College and University Professional Association for Human Resources

June 1, 2021

Brian D. Pasternak, Administrator
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington DC 20210

Submitted via regulations.gov

Re: Request for Information: Docket ETA-2021-0003 Data Sources and Methods for Determining Prevailing Wage Levels for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States

Dear Administrator Pasternak:

I write on behalf of the College and University Professional Association for Human Resources (CUPA-HR) and the undersigned organizations in response to the Request for Information (RFI) published April 2, 2021, in the Federal Register by the Department of Labor and entitled, *Request for Information: Data Sources and Methods for Determining Prevailing Wage Levels for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States*.[1]

CUPA-HR serves as the voice of human resources in higher education, representing more than 31,000 human resources professionals and other campus leaders at over 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 79 percent of all master's institutions, 57 percent of all bachelor's institutions and nearly 600 two-year and specialized institutions.

[1] 86 Federal Register 17343 (April 2, 2021), pp. 17343 – 17346.

The following associations join CUPA-HR in these comments:

American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Council for Christian Colleges & Universities
National Association of College and University Business Officers

The members of these higher education associations include approximately 4,300 two- and four-year public and private nonprofit colleges and universities and the professionals that work at those institutions.

STATEMENT OF INTEREST

Colleges and universities employ approximately 3.5 million workers nationwide, and there are institutions of higher education located in all 50 states.[2] Immigrant and nonimmigrant foreign workers represent a small percentage of the total number of workers in higher education, but they fill tens of thousands of critical positions on campus where there are a limited number of American workers with the requisite skills to perform the job successfully and ensure fulfillment of an institution's mission.

Since 2009, colleges and universities have relied on the methodology for determining prevailing wage levels for immigrants and nonimmigrants set forth in guidance issued by the Employment and Training Administration (ETA) to make hiring and retention decisions for key positions throughout the higher education workforce.[3] Unfortunately, DOL's January 2021 Final Rule, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States* (Final Rule),[4] made changes to the computation of wage levels in a manner that will negatively impact the numerous immigrant and nonimmigrant employees on campus. Furthermore, the Final Rule will preclude many U.S. colleges and universities from hiring for highly specialized and much needed positions in the future. As such we have an interest in responding to the RFI and encouraging DOL to revise the computation of prevailing wage levels in the Final Rule in a manner that protects American workers by reflecting the range of salaries paid to employees in each occupational classification in higher education.

BACKGROUND

On October 8, 2020, DOL issued an Interim Final Rule (IFR) revising the computation of prevailing wage levels for permanent labor certifications and labor condition applications (LCAs) under DOL's four-tiered wage structure based on the Occupational Employment Statistics Wage (OES) Survey administered by the Bureau of Labor Statistics (BLS).[5]

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[2] See Summary Tables (ed.gov)
[3] *Employment and Training Administration Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (revised Nov. 2009), available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf
[4] 86 FR 3608
[5] 85 FR 63872 (October 8, 2020), pp. 63872 – 63915, hereinafter referred to as IFR

Under DOL's previously used methodology to determine prevailing wage levels, a Level 1 Wage "entry level" is calculated "as the mean of the lowest paid one-third of workers in a given occupation (approximately the 17th percentile of the OES wage distribution)," and a Level IV "fully competent" wage is calculated "as the mean wage of the highest paid upper two-thirds of workers (approximately the 67th percentile)".[6] The Level II "qualified" and Level III "experienced" wage levels are set at approximately the 34th percentile and 50th percentile based on the mathematical formula Congress set forth in the Immigration and Nationality Act (INA).[7]

With the IFR, DOL recalculated the Level I Wage as the mean of the fifth decile of the OES distribution, or approximately the 45th percentile and the Level IV wage as the mean of the upper decile of the OES wage distribution, or approximately the 95th percentile. The intermediate wage levels continued to be set via statute, yielding second and third wage levels at the 62nd and 78th percentiles, respectively. The IFR took immediate effect and without prior notice and opportunity for the public to comment—leaving human resources professionals, who had worked with their campuses to make hiring and retention decisions for key positions, with significant practical problems posed by the IFR's abrupt changes.

While DOL did not provide an opportunity for impacted stakeholders to comment on DOL's new methodology **before** the IFR went into effect, it did accept comments for 30 days following issuance of the IFR. DOL received 2,340 comments in that short window. CUPA-HR and 18 other higher education associations filed an extensive comment on the IFR on November 9, 2020 (2020 comments).[8] In that letter we expressed deep concern with the IFR, because "it was implemented without opportunity for public comment, its methodology is fundamentally unsound, and the IFR does not provide colleges and universities adequate time to adjust to changes, which negatively impacts higher education's ability to provide services for students across the country." The IFR was subject to four different legal challenges in which a number of leading plaintiffs were institutions of higher education. In each case the district court entered an order that set aside or enjoined the IFR on procedural grounds.

Despite its legal setbacks and unsound methodology, DOL relied on the IFR and the insufficient 30-day comment period to issue its Final Rule during the last week of the Trump Administration. DOL changed its prevailing wage methodology from a mean-based calculation in the IFR to a percentile-based methodology in the Final Rule. Specifically, DOL revised the Level I wage downward to the 35th percentile as opposed to the mean of the fifth decile of the OES distribution used in the IFR and the Level IV wage downward to the 90th percentile of the

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[6] Intra-Agency Memorandum of Understanding executed by Mr. John R. Beverly, III, Director, U.S. Employment Service, ETA, and Ms. Katharine Newman, Chief, Division of Financial Planning and Management, Office of Administration, BLS (Sept. 30, 1998)

[7] See 8 U.S.C. 1182(p)(4) ("Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.")

[8] See Regulations.gov

OES distribution as opposed to the mean of the upper decile used in the IFR. DOL continued to set the Level II and Level III wages in accordance with 8 U.S.C. 1182(p)(4)—53rd and 72nd percentiles, respectively. DOL provided a 60-day effective date and delayed the transition period to the new wage levels phasing in the increased wage minimums over a multi-year period. Despite these changes, the Final Rule is still flawed, and many groups are continuing litigation efforts to prevent it from going into effect.[9]

On February 1, 2021, DOL proposed delaying the effective date of the Final Rule by 60 days in accordance with White House Chief of Staff Ron Klain's memorandum, "Regulatory Freeze Pending Review," and asked for public comment on "the proposed delay's impact on any legal, factual, or policy issues raised by the underlying rule and whether further review of those issues warrants such a delay."[10] CUPA-HR submitted comments supporting the delay while also urging "ETA to begin rulemaking to withdraw the final rule as it is both substantively and procedurally flawed."

On March 12, 2021, DOL formally delayed the effective date of the Final Rule by 60 days. Citing the comments issued in response to the proposed delay, DOL clarified that "it may be helpful for the Department to issue a request for information soliciting public input on other sources of information and/or methodologies that could be used to inform any new proposal(s)," and stated it was "considering whether to propose a further delay of the final rule's effective date."[11]

On March 22, 2021, DOL proposed further delaying the effective date of the Final Rule by eighteen months along with corresponding proposed delays to the rule's transition dates to allow DOL additional time to continue its review of the Final Rule and permit the agency time to review feedback to a Request for Information it intended to release shortly thereafter.[12] On May 13, 2021, DOL formally delayed the Final Rule's effective date and corresponding transition dates by eighteen months, concluding that the significant delay was necessary "given the complexity of the regulation, the serious concerns that have been raised, and the potential harm that would result from immediate implementation of the Final Rule."[13]

DOL issued its RFI on April 2, 2021, less than a month after issuance of the March 22 delay proposal, asking interested stakeholders for information on "the sources of data and methodologies for determining prevailing wage levels covering employment opportunities that United States (U.S.) employers seek to fill with foreign workers on a permanent or temporary basis" in order to help DOL review the Final Rule and potentially develop "a future notice of proposed rulemaking to revise the computation of prevailing wage levels" in a more effective manner.

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[9] See Chamber of Commerce Comments: ETA-2020-0006-3007
[10] 86 FR 7656
[11] 86 FR 139995, 139997
[12] 86 FR 15154
[13] 86 FR 26164

RESPONSE TO RFI

Below we provide data and analysis relevant to the RFI informed by CUPA-HR's research team and the association's salary surveys.[14]

Data Sources on Salaries and Positions at Institutions of Higher Education

DOL has asked for sources of data aside from the OES survey that can be used to approximate wage levels by occupation and geographic area, specifically for U.S. workers similarly employed at institutions of higher education. To our knowledge CUPA-HR surveys are the most comprehensive higher education-specific salary resource. Approximately 1,300 institutions participate each year, contributing incumbent-level data that reflects the salaries, demographic information and benefits of more than 270,000 full-time faculty by discipline and rank and more than 500,000 administrators and staff. Each year, from November to January, we gather institutional data from higher education institutions. Our research team then vets and reviews the data through February.

CUPA-HR has worked with college and university human resources professionals for over 50 years to collect salary data on the higher education workforce. Today the annual survey cycle culminates in the publication of results from four surveys: the administrators survey, professionals survey, faculty survey and staff survey.[15] Between the four surveys, CUPA-HR analyzes incumbent-level data for three-quarters of a million individuals employed at institutions of higher education. For three of the surveys (administrators, professionals, and staff), CUPA-HR has created its own system for classifying the occupations of employees on campus due to the fact that the standard occupational classification codes (SOCs), which the OES wage data is based on, are not sufficient.[16] While CUPA-HR uses the Classification of Instructional Programs (CIP) codes from the Integrated Postsecondary Education Data System (IPEDS) to classify employees in the faculty survey, IPEDS reporting on wage data is of the data

[14] CUPA-HR's research team consists of four researchers, three with Ph.D.s in the social sciences and one with an M.S. working on a Ph.D. in evaluation, measurement and statistics. A fifth member of the research team is the research operations manager, who has an M.S. in the area of human resources management. The director of research, Jacqueline Bichsel, has more than 20 years of experience in higher education research, measurement, survey development, evaluation, statistics and analytics. The other researchers have various levels of expertise in similar areas. Publications on the higher education workforce from the research team include CUPA-HR's annual reports and the various reports available here: https://www.cupahr.org/surveys/research-briefs/. Three members of our research team have contributed directly to the analysis presented in this comment.

[15] While the 2021 staff report has not been published at the time of filing, our analysis relies on the most recent data collection cycle (2020-21).

[16] In higher education, several positions may fit into one SOC code based on its general description. CUPA-HR surveys expand beyond the SOC codes, as several distinct positions may fall into the same SOC code, despite the vastly different levels of experience, duties performed, and level of supervision, etc. While CUPA-HR provides crosswalks to SOCs for the benefit of users, they are not used in the actual surveys themselves.

they collected two years prior, making it inadequate for benchmarking purposes and an unreliable source for calculating accurate prevailing wages. In comparison, CUPA-HR survey data is annually released one month after the survey closes and three months after the salary effective date.

Furthermore, the OES wage data for employers covered by the American Competitiveness and Workforce Improvement Act (ACWIA) is based on wage band data collected by BLS and classified via SOC codes. As discussed above, SOC codes are not sufficient; they tend to group several distinct positions with vastly different levels of experience, duties performed, and level of supervision.[17] Additionally, reporting salary data via wage ranges results in overall data that is less precise for purposes of calculating prevailing wages. The result is inaccurate OES wage data that is less representative of higher education as compared to the data in CUPA-HR's surveys.[18]

<u>H-1B Employees Are Not Underpaid Compared to U.S. Workers Similarly Employed in Higher Ed</u>
Using the salary data from the most recent data collection cycle related to CUPA-HR's faculty survey, our research team developed the three tables in Figure 1.[19] These three tables report the number of H-1B and non-H1B incumbents in the faculty survey based on tenure-track faculty, non-tenure track faculty and tenure-track and non-tenure track faculty combined. The tables also display the pay ratios for H-1B status employee median salaries compared to non-H-1B status employee median salaries. Pay ratios of $1.00 or more indicate equitable or more than equitable median salaries for H-1B status employees. Pay ratios less than $1.00 indicate less than equitable median salaries of H-1B status employees.

Figure 1:
Tenure-Track Faculty

Rank	H-1B Status	No. of Faculty	Pay Ratio Compared to Non-H-1B Status Faculty
Professor	No	54,141	
Professor	Yes	314	$1.14
Associate Professor	No	48,512	
Associate Professor	Yes	728	$1.07

[17] This one OES category, 11-9033, includes 126 separate higher education jobs included in our wage survey.
[18] In addition to employer-provided wage surveys, DOL should consider government-provided data sources that are widely used to set wage levels for postdoctoral trainees and fellows outside of the PWD context such as the National Institutes of Health's Ruth L. Kirschstein National Research Service Award (NRSA) Stipends, Tuition/Fees and Other Budgetary Levels table.
[19] CUPA-HR began collecting data on H-1B status in the 2020-21 data collecting cycle, as a greater understanding of the wages paid to H-1B employees became critical in light of the abrupt changes under the October 2020 IFR. Institutions were asked to report each incumbent as Yes, No, or Unknown regarding H-1B status. As such, some H-1B employees are represented in our faculty, administrators, professionals, and staff surveys.

Assistant Professor	No	33,858	
Assistant Professor	Yes	3,094	$1.10
Instructor/Scientist	No	1,599	
Instructor/Scientist	Yes	17	$1.07

**Note:* H-1B status was reported as Unknown for a total of 27,642 tenure-track faculty.

Tenure-Track and Non-Tenure Track Faculty Combined

Rank	H-1B Status	No.	Pay Ratio Compared to Non-H-1B Status Faculty
Professor	No	60,951	
Professor	Yes	348	$1.18
Associate Professor	No	56,649	
Associate Professor	Yes	843	$1.08
Assistant Professor	No	52,493	
Assistant Professor	Yes	4,048	$1.12
Instructor/Scientist	No	34,839	
Instructor/Scientist	Yes	501	$1.00

Note: H-1B status was reported as Unknown for 38,676 tenure-track and non-tenure-track faculty.

Non-Tenure Track Faculty

Rank	H-1B Status	No.	Pay Ratio Compared to Non-H-1B Status Faculty
Professor	No	6,810	
Professor	Yes	34	$1.56
Associate Professor	No	8,137	
Associate Professor	Yes	115	$1.16
Assistant Professor	No	18,635	
Assistant Professor	Yes	954	$1.09
Instructor/Scientist	No	33,240	
Instructor/Scientist	Yes	484	$1.01

Note: H-1B status was reported as Unknown for 11,034 non-tenure-track faculty.

As the data in Figure 1 bears out, H-1B employees in faculty positions at institutions of higher education are compensated at an equal or more than equal wage to other employees with similar levels of experience and education. Through all ranks of faculty from instructor to professor, in both tenure track and non-tenure track positions, the pay ratios compared to non-H-1B status faculty range from $1.00 (equitable) to $1.56 (more than equitable).

While our analysis in Figure 1 focuses on faculty positions within higher education, our analysis holds true for other positions across our three other wage surveys. H-1B status administrators in the category of "institutional administrator" and "academic associate and assistant deans" earn a pay ratio of $1.01 and $1.10, respectively. H-1B professionals in athletics, external affairs, and fiscal affairs earn pay ratios of $1.04, $1.00, and $1.15, respectively.[20] Since DOL has stated that its "primary" purpose in the Final Rule is to "better reflect the actual wages earned by U.S. workers similarly employed to foreign workers," it appears DOL's goal has already been met without changes to the prevailing wage methodology, at least as it relates to positions at institutions of higher education.

<u>Entry-Level Wages and Fully Competent Wages</u>

As CUPA-HR and many other commenters have relayed to DOL, the Final Rule's entry level (Level I) wage and fully competent (Level IV) wage are too high. In fact, calculations conducted by our research team demonstrate that the entry-level salary within the total compensation range for a series of positions within CUPA-HR's salary surveys come in below the 35th percentile (the first wage level in the Final Rule) and that the fully proficient/high point comes in below the 90th percentile (i.e., the fourth wage level in the Final Rule).

Below we highlight these findings based on the salary ranges within six positions from our survey data. The first five positions for which wage data was obtained were selected from our faculty survey and professionals survey as those surveys have the greatest number of incumbent-level data on H-1B positions. The fifth position for which wage data was obtained was selected from our administrators survey which had a relatively small number of incumbent-level data on H-1B positions and as such was included as a comparison to determine if percentile ranges differed for positions where H-1Bs may not necessarily be employed.

Engineering Faculty Tenure Track

The most recent data from CUPA-HR's faculty survey shows that the median entry-level wage for Engineering Faculty in a postsecondary program across all institutions surveyed by CUPA-HR falls at the 21st percentile of the total compensation range for that position within CUPA-HR's database. For the most senior professor (Level IV) the median salary falls at the 77th percentile of the total compensation range for that position within CUPA-HR's database.

Biological/Biomedical Sciences Tenure Track

The most recent data from CUPA-HR's faculty survey shows that the median entry-level (Level I) wage for Biological/Biomedical Sciences faculty in a Tenure Track position in a postsecondary program across all institutions surveyed by CUPA-HR falls at the 23rd percentile of the total compensation range for that position within CUPA-HR's database. For the most senior professor (Level IV), the median salary falls at the 76th percentile of the total compensation range for that position within CUPA-HR's database.

[20] Across all surveys, which included 751,787 incumbents in higher education, 7,820 incumbents were reported as H-1B employees, 575,700 incumbents were reported as non-H-1B employees, and H-1B status was reported as unknown for 168,267 incumbents.

Business Faculty Tenure Track/Non-Tenure Track Combined
The most recent data from CUPA-HR's faculty survey shows that the average entry-level (Level I) wage for a business teacher in a postsecondary program across all institutions surveyed by CUPA-HR falls at the 18th percentile of the total compensation range for that position within CUPA-HR's database. For the most senior professor (Level IV), the average salary falls at the 77th percentile of the total compensation range for that position within CUPA-HR's database.

Soccer Coach
The most recent data from CUPA-HR's professionals survey shows that the median entry-level wage for an Assistant Soccer Coach falls at the 28th percentile of the total compensation range for that position within CUPA-HR's database. At the other end of the wage scale, the median salary of an experienced soccer coach (Level IV) falls at the 54th percentile of the total compensation range for that position within CUPA-HR's database.

Budget Analyst
The most recent data from CUPA-HR's professionals survey shows that the average entry-level (Level I) wage for a budget analyst falls at the 29th percentile of the total compensation range for that position within CUPA-HR's database. At the other end of the wage scale, the average salary of the most senior budget analyst (Level IV) falls at the 73rd percentile of the total compensation range for that position within CUPA-HR's database.

Head of Development
The most recent data from CUPA-HR's administrators survey shows that on average an entry-level wage for the Head of Development falls at the 24th percentile of the total compensation range for that position within CUPA-HR's database. At the other end of the wage scale, the average salary of the most senior Head of Development (Level IV) falls at the 28th percentile of the total compensation range for that position within CUPA-HR's database.

The analysis above relies on data from across three of CUPA-HR's wage surveys and demonstrates that entry-level (Level I) wages can be represented by the 18th, 21st, 23rd, 24th, 28th and 29th percentiles while controlling for occupation, and the fully-qualified (Level IV) can be represented by the 28th, 54th, 73rd, 76th, 77th, and 77th percentiles. Put another way, basing the entry level wage on the 35th percentile produces wage data that is not only too high but also less precise than the current methodology, as it leaves out a significant percentage of workers similarly employed.

We stress this point especially for the world of postdocs—on-the-job training positions obtained after achieving an advanced degree—as their salaries are much more reflective of the lower range of the pay scale, especially if the wage data is not precisely tailored to the specific position at hand. For instance, the median salary of a Postdoc in Biological/Biomedical Sciences in the Non-Tenure Track Research Faculty position falls at the 8th percentile of the total compensation range for faculty in the Biological/Biomedical Sciences. For OES purposes, Postdocs do not receive a separate occupation and, instead, are grouped together with their faculty counterparts, highlighting the need to set prevailing wage levels for entry wages towards the lower end of the pay scale.

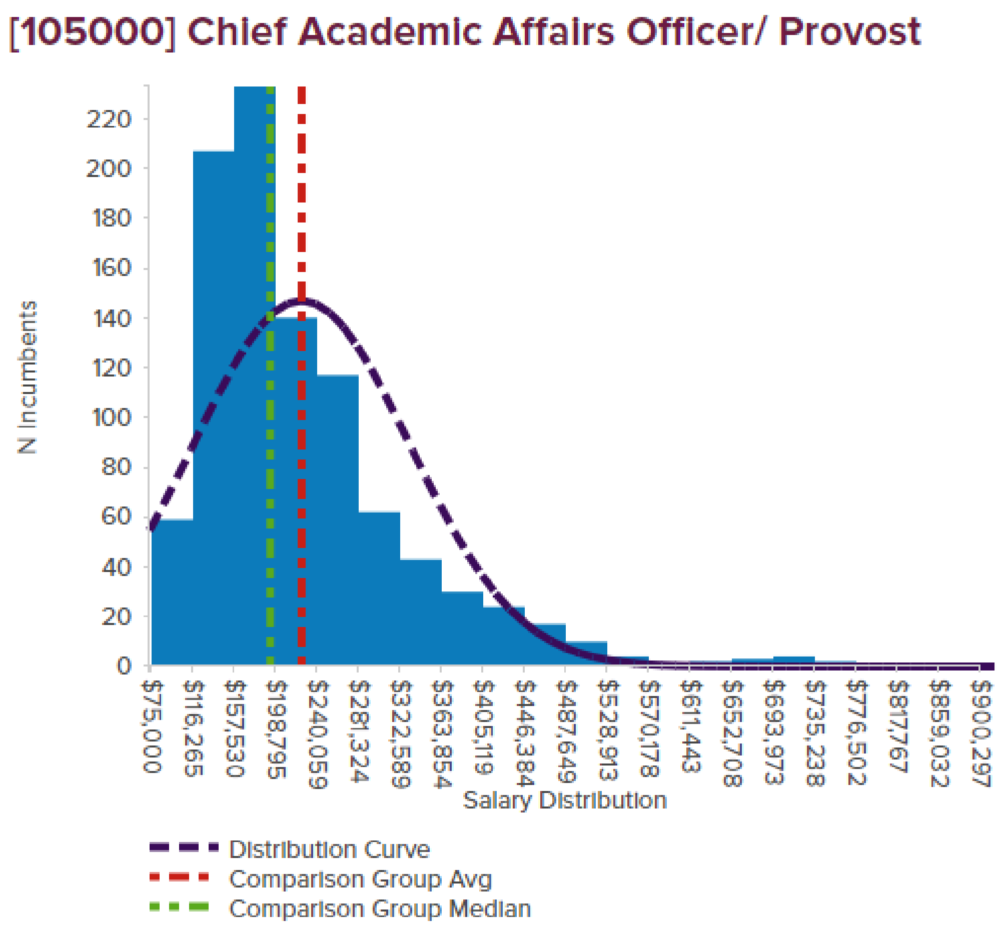
While an entire analysis of prevailing wage levels for every position in which higher education employers seek to retain international employees would be required to approximate the most appropriate Level I and Level IV wage levels, doing so would not create an apples-to-apples comparison for DOL to base prevailing wage levels given the vast differences between the salary data CUPA-HR has on the higher education workforce and that contained in the OES survey.

As explained earlier in our analysis, CUPA-HR data is more precise and representative of the higher education workforce, and based on that data, institutions have used the current wage methodology to produce equitable or more than equitable wages for H-1B employees (i.e., universities do not underpay their H-1B employees). It would be difficult to approximate meaningful percentiles for DOL using CUPA-HR data, but DOL should give considerable weight to the analysis above and revisit the Level I and IV percentiles, since calculations based on more precise and accurate data produce better and more precise results.

Mean v. Median

The department has asked whether it should consider other statistical approaches or estimation techniques when computing wage levels. Based on our expertise as survey researchers, computing wage levels using the median rather than the mean will provide the most accurate results, as the median is the best measure of central tendency for skewed data (and salary data are always skewed).

The graphic below shows why it's important to use the median for salary data. The red line shows the mean for this data, and the green line shows the median. The blue columns represent a frequency histogram. Note that most of the provosts depicted here are earning salaries toward the lower end of the distribution, in the $100,000 to $200,000 range. That is where the median falls. However, there are a few provosts who earn unusually high salaries. These outliers are not representative of the population of provosts. Importantly, these outliers pull the average toward the higher end, making it less representative of what this population earns.



In the context of setting wage levels for prevailing wage calculations utilization of the mean as opposed to the median tends to skew the percentile associated with the wage level upwards. For instance, in our earlier analysis of "soccer coach", if we were to utilize the mean salary of a "fully qualified" coach to determine the percentile at which a Level IV wage should be set, our calculation would fall at the 65th percentile of the total compensation range for that position within CUPA-HR's database—as opposed to the 54th percentile when calculated using the median salary.

If DOL is considering changes to its current methodology for computing prevailing wage levels, instead of basing the levels on the current percentiles from the total range, DOL could consider reflecting them as percentages of the median. For example, instead of setting the level I wage at the 17th percentile of the salary range, DOL could equate the Level I wage as 30% of the median amount.

Conclusion

We applaud DOL's decision not to place any limits on the use of alternative wage surveys in future consideration of notice and comment rulemaking on wage data. While we strongly support DOL's efforts to provide robust and predictable data through flcdatacenter.com, we also believe that alternative wage surveys like those completed by CUPA-HR are important additional sources of data.

Sincerely,

Josh Ulman

Josh Ulman, Chief Government Relations Officer, CUPA-HR