

10 Tips for Determining the Prevailing Wage

ILW.com Teleconference

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Prevailing Wage Basics

- Union or SCA Wage Trumps Survey
- Otherwise Based on Survey
- Weighted Average – Mean; not Median
- Cross Industry
- Mix of Type Ers (Profit, Non)
- Fresh Data – 2 Years – Latest Edition
- For the Area of Intended Employment

OES Wage Survey

- Default to be used in absence of a Survey
- Only 2 Levels – No True Definition
 - I: “Entry Level” – Demarkation of Bottom 33%
 - II: Experienced –
- Hourly Rate is Annual Divided by 2080
- Includes Total Comp – Bonuses
- Uses Broad SOC Job Families

On-line Wage Library

<http://edc.dws.state.ut.us/owl.asp>

- Quick Search – Only if you know the Code
- Advanced Search – Specify State, MSA
 - Select Job Title or search verbs
 - Check for SCA Wage or EDC
- Or Crosswalk from DOT
- Job Zone May Vary from SVP

10 Tips on Prevailing Wages

- 1. Don't Inflate the Job
- 2. State Skill Levels
- 3. Challenge SCA
- 4. Level 1 Can Be Advanced
- 5. Level 1 Can Have > 2 Year's Experience
- 6. Level 1s Can Roam
- 7. Level 1s Can Require Master's
- 8. Level 1s Can Be Licensed
- 9. Use Surveys
- 10. Can Pay Less Than PW While Case is Pending

TIP#1: Don't Inflate The Job

- Say Coordinates Unless Really Manages
 - Use Word Search Unless you know the Code
 - Key Word Search in OWL can locate title with the right level
- Managers Must Manage 80%+ of Time - SOC
 - If less, just a Level 2 Worker with glorified Title
 - Supervisors who do hands on work 20%+ are classified with the workers they supervise

Tip #2: Specify Skill Levels

- Generic or DOT Job Description include the full range of duties and are Level 2
- State Skill Levels if you Want Level 1
 - Box 13 Job Description is Key Determinant
 - Tasks: Basic or Moderate Complexity
 - Advanced only for purposes of training or assisting
 - Responsibility: limited or only occasional exercise of independent judgment
 - Supervision: close, specific instructions, reviewed for accuracy
- See Guidance Letter 5-02 (July 7, 2002) GL Q 1, 2, 8
 - Infonet Document No. 02081440, posted 8-14-02

Tip #3: Challenge SCA Wages

- SCA Job Description Must Match
 - Dictionary of Service Occupations
www.dol.gov/dol/esa/public/regs/compliance/whd/wag
 - Sofia's Ristorante Italiano, 89-INA-238 (May 21, 1999)
(Cook II does not Match Foreign Food Specialty Cook)
- Request Source & Basis of Wage
 - SCA Slots Various Occupations
 - May Request Source and Basis – El Rio Grande, 1998-INA-133 (Feb. 4, 2000)

#4: Level 1 Can Be Advanced Occupation GLQ #13, 3, 4

- Any Job Can Be Supervised
 - Or Moderately Complex with Advanced for Training & Development, Under Supervision
 - Tasks such as Design, Research or Analysis do not set the Level
- Level 1 is simply bottom 1/3 of wages
- All Jobs Must Have a Level 1 if it has a 2
 - Even Managers, Judges & Surgeons

#5: Level 1 Can Require 2+ Years

- Level Depends on Skills, Supervision & Responsibilities
 - Not Education or Experience Required
 - Requirements are Relevant but not determinative
 - Millershor, Inc., 2000-INA-288 (Jan 8, 2002)
 - Range within SVP Code not a Factor GL 1
 - Presumed Level 2 if SVP Exceeded GL 8
 - FN's Experience Irrelevant – Use Requirements at Date of Hire Systems Plus Technology, Inc., 1999-INA-311 (Aug. 10, 2000) (Many Years, But Could be Under Supervision)

#6: Level 1s Can Work Off-Site

- Consultants In the Field Are Not Necessarily Level 2 GL Q# 16
- Employer Can Still Provide Supervision
 - Thru Specific Guidelines, Reports, or On-Site Management of Client or Employer
- It is your job to clarify how supervision is given

#7: Level 1s Can Require MS

GL Q# 9,10, 12, 14

- Usually Level 2 if Master's Required and Bachelor's is Normal Requirement
 - Use OOH , Headhunters, Academics, or Trade Experts to Show Industry Requires a Master's
 - Employer's Past Practices Helpful but not Determinative – Standard is Industry Driven
 - Exception if job does not involve independent performance of all duties, e.g. PY-1 intern (GL 9, 14)
- Otherwise a question of whether the supervision, responsibility or tasks are Level 2, eg, tasks of advanced complexity Relative to the Occupation

#8: Level 1s Can Be Licensed

GL Q # 17

- Level 1 if Closely supervised
 - Or involves only moderately complex tasks
 - Or limited exercise of independent judgment
- E.g., a teacher working under a Sr Teacher or lawyer in large firm
- Dentist more difficult as they tend to function independently

#9: Use Surveys

GAL 2-98 & 1-00

- Watson Wyatt, Radford, AEA or Mercer often Accepted
- The Survey Group – 781-279-9994
 - Does Surveys for Mass. Employers
 - Also researches PW for H & LC cases
- Employer Wage & Comp Depts
- Document the 7 Points (TSG will help)

7 Points

- Valid Methodology (representative sample, not necessarily random)
- Data for the area – or as close as possible
- Weighted Average – Not Consensus or Mean
- Cross Industry
- Latest Edition (Not More than 1 Year Old)
- Data Not > 2 Years old
- Description for appropriate position or level

Common SWA Survey Objections

- Sample too Small
- Area too Large (CMSA)
 - Can Use if Insufficient Data in Smaller Area
- Inappropriate Position or Level
 - Not Required to Use OES Job Family
- Insufficient or Too Many Levels
- Undefined Sample Frame

**Be Patient, Persist, Keep it Simple, & CO Review
or Job Service Complaint if H-1B Case**

#10: Wage Not Operative Till PR Approved

- Pay PW When Alien Begins Work
 - 20 CFR 656.20(c)(2)
- Place on Payroll at Entry to US
 - 20 CFR 656.20(c)(4)
- Construes Entry as PR Entry
 - Maysa, Inc., 98-INA-259 (May 21, 1999)
 - Silver Spring Jewelers Mfg Co., A21409743 (Comm Dec. Dec 8, 1983) (3 AILA MOMA 4 (Jan. 1984))
 - Masonry Masters v. Thornburg, 875 F. 2d 898 (DC Cir, 1989)
- BUT Failure to Pay Can be an H-1B or 274A Violation, Can Reflect on Ability or Willingness to Pay

More Tips

- Wage Can Be Less Than FN's
 - If use range – Systems Plus Technology, Inc., 1999-INA-311 (Aug 10, 2000)
- Can Pay Post-Filing Raises
 - Weinig Memo, CO 204.8C (Feb 5, 1990) (67 IR 525 (April 30, 1990))
- Can Use Academic Wages for NonAcademic Jobs
 - Cross Industry Exemption Applies to the Er
 - Select OWL's ACWOA Data Set for EDC
- Insert OES Code in 750A, Item 9 (Job Title)
 - DOT Code Also if SVP > Job Zone
 - DOT Trumps OWL for purposes of SVP (GL #4)

SUBSTITUTION

- Allows New EE to Use Old EE's LC
- Must Substitute Thru INS
 - May do at any time prior to PR Approval
 - INS CO Memo, HQ 204.25-P (Mar 7, 1996), 8 CFR 204.5, 204.5(d)
 - We owe this gift to Sam Kooritsky

Mechanics of Substitution – What You File

- 140 with Original LC
 - Or Atty Certified Copy if with INS
 - Indicate File # or Consul where Original LC Resides
 - If lost, request duplicate – if issued w/in 5 years
- 750B w/ Docs Showing FN Qualified at PD
- Current Financials
- Copy of Any Prior I-140 Approval
- Request to Withdraw Any Approved I-140

Interplay with AC 21 106(c)

- AC 21 Sec. 106(c)
 - LC Portable After I-485 + 180 days
- Will revocation defeat portability for the initial FN? See INS CO Memo HQ 70/6.2.6 (June 19, 2001)
- Er can have EE port to similar job, then substitute
- Could theoretically have multiple substitutions –
Can't concurrently file w/o original LC

About the Author

Steven Clark is a founding member of the law firm of Flynn & Clark, P.C. He is a past president of AILA (1999-2000) and has authored over 40 publications on H & L visas, Labor Certification, and Employment Based Immigration. Mr. Clark served as Senior Editor AILA's Annual Conference Handbook, Editor of the chapter on Labor Certification in the treatise Immigration Law and Practice (Times Mirror/Mathew Bender Co.). He has also been listed as one of "The Best Lawyers in America" under the immigration heading since its inception and is rated "AV," the highest rating conferred by Martindale-Hubbell, an authoritative, independent rating service. Mr. Clark is also a founding member of IMMELAW®, the national consortium of preeminent immigration firms with over two centuries of combined immigration law experience.