

## Wage Transparency Laws Create Labor Cert. Hurdles

By **Eleanor Pelta and Whitney Lohr** (January 6, 2023, 6:04 PM EST)

Wage transparency laws — quickly cropping up across more U.S. state and local jurisdictions — govern employers' requirements to disclose pay ranges to job applicants or potential applicants in job advertisements.

Varying in scope, these laws will likely change the permanent labor certification, or PERM, process required for certain employer-sponsored foreign nationals and will require employers to consider their job advertisement strategy for PERM positions nationally.

While each wage transparency law may vary in its particulars, these laws typically require disclosure of a pay range for any publicly posted open position. Some jurisdictions also require a discussion or general summary of the benefits offered as well.

Labor certification refers to the labor market test and the U.S. Department of Labor certification that there are no U.S. workers willing and available to undertake a position that a U.S. employer wishes to offer to a foreign national on a permanent basis.

A PERM certification is a required basis for a large percentage of employment-sponsored U.S. permanent residence applications. The PERM process is heavily regulated by the DOL, and DOL regulations relating to the PERM process provide a list of mandatory recruitment steps an employer must undertake in order to adequately and fairly test the U.S. labor market before the DOL will certify the unavailability of U.S. workers for the position.

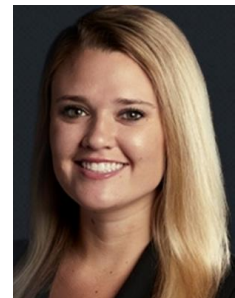
DOL regulations and guidance specify not only how many and what type of advertisements are legally sufficient for a particular PERM position, but also what the content of those advertisements must be.

Under Title 20 of the Code of Federal Regulations, Section 656.17(f), an advertisement for a PERM labor certification must name the employer, instruct applicants to report to or send resumes to the employer, provide "a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought," and indicate the geographic area of intended employment.

Per this section, advertisements may not contain a wage lower than the prevailing wage for the occupation — in the PERM process, the prevailing wage must be determined by the DOL. Also, it may



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not contain requirements that exceed those required for the job opportunity as ultimately articulated on the employer's PERM application form, and may not contain wages or terms and conditions of employment that are less favorable than those offered to the foreign national.

As PERM practice has developed since its 2005 initiation, DOL guidance and caselaw from the Board of Alien Labor Certification Appeals have refined these rules into a common-sense approach that allows employers to summarize job requirements for PERM advertisements.

According to the DOL:

The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity.[1]

Moreover, wages need not be listed in most PERM advertising. However, it is well established that, should an employer decide to articulate a wage in a PERM advertisement, that wage must be at or above the prevailing wage and must not be lower than that offered to the foreign national employee who is the subject of the PERM process.

Moreover, any wage range listed must start with a wage that is at least prevailing, encompass the wage offered to the foreign national employee, and the same range must be articulated on the employer's PERM form.

Given the DOL's rules and guidance relating to the articulation of wages in PERM advertisements, it is clear that state and local wage transparency laws will impact current employer practice and protocols for PERM advertising.

Colorado was the first state to enact a wage transparency law that could impact PERM advertisements.[2] In summary, as of Jan. 1, 2021, employers with at least one employee in Colorado have been required to disclose the hourly rate or salary range, along with a general description of benefits, in any job posting for a position that could be performed in Colorado.

Since then, additional jurisdictions throughout the country, including New York City,[3] California[4] and Washington,[5] have passed similar laws.

New York City's wage transparency law took effect Nov. 1, 2022, and amendments expanding existing laws in Washington and California took effect Jan. 1. Moreover, Gov. Kathy Hochul of New York signed a state-wide wage transparency law on Dec. 21, 2022, that is slated to take effect on Sept. 17.

Some of the state transparency laws that are in effect or will become effective in the near future apply only where an employer has a minimum number of employees working in that jurisdiction; many of the new laws apply to positions which, although based in a specific jurisdiction, can be performed remotely from anywhere.

The pay transparency laws also contain a variety of requirements relating to employer recordkeeping relating to published pay ranges and job descriptions.

### **Preemption Unlikely**

Could the state and local rules be preempted with respect to PERM advertising, since that is governed by federal rules? It is highly doubtful.

Under the U.S. Supreme Court's 2000 decision in *Crosby v. National Foreign Trade Council*, conflict preemption occurs both when "it is impossible for a private party to comply with both state and federal law and where the [challenged] law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives." [6]

Here, since the federal regulations governing the PERM process do not prohibit including a wage range in advertisements, state and local wage transparency laws requiring a wage range would not render compliance with both impossible.

Moreover, it would appear difficult to argue that requiring a wage range in PERM advertisements stands as an obstacle to the objective of the federal laws governing the PERM process, since the object of those federal laws is the protection of workers in the U.S. labor market — presumably the same purpose of the wage transparency laws.

### **Compliance in the PERM Context**

As a result of the rapidly changing landscape on wage transparency, U.S. employers undertaking the PERM process must now consider myriad state and local requirements in conjunction with the federal regulations governing PERM as they draft and publish their job advertisements.

For example, while the lower end of an advertised wage range may not present an issue under a state salary-transparency law, placing a job advertisement with a wage range lower than the prevailing wage determined by the DOL for the PERM process will lead to a DOL denial of a PERM certification under DOL regulations.

Compliance and strategy are especially tricky in the age of remote and hybrid work arrangements. Employers advertising for positions that can be performed remotely from anywhere in the U.S. will need to comply with wage transparency laws across multiple jurisdictions.

Large multistate employers will face similar challenges by virtue of employing one worker — or a handful of workers, depending on the jurisdiction — within a certain area of the country, or even just by advertising or doing business in that jurisdiction.

Employers may choose a broad approach to advertisement text that targets compliance across all jurisdictions.

For example, a broad approach to compliance may involve inclusion of a wage range where the bottom of the range meets the prevailing wage in a number of jurisdictions, as well as a general description of certain benefits to satisfy the heightened requirements under the Washington and Colorado laws.

However, inclusion of these items in all print ads nationwide will likely mean longer, more detailed and more expensive PERM advertisements.

Employers who are preparing PERM advertisements must begin strategizing and consider questions such as the following:

- Which laws apply to the company/employer as a whole?
- Which laws apply to the specific position being advertised?
- Does the law apply to this specific type of job advertisement? For example, must the employer include a wage range in a radio ad in a particular jurisdiction, or does the law only apply to print advertising?
- How will remote or hybrid work arrangements affect the requirements of the job advertisement?
- Does the posted wage range meet the DOL's prevailing wage?
- How will posting a wage range that includes the DOL's prevailing wage impact other ongoing recruitment that may contain different, more general wage ranges that may be in compliance with the new laws?

Colorado's wage transparency law, the first state law of its type, did not catalyze a widespread change in PERM practice. Just a few months after the law took effect, the Colorado Department of Labor and Employment unofficially acknowledged that under the theory of conflict preemption, it would not enforce transparency rules in PERM recruitment.[7]

In light of this announcement, it may be tempting for employers to hope that other jurisdictions will follow suit and opt for a business-as-usual approach to PERM advertisements. This approach carries risk and may be difficult to defend from a compliance standpoint.

Even if the authorities choose to look away when it comes to PERM advertisements, how would they distinguish a PERM advertisement from a non-PERM advertisement with certainty? Would they simply cease enforcement activities upon learning the advertisement is being utilized as part of the PERM process?

Amid the influx of new wage transparency laws, as well as subtle differences in the rules of each jurisdiction, a business-as-usual approach to PERM advertisements is untenable.

Employers should not count on favorable selective enforcement of wage transparency laws in jurisdictions such as California, for example, which has offered transparency in its enforcement mechanism and penalties within the statutory text of its new law,[8] and which is known in general for its expansive worker-protection laws.

Employers — especially those with liberal remote work options and locations in numerous states — would be well advised to do a deep dive into their PERM processes and an analysis of how best to bring those practices into compliance with the new wage transparency rules.

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[1] <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm?q!70>.

[2] <https://cdle.colorado.gov/equalpaytransparency>.

[3] <https://www.morganlewis.com/pubs/2022/01/new-york-city-enacts-law-requiring-salary-disclosures-on-job-postings>.

[4] <https://www.morganlewis.com/pubs/2022/09/california-law-requires-pay-range-disclosures-on-job-postings-and-mandates-pay-data-reporting>.

[5] <https://www.morganlewis.com/pubs/2022/12/washington-state-clarifies-new-requirement-to-list-compensation-and-benefits-in-job-postings>.

[6] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (internal citations omitted).

[7] AILA Doc. No. 21040231.

[8] [https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=202120220SB1162&showamends=false](https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220SB1162&showamends=false).