

How is an already complex PERM recruitment process further complicated by EPT laws?

October 25, 2023 – *Dorsey Work Watch*
by J. Mike Sevilla and Anabel Cassady

As we discussed in a [recent post](#), equal pay transparency (EPT) laws are on the rise across the country. While complex in their own right, EPT laws introduce new risks and challenges for employers undergoing an already complicated recruitment process to hire foreign nationals through the Department of Labor's (DOL) permanent labor certification process, or PERM.

What is PERM?

The United States Citizenship and Immigration Service (USCIS) offers foreign nationals different pathways to lawful permanent residence (i.e., obtaining a "Green Card") in the U.S. Relevant here, there are [five employment-based \(EB\) visa preference categories](#), and of the five, the most common are EB-2 (for workers holding advanced degrees or who have "exceptional ability" in the sciences, arts, or business) and EB-3 (for skilled workers, professionals, or other workers). Employers tend to pursue these two preference categories because there is generally less subjectivity in the process compared to the other preference categories, which makes the process more predictable. A drawback, however, is that in most instances, the hiring of a foreign national in either EB-2 or EB-3 requires the employer to complete the PERM labor certification process, which is highly technical, lengthy, and complex regulatory recruitment process.

Because U.S. immigration law requires that the hiring of a foreign national will not adversely impact U.S. workers, PERM regulations require a sponsoring employer to demonstrate that it has sufficiently tested the labor market and can attest that there are no qualified, able, and willing U.S. workers to fill the position in question.

Overview of the PERM Labor Certification Process

The PERM labor certification process is one of the most complex aspects of employment-based immigration. The entire process currently takes between fifteen to twenty-four months, which means that any mistake can derail the process and cause

Related People

- J. Mike Sevilla

Related Capabilities

- Labor & Employment

significant delays. Because many foreign nationals also rely on PERM to obtain additional extensions to their nonimmigrant statuses, these missteps can be detrimental to a foreign national's continued work authorization.

An employer begins the multistep PERM process by identifying the position to be filled and carefully drafting the position's job description. This includes identifying the position's duties, worksite location, minimum requirements, anticipated Standard Occupational Classification (SOC) code, and wage level. It is important to get this step right because the job description is an integral component of the PERM application.

Once the job description has been drafted, the employer submits a prevailing wage request to the DOL. The DOL, in about six months, issues a prevailing wage determination (PWD). A prevailing wage, which the DOL defines as "the average wage paid to similarly employed workers in a specific occupation in the area of intended employment," is based on a number of factors, including the position's title, worksite location, education, experience, and other requirements. It is the rate at which the employer must at least offer the position; the employer cannot advertise the position at a lower rate. The idea here is that a lower rate could discourage U.S. applicants from applying.

Impact of EPT Laws on PERM Recruitment

While EPT laws vary greatly by jurisdiction, a growing number of them require employers to disclose pay ranges in any advertisement for a job, with variations in content. The disclosure must be a good-faith expectation of the pay associated with the position, and must not be open-ended. In contrast, PERM regulations require that an employer include the wage information only on the Notice of Filing (NOF), which is a notice – not an advertisement – posted internally at the employer's respective job site. The other forms of mandatory PERM recruitment (e.g., advertising the position in two Sunday newspapers, placing the job ad on the State Workforce Agency website, etc.) do not require disclosure of pay. However, employers undergoing PERM recruitment must now assess whether the advertisement for the position constitutes an advertisement or other posting under applicable EPT laws. In other words, EPT laws may mandate that pay information be listed in all forms of PERM recruitment.

Moreover, an employer's disclosure under EPT law, while made in good faith, may otherwise be problematic for PERM purposes if the lower end of the pay range falls short of the PWD. For purposes of PERM recruitment, a job posting with a wage range lower than the PWD will be deemed insufficient to demonstrate compliance with the PERM regulations. The DOL has consistently denied PERM applications where the wage range on the NOF was lower than the PWD, so it is likely the DOL would do the same with other types of recruitment.

Accounting for Remote Positions

As mentioned above, the worksite location is an important factor impacting the PWD. But what if the sponsoring employer is advertising a PERM position that will be remote?

When a position allows for fully remote work from anywhere in the U.S., DOL guidance instructs that the employer should conduct PERM recruitment using the employer's corporate headquarters as the location.

By way of example, if a sponsoring employer has headquarters in California and submits a PERM application for a position that allows for fully remote work anywhere in the U.S., and the prospective employee for whom the application was submitted lives and works in Georgia, the employer must recruit in California to satisfy PERM requirements. Likewise, the PWD will also be based in California. Therefore, when the sponsoring employer advertises for the position, the wage range cannot be lower than the California-based PWD, even if the employer anticipates filling the position with a worker in Georgia.

As a further illustration, if a sponsoring employer has headquarters in Missouri, and submits a PERM application for a remote position to be performed anywhere in the U.S., the PWD and PERM recruiting efforts will be Missouri-based. If the prospective employee for whom the position was submitted lives and works in Washington state, the Missouri-based employer could be covered by Washington's EPT law, even though it is an out-of-state employer. Under Washington's law, out-of-state employers with 15 or more employees (including at least one Washington-based employee) are subject to the EPT law if the position *could be* performed by a Washington employee. Similar laws exist in California and New York City.

Notably, a number of EPT laws require more than just disclosures of pay ranges. For instance, Colorado and Washington require disclosure of benefits and other compensation. So, sponsoring employers covered by a myriad of EPT laws may be wise to choose a broad approach to advertising, requiring them to include not only a pay range, but also a general description of certain benefits and other information to satisfy those laws' heightened requirements.

What Employers Should Do

The Colorado Department of Labor (Colorado DOL) acknowledged the discrepancies between PERM regulations and Colorado's EPT law and informally announced that it would not enforce the EPT law in PERM recruitment efforts. This informal announcement left immigration practitioners wondering whether other state DOLs would issue similar relief. To date, however, no other agencies (or states with EPT laws) have gone as far to say that they will not enforce their EPT laws in the context of PERM recruitment.

The federal DOL, which administers PERM, has not updated the PERM regulations to incorporate language regarding whether or not practitioners must abide by the EPT laws to satisfy the PERM regulations.

The PERM labor certification process is no doubt a complex maze of regulatory requirements. And while EPT laws surely complicate the process, the consequences of noncompliance can be significant. Employers who violate EPT laws are up against a number of different penalties and fines. Depending on the jurisdiction, employers can be subject to agency investigations, lawsuits and associated costs and fees, civil penalties

ranging from \$500 to \$250,000, and more. As such, employers seeking a PERM labor certification should ensure compliance with all state and local laws (EPT or otherwise). Dorsey's immigration and employment counsel are here to help your business determine how best to approach PERM recruitment in light of EPT laws.