



THE FACEBOOK SETTLEMENT RESOLVING CLAIMS OF DISCRIMINATION AGAINST U.S. WORKERS ONLY ADDS TO THE CONTRADICTIONS IN THE LABOR CERTIFICATION PROGRAM

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On October 19, 2021, the U.S. DOJ and DOL [announced](#) that they had reached separate settlement agreements with Facebook regarding the company's purportedly discriminatory PERM labor certification practices. These settlement agreements stem from a December 2020 DOJ [complaint](#), in which the government alleged that Facebook had discriminated against qualified and available U.S. workers by "refus to recruit, consider, or hire" them for over 2,600 positions, which were tied to labor certifications filed on behalf of foreign national workers. Interestingly, Facebook was not accused of violating DOL rules, which require merely that employers test the labor market and discontinue the labor certification process if a qualified U.S. worker is found, but do not mandate that the company actually hire the U.S. worker or terminate the foreign national who currently holds the position pursuant to H-1B status. Instead, Facebook was charged with discriminatory practices under INA § 274B(a)(1), despite adhering to the DOL's rules for recruitment.

In particular, the complaint alleged that "in conducting recruitment, employers must also engage in a good faith search that closely resembles the employer's normal recruiting process", citing *Matter of Am. Specialty Pharmacy*, 2016-PER-00016, 2019 WL 2910815 (BALCA 2019). The complaint accused Facebook of designing recruitment practices specifically intended to deter US workers from applying for the relevant positions, a policy which discriminated against U.S. workers in violation of INA § 274B(a)(1)(A). 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. In a [previous blog](#), we discuss in greater depth the context of the complaint and its contradictions with actual DOL recruitment rules.

Although Facebook will pay a civil penalty of \$4.75 million to the United States and up to \$9.5 million to workers impacted by its practices, a sum that is likely small change to one of the largest companies in the world, the settlement carries more worrying implications for smaller companies that lack Facebook's resources. The complaint against Facebook emphasizes that employers must make "good faith" recruitment efforts, but paradoxically implies that it may not be sufficient for companies to follow the DOL regulations, particularly where an employer's PERM recruitment differs from the way it advertises regular job openings. DOL regulations are largely outdated and require employers to carry out recruitment practices, such as placing print advertisements in two Sunday newspapers, that are out of touch with modern employment practices. In addition to conforming their recruitment practices to the specific and anachronistic methods prescribed by the regulations, the Facebook complaint implies that employers must conduct PERM recruitment that mirrors their regular recruitment, requirements which may be near impossible to reconcile. Among the grievances leveled against Facebook were its failure to hire qualified U.S. workers who applied for PERM-related positions and its rejection of free online advertisements when it had purchased print versions, neither of which are prohibited by the regulations.

Even if an employer mirrors its real world recruitment with its labor certification recruitment, it will still be vulnerable to a citizenship discrimination claim by the DOJ's Civil Rights Division's Immigrant and Employee Rights Section (IER) because labor certification recruitment inherently requires a good faith test of the labor market, and [not to hire US workers and replace the foreign national worker](#), before the labor certification can be filed and certified by the DOL. If the employer hires the US worker, the labor certification may be denied. Even if the employer hires this minimally qualified US worker, and files the labor certification on behalf of the foreign worker, the employer may be found to be in violation as a result of "diversion." The Board of Alien Labor Certification Appeals (BALCA) has held that a US applicant cannot be diverted to another

position, even a more senior position. See *Engineering Technology, Inc.*, 89-INA-10 (BALCA 1990), *Sam's Exxon*, 91-INA-362 (BALCA 1992). BALCA has found "diversion" even when the U.S. worker was hired for the same position as the foreign national worker where the employer was unable to establish multiple openings. *Aloha Airlines*, 91-INA-181 (BALCA 1992).

As part of the [settlement](#), Facebook is required to consider applicants who apply for PERM positions on Facebook's Career website. Furthermore, the settlement requires the entry into "Facebook's recruiting system ("FBR") all applicants to all PERM related positions who apply via Facebook's Careers website, enabling such applicants to be searchable and remain searchable in the same manner as applicants to non-PERM related positions at Facebook, and allowing Facebook's recruiting team to identify, consider, and/or hire such applicants for Facebook job opportunities, including but not limited to ones in the same job profile group as the PERM-related position to which they previously applied. "It is hoped that if applicants for PERM positions are hired for other positions, the DOL does not deny the labor certification under its antiquated "diversion" doctrine.

These conflicting requirements may well prompt some employers to stop sponsoring foreign national workers for permanent residence. The penalty paid by Facebook would be ruinous to smaller employers and may deter them from even wading into the PERM domain. Further adding to the deterrent effect, Facebook faced not only a monetary penalty, but will also be forced to conduct supervised recruitment in future and will be subject to increased scrutiny even of its H-1B program. The latter penalty may be particularly off putting to companies who employ a large H-1B workforce.

Skilled foreign national workers already face several limitations in the US immigration system. There is a paucity of H-1B visas every year. The annual cap is set at a paltry 65,000 plus an additional 20,000 for those who have graduated with advanced degrees from US institutions of higher education. Skilled foreign national workers born in countries such as India and China also face disproportionate backlogs when they are sponsored for permanent residence due to the per country limits. The latest action against Facebook would now provide a disincentive for employers to file labor certifications. This would impact those caught in the backlogs who wish to change employers and obtain new labor certifications but retain their place in the queue by capturing the original priority date

The safest course for employers to pursue in light of the Facebook settlement may be to hew as closely as possible to their non-PERM recruitment practices when conducting PERM recruitment, within the dictates of the DOL regulations. If the employer normally accepts resumes by email, they should not require that applicants for PERM related positions send their resumes only by postal mail. When regular positions are advertised online, it may be prudent for the employer to do the same for PERM positions, rather than advertising only in print newspapers. At the same time, the employer must comply with the DOL regulation of advertising in two Sunday print newspapers even though they do not normally advertise in print for their normal recruitment.

Although the labor certification process requires an employer to conduct a “good faith” test of the US labor market to determine whether US workers are qualified or available for the position held by the foreign national, the very notion of “good faith” seems oddly out of place when used with reference to a recruitment effort that achieves its desired objective by failing to locate any qualified job applicants. Only in the [labor certification world do you win by losing](#). The real solution, though, would be for Congress or the Biden administration to amend the regulations to comport with real, modern recruitment practices, ensuring that employers will not be tripped up by the contradiction between the “good faith” recruitment suggested by the Facebook complaint and the antiquated practices laid out in the DOL rules.

(This blog is for informational purposes, and should not be relied as a substitute for legal advice).

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