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THE TENSION BETWEEN STATE WAGE TRANSPARENCY LAWS AND LABOR CERTIFICATION RECRUITMENT

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In the past year, several states and jurisdictions across the U.S. have begun enacting wage transparency laws, and others are poised to go into effect in the new future. Aimed at increasing wage transparency for job seekers, these laws typically require that job postings disclose the salary that the employer plans to offer applicants. Colorado's law went into effect on January 1, 2021, and requires employers with at least one employee in Colorado to list the applicable hourly wage or salary for the position. New York City's law went into effect on November 1, 2022, and requires employers with 4 or more employees, at least 1 of which is located in New York City, to disclose wage information in job advertisements. Washington State and California have enacted wage transparency laws effective January 1, 2023, with both applying only to employers with 15 or more employees. Other jurisdictions are considering implementing similar legislation in future. Interestingly, some wage transparency laws could be interpreted to apply even to remote positions that could be performed from one of the impacted jurisdictions, even if the employer does not currently have a presence in that state. Penalties in New York, for example, can require offending employer to "pay monetary damages to affected employees, amend advertisements and postings, create or update policies, conduct training, provide notices of rights to employees or applicants, and engage in other forms of affirmative relief", although the city will not assess a penalty on first time offenders who correct the violation within 30 days of receiving notice. Civil penalties of $250,000 per violation can be assessed on repeat offenders. Although Colorado indicated that it would not enforce its wage transparency law against PERM recruitment, it has not formalized this guidance in writing, and other jurisdictions have not offered similar assurances

In the permanent labor certification (PERM) context, these laws present a host of new issues for employers to consider. The PERM regulations 20 CFR §656.17 and 20 CFR §656.18 require only the Notice of Filing (NOF) to list the wage or wage range offered for the position, but employers may now find that they are required to disclose a salary range on newspaper and website advertisements that would typically not have included this information. Although Colorado indicated that it would not enforce its wage transparency law against PERM recruitment, other jurisdictions have not offered similar assurances. *See* AILA Doc. No. 21040231. Interestingly, some jurisdictions' wage transparency laws may apply to advertisements for remote positions that could be performed from that location, even if the employer otherwise has no presence or current employees in the jurisdiction.

Further complications arise when an employer wishes to list a salary range in its PERM recruitment in order to comply with a state or local wage transparency law, and the lower end of that falls below the prevailing wage determined by the Department of Labor (DOL) or if the wage range in the advertisement materials does not conform with the wage stated in the Notice of Filing. This scenario may be compliant with the relevant wage transparency law, but it could create issues in the PERM context. As yet, the DOL has not issued any guidance on the interaction between wage transparency laws and PERM regulations, and the Board of Alien Labor Certification Appeals (BALCA) has not directly addressed this issue. In the meantime, analyzing how the DOL has viewed wage ranges that partially fell below the prevailing wage can provide helpful guidance.

As mentioned above, the PERM regulations do not require recruitment to list a salary at all, with the exception of the NOF. 20 CFR § 656.10(d)(4) states: "If an application is filed under § 656.17, the notice must contain the information required for advertisements by § 656.17(f), must state the rate of pay (which must equal or exceed the prevailing wage entered by the SWA on the prevailing wage request form), and must contain the information required by paragraph (d)(3) of this section". Employers who do list a wage or wage range in advertisements in newspapers or professional journals are required to ensure that these advertisements do "ot contain a wage rate lower than the prevailing wage rate" pursuant to 20 CFR § 656.17(f)(5). Furthermore, 20 CFR § 656.17(f)(7) states that that advertisement shall "not contain wages or terms and conditions of employment that are less favorable than those offered to the alien."

If a wage range is indicated in the advertisements, it is important that the Notice of Filing (NOF) also contains the same wage range. BALCA has held that employers violate 20 CFR § 656.17(f)(7) if the NOF contains a wage lower than the wage offered the foreign worker. In *Gallup McKinley County Public Schools*, 2016-PER-00646 (BALCA April 16, 2021), the wage range offered to a Middle School Teacher was $50,273 to $57,402. The NOF identified the wage as $52,000 per year. The BALCA upheld the Certifying Officer's denial since the wage range suggested that the foreign national employee would be paid a wage up to $57,402 and higher than the wage indicated in in the NOF. BALCA reasoned that because the NOF stated a wage lower than the highest wage in the wage range, the "NOF did not disclose that opportunity to the Employer's other workers or other interested persons who may have viewed the NOF."

The employer cited a pre-PERM case *University of North Carolina*, 1990-INA-00422 (June 9, 1992) establishing that 20 CFR § 656.17(f) was satisfied if the wage offered is no less than the wage offered at the time of the foreign worker's initial hire. In *University of North Carolina*, the university indicated a salary of $23,100 in all of its advertisements for a research associate position, which exceeded the prevailing wage determination and reflected the noncitizen's salary at the time. By the time the PERM application itself was filed, though, the noncitizen's salary had risen to $30,000. BALCA overturned the denial of the PERM application, reasoning that 20 CFR § 656.21(g)(8) requires the employer to advertise a wage that is no less than what the noncitizen was offered at the time of their initial hire, not the offered salary at the time the PERM application is filed. However, in *Gallup KcKinley*, BALCA held that subsequent panels have rejected the reasoning in *University of North Carolina* as US workers could potentially pass on the job opportunity because of the difference in the lower wage in the advertisement and the higher wage privately offered to the noncitizen. *See*, *e.g.*, *Sensus Metering Systems*, 2010-PER-00849 (July 20, 2011). In *Sensus Metering Systems*, the employer listed a higher offered wage on the ETA 9089 than the NOF, and the employee had only gained about 7 months of additional experience with the employer since the position was advertised, rather than 3-5 years as in *University of North Carolina*. BALCA has also upheld denials of PERM applications where the lower end of a wage range as listed in the advertisements fell below the salary offered to the noncitizen on the ETA 9089. *See Om Shri Ganesh, LLC*, 2016-PER-00024 (July 28, 2016); *Red Apple Child Dev. Ctr*., 2009-PER-00472 (June 29, 2010); *Lakeview Farms, 2011-PER-01679* (Sept. 4, 2014); *Charles E. Churchwell*, 2012-PER-01662 (Mar. 2, 2016). *Sensus Metering Systems* and its progeny illustrate the importance of ensuring that a consistent offered wage range is listed across the NOF, advertisements, and the PERM application itself.

In cases where recruitment has inadvertently included a salary range that fell below the prevailing wage, there have been a few decisions where BALCA has been relatively forgiving. *In Re IAC Search & Media, Inc*., BALCA Case No.: 2011-PER-00845 (May 2, 2012), for example, involved an employer who inadvertently listed a salary lower than the prevailing wage in the ETA Form 9089 and in a website advertisement. BALCA held that employer had actually offered a salary that exceeded the prevailing wage, so the typographical error was not grounds for denial of the PERM. Similarly, in *Nancy Adelman*, 2011-PER-02464 (BALCA 2011), BALCA overturned a denial of a PERM application on the grounds that the “prevailing wage rate and validity period listed in Section F of the Employer’s ETA Form 9089 did not match the information contained in the PWD submitted by the mployer” as part of an audit response. BALCA held that a labor certification cannot be denied due to a typographical error unless the result is a violation of the PERM regulations, and no violation had occurred here since the offered wage had actually exceeded the prevailing wage. However, in *Marcel Cleaners, Inc*., 2009-PER-00395 (BALCA February 2010), BALCA affirmed the denial of a labor certification when the job order listed a wage range, the lower end of which was less than the prevailing wage. BALCA reasoned that 20 CFR § 656.17(f)(5) expressly specifies that advertisements placed in newspapers and professional journals must not contain a wage rate lower than the prevailing wage.

Finally, employers must also be careful about State Workforce Agency job orders whose algorithms may require a different formulation of the wage. Thus, a wage range of $0-$70,000 (depending on experience) will not be in compliance with the regulation. This issue also came up in *Gallup McKinley County Public Schools,* although BALCA focused its denial on the discrepancy between the wage range in the advertisement and in the single wage indicated in the NOF. Practitioners can take some comfort *in* [*A Cut Above Ceramic Tile*], 2010-PER-00224 (Mar. 8, 2012) where BALCA held that based on the history of the PERM regulations and the plain language of 20 C.F.R. §656.17(e)(2)(i), proof of publication of the State Workforce Agency ("SWA") job order is not required supporting documentation in the event of a DOL audit of the labor certification application.

Wage ranges in labor certification recruitment always add more complexity and risk to an already hyper technical process.   The DOL will likely continue to deny labor certification if there are discrepancies, such as when the salary range falls below the prevailing wage at the lower end (notwithstanding some BALCA decisions going the other way) or if the wage range stated in the advertisements is different from the wage reflected in the NOF. The DOL has said that employers must comply with PERM rules. If employers need to comply with local wage transparency laws it would be prudent for the employer to comply with those laws too during labor certification recruitment but DOL is not concerned about what employers must do under local laws. Employers need to now tread even more carefully when they are compelled to state a wage range under state transparency laws taking into account all the relevant considerations regarding wage ranges established under DOL rules and BALCA decisions.

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

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