

10 Tips for Determining the Prevailing Wage

ILW.com Teleconference

April 29, 2003

© 2002, 2003 Steven Clark

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