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# THE DOL'S PROPOSED PERM OVERHAUL GOES TOO FAR, AND LOPER BRIGHT GIVES US GROUNDS TO CHALLENGE IT

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A proposed PERM overhaul would change when employers can file, how they recruit, and how much compliance risk each case carries.

On November 17, 2026, the Department of Labor (DOL) published a proposed rule that would overhaul the labor certification process employers use to sponsor most foreign national workers for permanent residence. If finalized, the proposed rule would affect when employers can file, how they recruit, and how much compliance risk each case carries. Employers with recent or planned workforce reductions would be most directly affected, and sponsored employees could face longer green card timelines.

## What the proposed rule would do

The proposed rule would:

- Eliminate Schedule A, which currently exempts certain occupations, including nurses and physical therapists, from the PERM labor market test.
- Replace mandatory print newspaper advertising with electronic recruitment methods, such as employer websites, commercial job boards, social media, and job fairs.
- Prohibit PERM filings for two years after qualifying layoffs by the employer. A qualifying layoff is one that occurs in the same geographic area and in the same or a similar occupation that is the subject of a PERM application.
- Expand employer obligations to notify and consider laid-off U.S. workers both before and after filing the PERM application, continuing through

Form I-140 processing.
- Add disclosure requirements for remote, telework, hybrid, and roving work arrangements.
- Expand employer attestations, DOL audit authority, revocation procedures, and debarment provisions.
- Move PERM and prevailing wage applications fully to electronic filing and electronic communications.

## Harder For Employers to Sponsor Skilled Foreign National Workers

Under the Department of Labor's proposed PERM rule, filing labor certifications on behalf of skilled workers would become significantly more restrictive and burdensome due to several key changes:

- Two-Year Filing Prohibition: Employers would be barred from filing PERM applications for two years following any qualifying layoff occurring in the same geographic area and in the same or a similar occupation.
- Expanded Obligation to Notify and Consider Laid-Off U.S. Workers: Employers would be required to notify and consider laid-off U.S. workers both before and after filing the PERM application, continuing continuously through Form I-140 petition processing.
- New USCIS Scrutiny via Layoff Notices: The rule invokes INA § 204(b) to require layoff notifications to USCIS while an I-140 petition is pending. This invites USCIS to inject itself into the DOL's labor certification process, potentially questioning whether the permanent job remains available, whether it should have been offered to a laid-off U.S. worker, and whether laid-off workers met minimum qualifications.
- Increased Compliance and Audit Risks: The proposed rule adds complex disclosure requirements for remote, telework, hybrid, and roving work arrangements, while expanding employer attestations, DOL audit authority, revocation procedures, and debarment provisions.

## MY CONCERNS: USCIS AND THE LAYOFF NOTICE

While Congress entrusted the Labor Department to administer labor certification, the proposed rule gives USCIS a new role that could be beyond its statutory authority. As I told Stuart Anderson in his Forbes article, *Immigration Rule Aims To Block Many High-Skilled Green Card Applicants*:

"One of the troubling aspects of the proposed PERM rule is its invocation of INA § 204(b) as authority for requiring employers to notify USCIS of layoffs while an I-140 petition remains pending. That could invite USCIS to reach beyond its traditional role of adjudicating the immigrant petition and inject itself into the labor certification process administered by DOL. Once notified of a layoff, USCIS could potentially question whether the permanent job remained available, whether it should have been offered to a laid-off U.S. worker, and even engage with labor-certification concepts such as whether the laid-off worker met the minimum qualifications and the area of intended employment."

## Schedule A is eliminated, but not entirely gone

The elimination of Schedule A will hit healthcare employers hardest, but one important protection survives. Also quoted in the Forbes article, I explained:

> ***Although the proposal would eliminate the Schedule A designation, DOL will still be bound by INA § 212(a)(5)(A)(ii), which creates the more favorable 'equally qualified' standard for individuals of exceptional ability in the sciences or arts. Thus, even though they would now undergo recruitment, the employer would not have to reject the foreign worker merely because a minimally qualified U.S. worker applies. Schedule A Group II thus lives on in a new incarnation.***
> — Cyrus D. Mehta, quoted in Forbes

## RECRUITING FOR ROVING EMPLOYEES AND UNANTICIPATED WORKSITES

The proposed rule would also change how employers handle recruitment when the worksite is not fixed. Today, under the Barbara Farmer memo, an employer whose employee's work location is unanticipated or variable generally uses the company headquarters address for the prevailing wage request and for recruitment. The proposal points in a different direction. DOL proposes using the employer's nearest office for roving positions and the employee's own location (city, state, county, and ZIP code, rather than a residential address) for fully remote positions. DOL's recruitment and notice of filing would also have to identify the position as remote, hybrid, or roving, and advertisements would have to state the work location. DOL has also asked whether fully remote

positions should remain eligible for PERM at all.

## Why the rule can be challenged under Loper Bright

The proposed rule may also be vulnerable to challenge under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), in which the Supreme Court overruled *Chevron* deference and held that the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority. As I discussed in an earlier blog, How Corner Post Along with the Demise of Chevron Deference Can Open Up Immigration Regulations to Challenges, the loss of deference opens agency regulations to scrutiny that they once avoided.

Under INA § 212(a)(5), an alien is deemed "inadmissible unless the Secretary of Labor" certifies, inter alia, that "there are not sufficient workers who are able, willing, qualified…and available at the time of application" among the U.S. workforce. A plain reading of INA § 212(a)(5) does not in any way suggest that an employer must seek to recruit U.S. workers in order for the Secretary of Labor to certify that there is a lack of U.S. workers who are qualified and willing at the time of the application. Similarly, there is no statutory basis to preclude a labor certification for two years if there has been a layoff.

## What employers should do now

The Alliance of Business Immigration Lawyers of which I am a member recommends that employers plan now. The final rule proposes to use the date on which an employer submits a PERM application to determine which set of rules will govern. It will not be sufficient for the employer to have filed a prevailing wage request; the final PERM application must have been submitted before the cutoff. Cases filed before the final rule takes effect will be processed under the current PERM regulations. DOL proposes a 90-day transition period, with the final rule taking effect 60 days from the date of publication and providing employers an additional 30 days to acclimate.

Employers should consider taking the following steps now:

- **Inventory the PERM pipeline.** Identify cases in prevailing wage, recruitment, or pre-filing stages, and prioritize those that could be

affected if the rule is finalized.

- **Review recent and planned layoffs.** Coordinate with human resources and legal teams so that workforce decisions take PERM timing into account.
- **Evaluate Schedule A cases.** Healthcare and other Schedule A employers should discuss with counsel whether to file eligible cases under current rules.
- **Assess remote and hybrid roles.** Confirm how worksite locations are documented for sponsored positions.
- **Strengthen recordkeeping.** Expanded attestations and audit authority increase the importance of complete, well-organized recruitment files.

Comments on the proposed rule are due by January 19, 2027. Employers can tell DOL how the proposal would affect their operations.