

PERM Labor Certification Updates

Practical guidance and updates on PERM drafting trends

Maggie Murphy, Berry, Appleman & Leiden

Paige Taylor, Fragomen

Heather Frayre, Dickinson Wright

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Reminder on Good Faith Compliance: Overview of the Facebook Settlement

Department of Justice Settlement:

▶ Complaint

DOJ alleged Facebook's PERM recruitment practices intentionally discriminated against US workers by showing discriminatory preference for temporary workers. At issue in particular were Facebook's use of different recruitment methods for PERM labor certifications than those employed for regular positions, such as requiring resumes to be sent by postal mail for advertisements related to labor certifications while accepting resumes by email for other open positions.

▶ Settlement Terms

\$4.75 million in penalty; \$9.5 million in backpay to affected US workers; Facebook agreed to post PERM jobs on their website, accept electronic applications, conduct training as to non-discriminatory provisions

▶ *But isn't PERM recruitment just a good faith test of the labor market???*

DOJ's position is that there is a *hiring event* taking place through the PERM process because (1) foreign workers are being offered permanent employment through the process and (2) because the Form 9089 requires a declaration by the foreign national as to acceptance of a job offer. (See also recent settlement between DOJ and 16 employers who recruited through a campus website that permitted employers to select citizenship boxes)

Copies of settlement agreement can be found via AILA, **DOJ and DOL Settle with Facebook Regarding Claims of Discrimination Against U.S. Workers and Use of PERM**, *AILA Doc. No. 21101910*

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Reminder on Good Faith Compliance: Overview of the Facebook Settlement

Department of Labor Settlement

- ▶ DOL issued 126 audit notices, timing coincided with the start of the DOJ investigation
- ▶ Terms of the settlement:
 - ▶ Must place in in-house media in accordance with normal hiring practices. DOL provides a sample Notice of Filing (reminder: update your template to Washington DC)
 - ▶ Must post on Facebook's website for a minimum of 14 days
 - ▶ Must use one of four job search websites, as agreed upon between Facebook and DOL
 - ▶ Must use a trade or professional organization
 - ▶ Must permit applicants to submit resumes electronically and not require mail-in applications

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Reminder on Good Faith Compliance: Lessons Learned from the Facebook Settlement

- ▶ DOL and DOJ have their respective settlements with Facebook. Each agency has its own mission and its own regulatory requirements.
- ▶ While there is a Memorandum of Understanding (MOU) for the DOL to speak with and to educate the DOJ, and with other agencies for that matter, regarding the DOL's programs, the DOL does not currently have any plans to make any regulatory changes to its PERM program. Should there be any regulatory changes, DOL will follow the usual Administrative Procedure Act (APA) requirements of notice and comment.
- ▶ The settlement agreement with Facebook is very fact specific and should not be read as guidance for other cases.
- ▶ In order to be compliant with DOL rules, one must follow the existing regulations. There is no change to the PERM labor market test requirements.
- ▶ That said, DOL did indicate that one should not forget the reason for the labor market tests and should keep the purpose in mind when conducting labor market tests.
- ▶ DOL also indicated that U.S. worker applicants should not be treated any differently than others.

Practice Pointer: Facebook Settlement: Updates, Resources, and Practice Pointers from the DOL OFLC Perspective, AILA Doc. No. 21120804 (includes a great chart comparing settlement with the regulations)

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Dealing with a Virtual Workforce

- ▶ Reminder on virtual headquarters: DOL Reiterated in June 2022 at the AILA Annual Conference that there is no such thing as a “virtual business” for PERM purposes. An employer must have a headquarters, and the “official” address to be used on the PERM-related documents should be the official address used for tax filing and other business purposes.
- ▶ How to file the 9089 if the verification process requires the employer to submit proof of a physical location?

Key Takeaways from the DOL Open Forum at AILA’s 2022 Annual Conference, AILA Doc 22070510

DOL Liaison Committee Takeaways from DOL Panel at AILA 2022 Spring Conference, AILA Doc 22042003

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Dealing with a Virtual Workforce Barbara Farmer Memo

Memorandum from Barbara Ann Farmer (Farmer Memo), DOL.Emp’t & Training Admin’r for Reg’l Mgtpt., to Reg’l Admin’rs, § 10 (May 16, 1994), AILA Doc 94052390

10. LABOR CERTIFICATION APPLICATIONS WHERE ALIENS WILL BE WORKING AT VARIOUS UNANTICIPATED SITES

Applications involving job opportunities which require the beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer’s main or headquarters office is located.

In Item 7 (address where alien will work) of part A of the Application for Alien Employment Certification, the employer should indicate that the alien will be working at various unanticipated locations throughout the U.S. A short statement should also be included explaining why it is not possible to predict where the work sites will be at the time the application is filed.

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