Improving the integrity of worker protections with evidence-based prevailing wage reform

Tabulating occupational wage data based on experience and education

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Executive summary

The Department of Labor (DOL) sets prevailing wage levels with underlying data that does not contain information on the education and experience of workers. This leaves the prevailing wage system inadequate in preventing employers from hiring foreign workers at lower pay than US workers with similar levels of experience and education.

By linking existing administrative records (1040s, LEHD, and optionally W-2s), the government can generate wage tabulations by occupation, geography, experience, and education without any new data collection. DOL should convene an interagency working group with Census to build this dataset and generate public tabulations as the basis for a new system of determining prevailing wage levels that better protects US workers.

Proposal in a nutshell

The US immigration system relies on identifying prevailing wages to protect the integrity of employment-based visa programs. Prevailing wage determinations are the linchpin in satisfying the statutory requirement that employers pay immigrants at least the actual wages they pay other similar US workers and the prevailing wages for the occupation in the place of employment, and that such wage levels “shall” be commensurate with experience and education.

The federal government’s inability to capture and analyze wage characteristics by experience and education within occupations seriously limits its ability to protect American workers. When DOL generates prevailing wage levels for the purpose of immigrant (green card) and nonimmigrant visas, it implements the statute in a way that implicitly assumes, without evidence, that all occupations have exactly the same distribution of experience, education, and skills. This

questionable assumption is necessary to justify uniformly designating wage levels based on the same percentile cutoffs across different occupations: Level I ("entry level") at the 17th percentile, Level II ("qualified") at the 34th percentile, Level III ("experienced") at the 50th percentile, and Level IV ("fully competent") at the 67th percentile. Historically, proposals to change the prevailing wage system would change the particular percentile thresholds, but have retained the uniform application of the same percentiles to different occupations.

By linking existing administrative datasets, the government can make prevailing wage determinations more evidence-based: ensuring that foreign workers are offered at least the median for similarly situated US workers (i.e., workers in the same occupation, area and with similar experience and education), based on actual data on what similarly situated US workers earn. In cooperation with the Census Bureau, DOL can generate high-quality tabulations of wages for combinations of occupation, area, experience, and education by combining 1040 data from the IRS and available to the Census Bureau, the Longitudinal Employer-Household Dynamics (LEHD) data from Census, and (optionally) W-2 data available to Census. Doing so would harness existing administrative datasets to create the most detailed longitudinal dataset on labor market impacts across different jobs, workers, and employers.

The existence of this dataset would transform the Department's understanding of and ability to forecast labor market impacts, benefitting many other government functions beyond the immigration system. For example, it would provide the AI Workforce Hub invaluable information that is not available anywhere else and that can only be approximated by lower-quality, less granular surveys from the private sector. It will also include many more variables and extend back decades further than anything available outside government.

This brief outlines the relevant data sources involved, the steps necessary to link them, and how this new data would provide DOL a methodology for calculating prevailing wages that is more reliable, precise, evidence-based, and better suited to protect US workers.

Problem

The Immigration and Nationality Act (INA) at Section 212(p) provides that a default requirement for foreign-born workers seeking employment-based green cards and numerically-limited employer-sponsored nonimmigrant worker visas is a DOL prevailing wage determination. A DOL-issued prevailing wage determination is required for all EB-2 immigrants without National Interest Waivers and all EB-3 immigrants (Employment-Based 2nd and 3rd preference green cards), while compliance with DOL prevailing wage levels is a prerequisite for filing a petition on behalf of H-1B, H-1B1, E-3, and H-2B nonimmigrant workers.

The INA currently mandates that when DOL provides prevailing wage levels such wage levels "shall" be commensurate with experience, education, and level of supervision. However, DOL sets these prevailing wages using information from the Occupational Employment Statistics (OES) survey, which does not include information on the experience or education of workers. Nevertheless, DOL sets Level I at the 17th percentile of pay, Level II at the 34th, Level III at the

50th, and Level IV at the 67th. Without any evidence or analysis, 2009 Prevailing Wage Determination Policy Guidance from DOL establishes that these levels are then associated with "skill levels" to satisfy the statutory intent, with Level I identified as "entry level," Level II as "qualified," Level III as "experienced," and Level IV as "fully competent."

Occupational Employment Statistics (OES) survey data on which DOL currently relies have severe limitations. Put simply, the OES survey data used by DOL in prevailing wage determinations since 1997 are inadequate to the task being demanded of them:

- **No information about skill differentials.** Most importantly, OES survey data provide no information about the variation in education, experience, or other skills for workers within Standard Occupational Classification (SOC) codes, as this information is not requested. Therefore, rather than using data to compare foreign to actual US workers of similar education or experience, the prevailing wages are set by simply assuming different "skill levels" (I-IV) can be identified at different percentiles in the wage distribution for the entire occupation.
- **Small sample sizes.** Numerous geographic areas and occupational categories have sample sizes that are relatively small or even zero within OES. The result is that for many areas and occupations, DOL often resorts to substituting data for larger geographies, including at the national level.
- **Imprecision.** OES data are not granular or precise. Information is collected in the form of broad pay bands. Not only does this necessarily entail imprecise results, prevailing wage determinations are ultimately sensitive to arbitrary decisions about how DOL sets the bins. Furthermore, because the OES does not report earnings at the 17th, 34th, or 67th percentiles, DOL resorts to linearly interpolating these percentiles, further distancing the prevailing wage standard set by the agency from the actual survey results.

Any division of the wage distribution into bins uniformly across occupations is inherently arbitrary and does not reflect economic reality. Since 1997, most changes and proposed changes to the prevailing wage system have reflected where to set the bins. But given the lack of information about education and experience within the OES survey, the evidence underlying these changes has been thin. Furthermore, variation in the pay structure across occupations calls the paradigm of uniform percentile rankings applied equally to all occupations into question.

Consider two model examples that each highlight a different type of occupation stylized with very different characteristics:

A. Junior-heavy occupations. Some occupations are characterized by a base that is packed with entry-level staff relative to senior staff. These occupations often face "up-or-out" dynamics, where junior staff compete for a small set of upper-tier roles. Academia might be the paradigmatic case, where adjuncts, lecturers, and assistant professors far outnumber tenured professor positions.
B. Senior-heavy occupations. Other occupations are characterized by the opposite pattern, an inverted pyramid where the workforce is dominated by experienced practitioners, with

only a thin cohort of entry-level staff. These might include specialist medical practices (nearly all attending physicians, few residents), skilled-trades where the workforce is aging and juniors are scarce, or executive-level decision-makers.

Note how the uniform wage level paradigm fails to generate the right prevailing wages given some knowledge about distribution of experience within an occupation. For example, a uniform percentile threshold across all occupations forces DOL into an undesirable dilemma: If DOL sets the percentile thresholds appropriate to senior-heavy occupations, then junior-heavy occupations can unfairly use the immigration system for wage arbitrage, undercutting US workers, and still successfully satisfy labor certifications. But the other horn of that dilemma has real costs as well: if DOL instead sets the percentile thresholds appropriate to junior-heavy occupations, then senior-heavy occupations will unfairly be boxed out of recruiting non-citizens for entry-level and qualified candidates even if they pay significantly above-market compensation.

Of course, these two simple dichotomies do not at all fully capture the diversity of wage distributions. Many occupations will be somewhere in the middle of senior-heavy or junior-heavy, and others might exhibit bimodal distributions. Furthermore, an occupation may change over time, for instance if a new technology or outsourcing strips out routine junior tasks. Some occupations, especially in emerging and complex fields are characterized by entry-level roles that almost always require sophisticated knowledge and completion of tasks either critical to the development of a new field or embodying complicated responsibilities that are often multi-disciplinary. For these occupations, the wages curve might have the sharpest upward trajectory early on, based on skill development through experiential learning integral to credentialing prerequisites in these fields. In other occupations, specialized duties might correspond to a more traditional wages growth curve based on longevity.

The important point is that DOL has implicitly assumed, without evidence, that all occupations have approximately the same distribution of workers with different levels of experience and education. Instead, it would be preferable to set wage levels appropriate to the actual distribution of experience and education within an occupation based on reliable data. Because OES offers no evidence about experience or education, DOL will need a new approach to implement an evidence-based methodology so that it can adequately protect US workers as tasked by Congress.

Solution

DOL and BLS should work with other statistical agencies, including the Census Bureau, to tabulate joint occupation, wage, geography, education, and experience data that can be used to underlie a new methodology of determining prevailing wage rates. Tabulating figures at this level of detail requires much larger sample sizes than existing surveys and is possible with administrative data.

Data sources:

1. **1040 data.** Administrative 1040 data contain all of the ingredients necessary to compute detailed earnings distributions by occupation and location (down to the level of street address), and with longitudinal linkages these data can also capture measures of experience. Occupations are accepted as write-in fields and would need to be autocoded to match SOC codes used in prevailing wage determinations. The process of translating written occupation descriptions to occupation codes is already performed on ACS and CPS data. However, cross sectional 1040 data does not include employment history. The 1040 data would need to be longitudinally linked to determine experience (i.e., tenure within an occupation). Fortunately, the Protected Identification Keys (PIKs) would allow longitudinal linking. Without any additional linking to outside data sources, 1040s would be sufficient to generate earnings tabulations by occupation, area, and experience. This alone would represent a major value add to setting prevailing wages by including experience data, giving much greater precision, and having much larger sample sizes (i.e., the entire population).
2. **LEHD data.** The LEHD data is built and maintained by the U.S. Census Bureau using quarterly state administrative unemployment insurance records. For our purposes, LEHD is relevant because it offers the chance to complement longitudinally linked 1040s with education data. The LEHD data provides linked employer-employee data covering approximately 96% of private sector employment. Importantly, because the system follows workers over time, work histories can be reconstructed. Moreover, the employee-employer data have been linked to both firm, establishment, and person attributes. For a subset of workers self-reported education information is available. If 1040 and LEHD were linked using PIKs, then earnings tabulations can be generated by occupation, area, experience, *and education*.
3. **W-2 panel data.** Including W-2 data is an optional add-on, as 1040 and LEHD data is sufficient for earnings tabulation by occupation, area, experience, and education. Like LEHD, IRS Form W-2 can be used to create detailed person-level earnings histories. One limitation of the LEHD data is that not all states are available every year and the panel of states included does not become nationally representative until 2000. W-2 data is available nationally and for more years, making possible a national worker panel going back many decades. But perhaps the biggest value of including W-2 data is that it gives employer-side information that can be useful for other purposes outside of the immigration context.

Data sources to be linked and what information they offer

	Geography	Occupation	Experience	Education	Employer-side information
1040	Yes	Yes	Yes*	No	No
LEHD	Yes	No	No†	Yes	No
W-2	Yes	No	No	No	Yes

*Cross-sectional 1040s will not show experience, but longitudinally linking 1040s can generate experience within an occupation over time.
† LEHD contains work history, but without occupation information, is insufficient on its own to provide a basis for occupational experience without linkage to 1040 data.

Linking will require inter-agency cooperation and may prove the most difficult part of this proposal. 1040 data are filed with the Internal Revenue Service (IRS) and protected from disclosure. These data are shared with the Census Bureau for specific purposes and this proposal would seek to expand those purposes, requiring explicit approval from IRS. While LEHD data require memoranda of understanding with the states, the Census already has many MOUs and may not need to update them if it is a tabulation for another government agency rather than a Census release. BLS should work with the Census Bureau to determine what agreements will be necessary for these linkages.

After a tabulation is generated, the new data will need to be validated by comparing to the OES-generated tabulations. For example, this will ensure that autocoding occupations from the 1040 data to make them comparable with SOC codes does not introduce important problems. Agencies must also validate the data linkages, cleaning of wage values, and other features of the new tabulation. Furthermore, agencies will need to verify that disclosure requirements are satisfied. Census Bureau tabulations must adhere to strict disclosure limitations to avoid the release of information about individuals or businesses.

The prevailing wage system will remain blunt and contested so long as it relies on survey data that cannot observe how pay varies with workers' experience and education. By securely linking 1040 returns (to supply occupation, earnings, geography, and with longitudinal linkages, experience) with LEHD (to supply education) the federal statistical system can, for the first time, generate tabulations that match occupation × area × experience x education. Optionally, W-2 data linkages would give the federal government the ability to include employer-side information, including industry, which may be useful for other purposes outside prevailing wage determinations.

Those tabulations would allow the Department of Labor to assign wage levels that are anchored in the actual pay structure of each occupation—rather than in broad percentiles that fit some occupations and distort others.

Implementing this linkage squarely advances the aims of the *Foundations for Evidence-Based Policymaking Act of 2018*: it repurposes existing administrative data, minimizes new reporting

burdens, and produces statistics that improve program integrity and protect U.S. workers. It also keeps faith with the Immigration and Nationality Act's requirement that employment-based visas not depress local wages, while giving employers a transparent, defensible benchmark for recruiting needed talent.

We therefore recommend that DOL:

1. Convene an inter-agency working group with the Census Bureau and any other partners necessary to finalize data-sharing agreements;
2. Generate the linked dataset and tabulations and validating results against current OES-based determinations; and
3. Publish a new prevailing wage determination methodology for notice-and-comment, based on actual data of earnings within combinations of occupation, area, experience, and education (or, if only 1040 data is used, just occupation, area, and experience). No prevailing wage should be below the median for a given occupation, area, experience and education combination.

Conclusion

Creating these linked tabulations would dramatically improve DOL's ability to ensure its prevailing wage system adequately fulfills its congressional mandate to protect US workers.

The focus on "prevailing wages" has long been a feature of immigration-related actions by federal agencies, starting a century ago with the first Mexican Bracero program for agricultural workers during World War I and then the restart of the Bracero program during World War II.[1] In the decades following, the Department of Labor issued and revised policy-level guidance multiple times on required wage constructs for the hire of noncitizen workers in agriculture and beyond, even before the INA specifically talked about "prevailing wages" and before the 1990 Act amendments established a prevailing wage requirement for H-1B professionals.

It was so well-understood that agencies had experience validating prevailing wages that imposing a prevailing wage mandate on the H-1B classification did not initially come with any statutory language delineating such wage confirmation. Indeed, prevailing wage guidance from DOL following implementation of IMMACT90 made clear that the prevailing wage determination could be based on a survey conducted by a state agency or by any published survey that was

[1] In the 1917 immigration statute, contracted workers were specifically ineligible for entry to the US but the Commissioner of Immigration and Secretary of Labor were also specifically authorized to admit otherwise barred persons. See Section 3 of Pub.L. 64-301 (February 5, 2017, the Immigration Act of 1917). After the US entered World War I, the Department of Labor exercised this authority to allow Mexican Braceros to work for farmers in the western US when, among other conditions, wages offered were the same paid for similar labor in the community in which the Mexicans were to be employed. This same wage concept was also featured when the Bracero Program was re-started during World War II, that the Department of Agriculture initially chose to administer with a requirement of an annual "prevailing wage" determined at the beginning of the growing season based on the locality in which the labor was to be provided, but which Congress later determined should not be subject to any governmental determination of required wage. See Section 4(b) of Pub.L. 78-45 (April 29, 1943, as part of food production appropriations bill).

specific enough to the occupation and locale, with the idea that published, publicly available surveys were preferred.[2] Later, in 1997, DOL concluded that "the most efficient and cost effective way to develop consistently accurate prevailing wage rates is to use the wage component of the BLS Occupational Employment Statistics (OES) program."[3] Thus, by agency action, relying on BLS data became the primary means to establish prevailing wages. It was only in 1998 that Congress acted to add Section 212(p) to the INA, governing the computation of prevailing wage levels for H-1B, H-2B, and permanent labor certification by statute.[4] But even then, agency action controlled the prevailing wage determinations, establishing by DOL policy that prevailing wages issued for H-1B and permanent labor certifications programs identified two wage levels based on OES survey results with Level 1 utilized for what DOL described as beginning level employees that performed routine or moderately complex tasks and Level 2 for fully competent employees that used advanced skills.[5] Congress last acted to amend the controlling prevailing wage statute in 2004, adding mandates that employers pay 100% of the prevailing wage determined, that wage levels be commensurate with levels of education, experience, and supervision, and that at least 4 wage levels be provided by the government.[6]

In other words, the current provisions of the governing *statute* are best understood as a response to and a reflection of the (much) longer record of *agency* action attempting to consider and operationalize a "prevailing wage" construct to protect US workers.

Now, with modern data sources and data analysis capabilities, DOL is uniquely positioned to update the prevailing wage calculation to better select immigrants who affirmatively contribute to the American workforce while scrupulously protecting American workers.

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[2] See, e.g., DOL's General Administration Letter (GAL) 4-95, issued May 18, 1995.
[3] See DOL's General Administration Letter (GAL) 2-98, issued October 31, 1997. Interestingly, the new instructions to State Employment Security Agencies (SESAs) to rely on OES data barred the use of the OES wage data during a 60-day delayed effective date period unless no other sources for a particular occupation and geographic area were available, suggesting that from the outset DOL saw the weakness in relying primarily on OES.
[4] Section 212(p) of the INA, first codifying the computation of prevailing wage levels for H-1B, H-2B, and permanent labor certification, was added by Section 415 of Pub.L. 105-277 (October 21, 1998, the American Competitiveness and Workforce Improvement Act).
[5] See, e.g., DOL's Training and Employment Guidance Letter (TEGL) 5-02, issued August 7, 2002.
[6] Subsections 212(p)(3) and (4) of the INA were added by Section 423 of Pub.L. 108-447, December 8, 2004, in Title IV (Visa Reform) of the Consolidated Appropriations Act of 2005). DOL's Prevailing Wage Determination Policy Guidance, a 36-page description of the process and how employers should assess prevailing wage levels in compliance with DOL policy, was last updated November 2009.