

CLIENT ALERT

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New System Governs Hiring Of Foreign Workers

The United States Department of Labor (“DOL”) is about to implement a long-awaited new system for the filing and processing of Labor Certification applications. It is of particular interest to industries that regularly employ foreign workers with bachelor’s or advanced degrees, such as the pharmaceutical industry. The new system, known as “PERM” (Program Electronic Review Management Processing), is intended to accelerate the Labor Certification process, which is the process that employers must follow in order to hire foreign workers for vacant positions in the United States. The DOL has issued a final rule creating PERM, which will take effect on March 28, 2005 and govern Labor Certification applications filed on or after that date. Once the new system takes effect, the DOL will no longer accept Traditional or Reduction In Recruitment (“RIR”) applications.

For employers seeking to fill vacancies with foreign workers, PERM brings significant changes. In particular, employers must be aware of differences in the procedures for filing applications, obtaining prevailing wage determinations, posting notices, advertising, recruiting for professional positions, and preparing recruiting reports.

Filing Applications

Under PERM, Labor Certification applications will no longer be filed with State Workforce Agencies (“SWAs”). Instead, they must be filed either electronically on the Department of

Labor’s Internet website or by mail to a centralized processing center.

Prevailing Wage

Employers seeking to fill a vacancy with a foreign worker are required to pay the prevailing wage for similar positions in the region. Under the old system, employers were permitted to pay 95% of the prevailing wage. Under PERM, SWAs will determine the prevailing wage for a job based upon such factors as the job duties and requirements for the position, and the geographic area in which the job is located. It is imperative that employers and their counsel craft job descriptions that adequately reflect the minimum requirements necessary for each position, to ensure that the correct prevailing wage is applied. Employers must obtain an SWA prevailing wage determination before filing an application for Labor Certification.

Recruitment Steps, Posted Notice And In-House Media

The DOL will not approve a Labor Certification application unless the employer demonstrates that it was unable to attract a qualified U.S. worker for the vacant position. Under PERM, in order to satisfy this requirement, employers must post a notice of the vacant position for ten consecutive business days in a conspicuous location. The notice must be posted between 30 and 180 days before filing a Labor Certification application, and must contain the salary being offered (or a salary range, as long as the lower level of the wage range is not lower than the prevailing wage). The employer must also use in-house media (whether electronic or printed) “in accordance with the normal procedures used for the recruitment of

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other similar positions” to advertise the position. The duration of the in-house posting must be in accordance with normal posting procedures.

Job Orders, Advertisements And Special Requirements For Professional Positions

Under PERM, employers must submit a job order to the local SWA for a period of 30 days and run two consecutive Sunday advertisements in a newspaper of general circulation. An advertisement placed in a professional journal related to the position being offered can be used in lieu of one of the Sunday advertisements if the job requires experience and an advanced degree.

The advertisements must be placed between 30 and 180 days before the filing of the Labor Certification application and are not required to include a salary or salary range. The advertisement must, however, include the name of the employer, a requirement that is not currently in effect for Traditional or RIR recruitment.

If an employer is seeking to fill a “professional” position (*i.e.*, one requiring a bachelor’s or higher degree), PERM will also require any three of the following additional recruiting steps: (i) job fairs; (ii) employer’s web site postings; (iii) job search web site postings; (iv) placement of a job order on a local college campus, provided the position calls for a degree but no experience; (v) local and ethnic newspaper advertising; (vi) radio and television advertising; (vii) professional or trade organization newsletter or journal postings; (viii) an employee referral program (listing incentives); (ix) private employment firms; and (x) on-campus recruiting. Of the three

additional recruiting steps, one may take place within 30 days of the filing the Labor Certification application and none may occur more than 180 days before such filing.

Post-Recruitment Report

Under PERM, an employer must prepare a recruitment report for its internal files (and retain the report for five years in case of an audit) after the recruitment process and before submitting a Labor Certification application to the DOL. The report must document the recruitment steps that the employer undertook and the results achieved. The report must set forth the number of hires and, if applicable, the number of US workers rejected (although the report need not identify specific applicants).

The report must also summarize the lawful job-related reasons for any such rejections. Notably, an employer may lawfully reject a US worker who does not meet the employer’s stated minimum requirements, unless the worker can acquire the required skills after a “reasonable period” of on-the-job training. The DOL has not yet defined the term, “reasonable period.” The report must be signed by the employer. If audited, the Certifying Officer may request a copy of the report as well as copies of applicants’ resumes.

Converting RIR Cases

Applications filed with the DOL before PERM takes effect will be processed under the old system. An employer wishing to do so may have its pending applications converted so that they are processed under PERM, as long as the conversion request is made before a job order has been placed.

Conclusion

Though intended to streamline the filing and processing of Labor Certification applications, PERM has different requirements and, particularly at the beginning, will present new challenges for employers. Employers should work closely with counsel and bear in mind that the DOL may audit any Labor Certification, either for cause or randomly. An employer selected for audit will receive a letter requesting specific additional information, and will have only 30 days within which to comply. If the employer’s response is not timely or satisfactory, its application may be denied. Moreover, the DOL may require that the employer’s recruitment for Labor Certifications for the next two years be conducted under supervision.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

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