. Please confirm whether such surveys are acceptable for post doctoral researchers and advise why such surveys have not been accepted by national DOL.

NAFSA summary of DOL response: DOL responded that all surveys must adhere to regulatory requirements for content. DOL indicated that they should offer specific reason(s) as to why a survey is not accepted. Users might consider requesting a redetermination through iCERT to offer further information and request additional review. NAFSA encourages members with concerns about survey denials to NAFSA through Issuenet

- 5) How should employers include more than 3 worksites on the ETA 9035? For example: clinical residents often rotate through 6 different physical sites in within a 3 mile radius.

NAFSA summary of DOL response: DOL responded that employers should submit multiple ETA 9035's if employees will work at more than 3 locations.

8. NAFSA request for wage level 1 determinations for postdocs and residents

Post Doctoral researchers are considered by most institutions to be entry-level trainees that require direct supervision by faculty. However, many members have received PWDs from the NPWHC that place postdoctoral positions above level 1, sometimes as high as level 3 or 4. In part, this seems to be due to overly mechanical wage level calculations that over-emphasize application of Appendix D (which was originally developed to guide PERM advertising requirements). For example, Appendix D lists the occupation "biochemist" as requiring a PhD, but the occupation of "chemist" as requiring only a bachelor's degree. When dealing with postdoctoral positions, however, all such positions require by definition a minimum of a Ph.D.

DOL's prevailing wage guidance states that the worksheet calculations "should not be implemented in an automated fashion. The NPWHC must exercise judgment when making prevailing wage determinations. The wage level should be commensurate with the complexity of tasks, independent judgment required, and amount of close supervision received as described in the employer's job opportunity."

We ask that DOL consider postdoctoral positions in the context of this statement, and, when evaluating the minimum education requirements for a post-doc, that the requirement of a PhD be considered as the normal educational requirement for a postdoctoral position in determining wage level assignments for such positions.

NAFSA summary of DOL response: DOL recognized that post-doc positions are typically entry-level training positions that should not be calculated automatically and PWDs should be assigned based on actual duties of the position. They have offered additional training to NPWHC staff regarding post-doc positions and wage assignments. Users are encouraged to request redeterminations through iCERT as outlined above and to reference the entry-level nature and training component of post-doctoral research in the explanation. Users are also encouraged to include the same terminology under job duties in future post-doc prevailing wage assignments. NAFSA encourages members who do receive resolution to high PWDs for post-doc positions through the iCERT redetermination process, to report cases to NAFSA through Issuenet so NAFSA can track the success of relief through the redetermination process.