AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practice Pointer

# Practice Pointer: Layoff of U.S. Workers in the PERM Context

*By AILA's Department of Labor Liaison Committee*[1]

In the context of PERM application filings, employers who have recently laid off U.S. workers must abide by additional regulations demonstrating notice and consideration of all potentially qualified laid-off U.S. workers. These regulations are especially relevant during the COVID-19 pandemic, where more employers may have had to conduct layoffs. The AILA Department of Labor Liaison Committee provides FAQs to help AILA members conduct the PERM layoff analysis.

The provisions of the "notice and consideration" regulations are found at 20 C.F.R. § 656.17(k)(1) and state in pertinent part:

> If there has been a layoff by the employer applicant in the area of intended employment within six months of filing an application involving the occupation for which certification is sought or in a related occupation, the employer must document it has notified and considered all potentially qualified laid off (by the employer applicant U.S. workers of the job opportunity involved in the application and the results of the notification and consideration.

**What is a layoff?**

A layoff is "any involuntary separation of one or more employees without cause or prejudice." 20 C.F.R. § 656.17(k)(1). The regulation does not apply to individuals fired for cause, nor does it apply to contractors. Contractors are not considered employees and do not need to be included in the layoff analysis.

**When is the relevant period?**

Layoffs become relevant when they happen in the six-month period preceding filing the PERM application. 20 C.F.R. § 656.17(k)(1).

**Who must be notified, and for what position?**

The employer applicant must notify recently laid off workers during the aforementioned 6-month period. These individuals must be U.S. workers, who (1) worked in the area of intended employment and (2) worked in the occupation for which certification is sought or in a related occupation.

[1] Special thanks to DOL Liaison Committee members Meredith Jolie and Amy Novak for their work on this alert.

**What is a "related occupation" for purposes of the layoff analysis?**

A related occupation "is any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought." 20 C.F.R § 656.17(k)(2).

**What's the best way to identify a "related occupation?"**

In order to identify a related occupation, the employer should:

1. compare the PERM position to other potentially related occupations by listing each of the essential duties; and
2. assign the percentage of time attributed to each duty. If more than 50% of the essential duties are in common between the PERM position and the potentially related occupation, then best practice dictates that employees in the related occupation position who were laid off within the last six months should be considered for the position.

**How shall "notification" to the potentially qualified laid off U.S. workers be made?**

While no specific notification method is prescribed by DOL, an employer should select an option that it believes in good faith will reach the individual. Such notification can be done by Federal Express or any other courier, certified mail, fax, or e-mail to the last known contact for each laid-off worker.[2]

The notification must:

1. Provide a full description of the specific job opportunity;
2. Include clear instructions; and
3. Invite the worker to apply for the position.

**What obligations does an employer have?**

Employers must proactively reach out to laid-off employees. It **is not** sufficient to tell laid-off workers at the time of layoff to "monitor future openings on the company's website."[3] The employer:

- Must make a reasonable, good-faith effort to notify the potentially qualified U.S. workers. Please be advised the DOL has not given clear guidance on what constitutes sufficient notice.
- Should keep written records of all attempts to reach the laid-off U.S. worker(s) with some form of method that contains the date and confirmation of receipt such as Federal Express or any other courier, fax, or e-mail. As a best practice, an employer

[2] DOL FAQ on Notification and Consideration of Laid-Off U.S. Workers for PERM Applications, AILA InfoNet Doc. No. 14022460 (Posted 02/24/14), *available at*: https://www.aila.org/infonet/dol-faq-consideration-of-laid-off-us-workers-perm.
[3] *Id.*; *see also Matter of Oracle America, Inc.*, 2015-PER-00308 (May 4, 2017).

should select a method which it believes would best reach the individual in order to meet its notification obligation.

- Does not need to notify and consider individuals laid off by *other* employers in the area of intended employment. That said, the DOL certifying officer could well take notice of industry layoffs in the area of intended employment, which could call into question the labor market testing efforts of the employer.

**What is a "potentially qualified laid-off" U.S. worker?**

The regulations do not define what "potentially qualified" means. Given that the DOL may heavily scrutinize any related layoffs, the employer will need to review education, training, and experience for all "potentially qualified" laid-off U.S. workers.

A "U.S. worker" is any employee who is a citizen or national of the United States, any U.S. Lawful Permanent Resident, any alien admitted as a refugee under § 207 of the Immigration and Nationality Act (INA), any alien granted asylum under § 208 of the INA, or any immigrant otherwise authorized (by INA or by the Attorney General) to be employed in the United States. This excludes any laid-off workers on non-immigrant visas.

**What are the employer's "consideration" obligations?**

If the laid-off worker does not possess the minimum education, experience, skills or is not the best fit for the position, the employer must document the lawful job-related reasons for disqualification in the recruitment report. 20 C.F.R. § 656.17(k)(1) and DOL FAQ.[4]

**What can serve as proof of notification and consideration?**

Employers must keep written documentation of the notification and consideration **AND** of the results of notification and consideration to prepare the recruitment report. While submission of such report is not needed unless the case receives an audit, it is best practice to have this prepared before filing the PERM application. The report should include the following:

- Number and names of U.S. workers laid off in the occupation or related occupation;
- Proof of notification to the potentially qualified laid-off workers;
- Number of laid-off U.S. workers who did not respond or chose not to apply for the opportunity;
- Number of laid-off workers who actually applied and their respective resumes;
- Reasons for lawful disqualification and any other related evidence.[5]

[4]*See* DOL FAQ, 02/24/24, AILA InfoNet Doc. No. 14022460.
[5]*See* 20 C.F.R. § 656.17(k)(1); Supplementary Information to Final PERM, 69 Fed. Reg. At 77354; and DOL FAQ, 02/24/24, AILA InfoNet Doc. No. 14022460.

**What if a potentially qualified U.S. worker does not apply for the PERM position after notification has been delivered?**

Even if the laid-off U.S. worker does not apply, the employer should still consider the applicant and document whether the applicant was qualified or not. 20 CFR § 656.17(k)(1). Then the employer has met its obligation under the regulations. If the worker was not qualified, then state the legal job-related disqualification.

**What if an employer reduces salaries or furloughs some of its employees? Does the layoff analysis need to be conducted?**

The regulations require an employer to notify and consider laid-off U.S. workers. Technically, a furlough which is defined as "a temporary leave from work that is not paid and is often for a set period of time,"[6] is not a layoff. Accordingly, the "notice and consideration" requirements do not apply to employees that have been furloughed. Likewise, a reduction in an employee's salary does not trigger the "notice and consideration" requirements either, since a reduction in salary is not a layoff. For more information about furloughs and salary reductions, please see "Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues" produced by the Wage and Hour Division of DOL.[7]

[6] *See d*efinition obtained from Merriam-Webster *available at*: https://www.merriam-webster.com/dictionary/furlough.

[7] *See* Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues (09/2019) by Wage and Hour Division of DOL, *available at*: https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs.