



Record DOJ Settlement Sends Warning To Employers Participating In PERM

January 12, 2024 | [Labor And Employment](#)



Tejas Shah
Partner

In November, the U.S. Department of Justice (DOJ) [announced a dispute settlement](#) with Apple Inc., resolving allegations that Apple illegally discriminated against U.S. citizens and certain non-U.S. citizens in the hiring and recruitment process. This settlement resulted from an investigation initiated by the Department of Justice in February 2019 regarding the alleged discriminatory hiring and recruitment processes in which Apple engaged in relation to the permanent labor certification (PERM) program.

The cumulative \$25 million in penalties, including back pay and civil fines, levied in the Apple settlement were historic – the highest award the department has recovered under the anti-discrimination provision of the Immigration and Nationality Act (INA).

This high-profile settlement follows a notable 2021 settlement with Facebook in which the company agreed to pay nearly \$14.25 million in cumulative fines and penalties for similar alleged violations.

Recruitment in the Context of the Labor Certification (PERM) Process

The PERM program enables employers to provide more permanent work authorization for foreign workers through sponsoring such individuals for lawful permanent residence in the United States. This process, managed by

RELATED PRACTICE AREAS

Immigration and Global Mobility Services
Labor and Employment

RELATED TOPICS

Department of Justice (DOJ)
Discrimination
Immigration

the U.S. Department of Labor (DOL) and the U.S. Citizenship and Immigration Services (USCIS), consists of three phases: 1) obtaining a labor certification from DOL, 2) filing an I-140 Petition with the USCIS, and 3) submitting an I-485 Application or pursuing permanent residency through consular processing with the U.S. Department of State.

Employers who recruit talent through the PERM process may view it as a bit backwards in nature, as the employer must conduct good faith recruitment for a position for which a candidate already exists. However, this is a critical component of the first stage in this employment-based path to permanent residency, as employers must demonstrate a qualified and willing U.S. worker did not exist.

To comply with DOL requirements, an employer must complete a series of recruitment steps to demonstrate that a U.S. worker is not able, willing, qualified, and available to accept the job opportunity in the area of intended employment. Further, the employer must demonstrate that employing the foreign worker will not adversely affect the wages and working conditions of U.S. workers, or certain non-U.S. citizens, employed in similar positions. The employer must act in good faith when recruiting for positions, properly testing the labor market to determine whether there are any qualified, available and interested U.S. workers for the job.

Such requirements are enforced by the Civil Rights Division's [Immigrant and Employee Rights Section](#) (IER) pursuant to the INA's anti-discrimination provision, which [prohibits discrimination](#) based on citizenship status and national origin in hiring, firing, or recruitment or referral for a fee; unfair documentary practices; and retaliation and intimidation.

Apple's Alleged Violation

The Department of Justice initiated an investigation into Apple's recruitment practices in relation to employment positions Apple sought to fill through the PERM program in February 2019. The investigation found reasonable cause to believe Apple exercised a pattern or practice of discriminatory recruitment practices, deterring protected workers from applying to those positions, from Jan. 1, 2018, to Dec. 31, 2019.

In particular, the DOJ revealed that, in connection with PERM recruitment efforts, Apple did not advertise certain job openings on its website as it routinely does for other positions. Further, the company required applicants for those jobs to mail paper applications its typical practice of accepting electronic applications, resulting in few or no applications for PERM positions from applicants whose permission to work does not expire.

Civil Penalties and Recourse

Also mirroring the Facebook investigation, Apple's penalties are historic in nature. Apple is [required to pay](#) \$6.75 million in civil penalties and establish an \$18.25 million back pay fund for eligible affected workers. This \$25 million agreement represents the largest fine and monetary settlement recovered by IER. Previously, Facebook held this record with its settlement of \$14.25 million

As part of the agreement, Apple is required to ensure that its recruitment for PERM positions more closely matches its standard recruitment practices. Specifically, Apple will be required to post PERM positions on its external job

website, accept electronic applications, and permit applicants to PERM positions to be searchable in its applicant tracking system. Further, Apple will train employees on the INA's anti-discrimination requirements. To ensure compliance, Apple will be subject to monitoring by the DOJ for three years.

Apple has expressed a willingness to comply, acknowledging in a statement to the media that it had "unintentionally not been following the DOJ standard." The company further noted that it has "implemented a robust remediation plan to comply with the requirements of various government agencies as we continue to hire American workers and grow in the U.S."

Preparing for Enforcement Trends and the Difficulties of Compliance

The charges and settlements against both Apple and Facebook illustrate the inherent conundrum facing employers in the PERM context. When employers embark on the PERM process to support a foreign national they wish to sponsor for permanent residency and have already "identified" the individual they wish to hire, federal regulations require this test of the labor market. The federal regulations don't, however, compel the employer to make a job offer to a minimally qualified U.S. worker; thus, there is an inherent tension between these settlements and the real-world implications of PERM processes.

Nevertheless, the DOJ has doubled down on its commitment when commenting on the settlement. In particular, Assistant Attorney General Kristen Clarke of the DOJ's Civil Rights Division commented in the agency press release, "Creating unlawful barriers that make it harder for someone to seek a job because of their citizenship status will not be tolerated, [and] this resolution reflects the Civil Rights Division's commitment to ending illegal discriminatory employment practices."

Such rhetoric is consistent with the DOJ's actions as of late, and given recent trends, employers may anticipate more activity in IER enforcement actions involving alleged discriminatory practices.

To prepare for a potential investigation, employers who work with the PERM process should consider auditing their recruitment processes to identify any inconsistencies with standard recruitment practices. Employers should also review all recruitment processes, including third-party platforms, to ensure compliance with broader DOL and IER requirements.

This article was co-authored by Tieranny Cutler, independent contract attorney.