

IMMIGRATION PRACTICE GROUP | IN-DEPTH ANALYSIS

DOL proposes sweeping overhaul of PERM Labor Certification process

What the proposed rule would change, the open questions it raises, and how it may fare in court

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Executive summary

This week, the U.S. Department of Labor proposed a sweeping overhaul of the Permanent Labor Certification Program, the process that employers must complete before sponsoring most foreign nationals for EB-2 and EB-3 green cards. The proposed rule, formally issued on November 17, include eliminating Schedule A, requiring at least 90 days of online recruitment, and barring filings after recent layoffs of U.S. workers in the same occupation.

We blogged about the proposed rule the day it was initially released (here). A more concise version of the information in this article is available here.

If adopted, the rule would lengthen and add cost to the process, extend employer obligations until the U.S. Citizenship and Immigration Services decides the employer's Form I-140 immigrant petition, and increase enforcement exposure. This is especially true for employers with layoffs, remote or placed workers, or Schedule A occupations.

Comments on the proposed rule are due January 19, 2027, and a final rule could take effect as early as 60 days after publication, so current rules apply until then; legal challenges are likely. Please read on for details.

Background: How permanent labor certification works today

Most employer-sponsored green cards in the second and third employment-based preference categories (EB-2 and EB-3) require the U.S. Department of Labor to make two findings before the employer may file with the USCIS an immigrant petition (Form I-140). First, there must not be enough able, willing, qualified, and available U.S. workers for the job at the place where it will be performed. Second, employing the foreign national must not adversely affect the wages and working conditions of similarly employed U.S. workers. These requirements come from section 212(a)(5)(A) of the Immigration and Nationality Act. The requirements do not apply to certain other categories, such as EB-1 and the national interest waiver.

The DOL administers these requirements through the Permanent Labor Certification Program, commonly called PERM, under 20 CFR Part 656. The program was last substantially rewritten in a final rule that took effect in March 2005, with a fraud-focused amendment in 2007. In practice, an employer proceeds as follows:

1. **Prevailing wage.** The employer asks the DOL to determine the prevailing wage for the position in the area of intended employment, and must offer at least that wage.

2. **Recruitment and notice.** The employer tests the U.S. labor market by following a prescribed set of recruitment steps, including a 30-day job order with the State Workforce Agency and print advertisements on two Sundays. It also posts a notice of filing for its own workforce, or gives notice to a bargaining representative.
3. **Filing.** The employer files an application through the DOL's online system. The application is largely attestation-based: the employer attests that it completed each step and keeps the supporting documents.
4. **DOL review.** The DOL may certify the application, deny it, select it for an audit, or require supervised recruitment.
5. **Appeal.** An employer whose application is denied has 30 days to request reconsideration or review by the Board of Alien Labor Certification Appeals.

A certified application then supports the employer's I-140 petition filed with USCIS. Because the DOL's own regulations use the statutory term "alien," the proposed rule uses it as well; this article uses "foreign national" except when quoting or describing regulatory text.

What the proposed rule would change

The new proposal rewrites most of 20 CFR Part 656 and reorganizes it by processing stage. The DOL groups its changes under four themes: modernizing recruitment, protecting U.S. workers affected by layoffs, strengthening compliance and program integrity, and modernizing the prevailing wage and filing process. The most significant changes are summarized below, roughly in order of how broadly they affect employers, with proposed section numbers for reference. The litigation section near the end assesses how the key provisions may fare in court.

Single, online-focused recruitment standard (§§ 656.17, 656.13(d))

The proposal would end the distinction between professional and non-professional occupations. It eliminates mandatory print advertisements and the menu of three "additional" steps, and requires up to five activities instead: A job order with each relevant State Workforce Agency; an advertisement on the employer's business websites; an advertisement on at least one outside job search website; social media advertising where the employer customarily uses it for the occupation; and at least one job fair, on-campus event, or school placement office listing.

The first four must run at least 90 days, or longer if the employer customarily advertises comparable non-PERM jobs for longer. They must finish 30 to 60 days before filing, and the application must be filed within 30 days after recruitment ends.

Recruitment would also have to mirror the employer's ordinary hiring: the same channels, locations, application methods, and timeframes it uses for comparable non-PERM roles. Interviews must be available by phone or video. Recruitment through a less accessible channel is presumed not to be in good faith and may be referred to the Department of Justice or the Equal Employment Opportunity

Commission. The proposed rule would also require employers to configure their applicant tracking systems to capture and keep searchable every U.S. worker application received through PERM recruitment.

Two-year layoff bar and expanded layoff obligations (§ 656.13(e)–(f))

Currently, an employer who has a layoff in the area of intended employment within six months before filing must document that it notified and considered the laid-off workers. The proposal would instead prohibit filing if the employer laid off U.S. workers in the same or a similar occupation in that area during the prior two years. "Similar" means the same Standard Occupational Classification code or a position sharing at least 51 percent of the same duties, and "layoff" means any involuntary separation without cause, including a reduction in force or restructuring.

After filing, and until USCIS decides the I-140 petition, the employer must report any such layoff to DOL (and USCIS, if an I-140 petition is pending) within five business days. It must also offer the job to the laid-off workers and update its recruitment report. Employers could not place the sponsored employee with another employer who has had similar layoffs where there are indicia of an employment relationship.

Which workers, and notice or an offer? The post-filing obligation applies to U.S. workers (citizens, nationals, lawful permanent residents, refugees, and asylees) who, after the employer has filed, are laid off from the same or a similar occupation in the area of intended employment of the place(s) of employment. The current rule requires the employer to notify and consider laid-off workers. The proposed text instead requires an offer of the job at no less than the same wage and on the stated terms, with documentation of whether each worker refused, was rejected for a lawful, job-related reason, or was hired (§ 656.13(e)(2)).

The preamble describes the offer as going to "potentially qualified" laid-off workers, which suggests an employer could document that a worker was not qualified. However, § 656.13(e)(2) contains no qualification limit, § 656.17(f)(2) refers to notifying "potentially qualified" workers, and the proposal does not define the term.

How and when. The text does not prescribe the method, format, response period, or deadline for the offer. The employer must describe in an updated, signed recruitment report the methods it used, the dates it contacted each worker, and each worker's name, contact information, and disposition. The separate report of the layoff to the DOL, and to USCIS if an I-140 petition is pending, is due within five business days after the layoff. The preamble adds that failing to re-hire a qualified and available laid-off U.S. worker could support an inference of discrimination, and that the DOL would tell USCIS whether the certification remains valid or is revoked. It does not address what happens if there are more acceptances than openings. Employers may wish to ask the DOL to specify the timing, method, and content of the offer.

The litigation section below assesses whether the layoff requirements would withstand judicial review.

Third-party placements: "End clients" and "placing employers"

Several proposed provisions address employees who are placed at other companies' worksites (§§ 656.3, 656.13(e)–(f), 656.14(b)). The rules regulate only the employer who sponsors the foreign national, but they affect both sides of a placement arrangement. The DOL would use the H-1B criteria for "indicia of an employment relationship": which company controls when, where, and how the work is done; who supplies the tools; where the work is performed; who sets the hours and duration; and whether the work is part of the other company's regular business.

End clients. A company who hosts workers placed by another employer would have no filing obligations of its own but would be affected in practical and contractual ways:

- **End client layoffs can end the placement.** If the end client laid off U.S. workers in a same or similar occupation within the two year period before the sponsor's filing, or did so before USCIS decided the I-140 petition, the sponsor could not place the employee there. End clients should expect requests for layoff information, and may have confidentiality or contractual concerns about providing it.
- **Notice at end client worksite.** The sponsor's notice of filing must be posted at the site of the end client, which requires the end client's cooperation.
- **Closer supervision may trigger the rule.** An end client who directs the work, supplies the tools, and treats the role as part of its regular business is more likely to be found to have an indicia-of-employment relationship, which is the condition that triggers the layoff restriction.
- **Strike attestation.** The sponsor must attest that the position is not vacant because of a strike or lockout at any place of employment, including end client sites.

Employers whose business model includes placements. Staffing, consulting, outsourcing, and professional services firms face the most direct effects:

- **Eligibility of the model.** The proposed definition of "permanent employment" adds a condition that the employer will not enter into a temporary staffing agreement placing the employee with third-party clients. The term is not defined, so it is unclear whether project-based consulting or services contracts qualify.
- **Information and tracking.** The sponsor must identify third-party sites at filing, check each client's layoff history, and monitor changes through the I-140 decision, even though assignments change and the client controls the information.
- **Multiple places of employment.** Each client site can require its own job order, notice, bargaining-representative notice, and prevailing wage analysis.
- **Recruitment.** Recruitment must mirror the employer's customary recruitment for comparable non-PERM roles, which may be client-specific.
- **Enforcement focus.** The preamble cites investigations of third-party staffing in the technology sector as a reason for the rule.

Challenges in applying the rules. The proposal leaves several questions open:

- The definition of "temporary staffing agreement" and how it differs from a services contract.
- How an employer proves a lack of indicia of employment, with no safe harbor, when the answer depends on the client's conduct.
- How a sponsor attests, under penalty of perjury, to a client's past and future layoffs that it may not know about, and when the five-business-day reporting clock starts for a client's layoff.
- Whether a layoff at a client after placement requires removing the employee, since the text says the employer "will not place" the employee there.
- The scope of a client's layoffs. The text for placements refers to layoffs in the other employer's workforce, without the area-of-intended-employment limit that applies to the sponsor's own layoffs, and it covers the client's parent, subsidiaries, and affiliates.
- How to satisfy notice-of-filing posting when a client refuses, and whether electronic posting is allowed on a client's systems.
- Whether DOL will add the contract requirement between employers that it says it is considering.

Because the sponsor bears the burden of proof and the attestations are made under penalty of perjury, these ambiguities create risk of denial or later revocation. Employers on either side of placement arrangements may wish to review their contracts now and to ask DOL for definitions and safe harbors.

Elimination of Schedule A and the sheepherder procedures (§§ 656.5, 656.15, 656.16)

Employers sponsoring physical therapists, professional nurses (Group I), or individuals of exceptional ability in the sciences or arts (Group II) currently skip recruitment and file directly with USCIS. Under the proposal they would use PERM, like every other employer. In Group II cases, and for college and university teachers, DOL would apply the statutory "equally qualified" standard, under which a U.S. applicant at least as qualified as the foreign national counts as available. USCIS, not the DOL, would still decide whether exceptional ability exists.

The DOL gives two reasons. First, it concludes that the Immigration and Nationality Act gives it no authority to exempt occupations from the labor market test. Second, after a 2023 request for information that drew more than 2,000 comments, it found no reliable, objective method for deciding which occupations are in shortage.

The litigation section below assesses whether these reasons would withstand judicial review.

Remote, roving, and telework positions (§ 656.3 and preamble)

The preamble describes how the DOL might define the place of employment for roving, remote, and telework roles. For roving work it would be the employer's nearest business office. For remote work it would be the employee's city, county, zip code, and Bureau of Labor Statistics area. DOL also asks

whether fully remote positions should be eligible at all, and what geographic area should set the prevailing wage. The proposed regulatory definition of "place of employment" is brief and does not contain these rules, so they appear to be "under consideration" rather than "proposed."

The "nearest office" approach for roving employees raises practical questions that the preamble does not answer. The points below are our observations, not statements by the DOL.

- **No stated method for choosing the office.** The DOL's example assumes work in one state and an office in that state. It does not say how to measure "nearest" (straight-line or driving distance, or by reference to which assignment), what to do when two offices are close to equally near, or what applies when work spans several regions or has no identifiable location at filing. The DOL acknowledges that the nearest office may be far from the work, and asks commenters for practical approaches.
- **The choice has legal consequences.** Under the proposed text, the place of employment determines which State Workforce Agency receives the job order, where the notice of filing is posted, which bargaining representatives are notified, which area's prevailing wage applies, and which area's layoffs trigger the two-year bar. Picking one office over another can therefore change the wage, the recruitment market, and whether the employer can file at all. Listing several offices multiplies those obligations.
- **Tension with the proposed definition.** The proposed regulatory definition describes the place of employment as a location where work is actually performed. A business office the employee rarely or never visits would not fit that wording, so the preamble approach would need to be written into the rule to be reliable.
- **Documenting the choice.** In some cases the selection will necessarily involve judgment. The employer bears the burden of proof (§ 656.2(b)), and certification requires compliance with every requirement of Part 656 (§ 656.24(b)(1)). Contemporaneous records are the practical protection: the assignment locations known at filing, the offices considered, the method used to compare them, the reasons for the choice, and consistent treatment across similar filings.
- **Risk if DOL disagrees.** Because the proposal offers no tie-breaker or safe harbor, the DOL could treat a different office as the correct one, which could lead to an audit or denial. A mistake cannot be fixed on the pending application, because modifications after filing are prohibited (§ 656.11(b)), and recruitment may have to be repeated in the correct area. A denial would then be reviewed under the deferential "arbitrary and capricious" standard (§ 656.27(c)). Inconsistent descriptions of a role's location across filings could also draw a misrepresentation inquiry, since the proposed definition of "willful misrepresentation" includes reckless disregard and does not require intent to deceive.

Employers with roving employees, such as the consultants, technicians, sales representatives, and project engineers whom the DOL itself lists, may wish to ask the DOL for a clear selection rule or a safe harbor -- for example, allowing use of the office to which the employee reports or the employer's headquarters.

Fully remote positions: exclusion and alternatives

The DOL's stated reason for considering a categorical exclusion of fully remote positions is that it is unsure how to define the place of employment, the recruitment area, and the prevailing wage for them. Employers and commenters may respond that this is a reason to solve the problem rather than to exclude the jobs, for the following reasons:

- The statute applies the certification requirement to every foreign national who will perform skilled or unskilled labor, and does not distinguish between onsite and remote work.
- The preamble to the proposed rule acknowledges that remote work has become commonplace and that the DOL currently processes these cases, so a rule that removes access to the process would affect a category of roles that is common today. Sponsored remote employees who need labor certification would have no route to EB-2 or EB-3 classification, and other routes such as EB-1 and the national interest waiver have different eligibility requirements.
- An exclusion could push employers to require relocation, which affects hiring and retention for roles that were designed to be location-independent.

The DOL has legitimate concerns on the other side. A job that can be performed anywhere draws on a national labor pool, and a prevailing wage tied to one location could let an employer choose a lower-wage area. Whether exclusion is unfair is ultimately a question for the rulemaking and, if the rule is finalized, the courts. Commenters could offer several workable alternatives:

- **Headquarters approach.** Recruit and obtain the prevailing wage determination at the employer's headquarters, as the 1994 Farmer memorandum (Field Memorandum No. 48-94) provides for roving work with unanticipated locations. This is simple and predictable. The DOL says headquarters may not always be the appropriate location, and the preamble describes current practice for remote roles as listing a full address, so practice for remote roles may have varied.
- **Employee location.** Use the employee's city, county, zip code, and BLS area, as the preamble describes. This matches the wage to the worker's actual labor market, but the worker may move after filing.
- **Highest of several wages.** Require the highest of the prevailing wages for the employee's location, the nearest office, and headquarters. The DOL asks about this option. It reduces wage-arbitrage concerns at some cost to the employer.
- **National recruitment with a wage floor.** Because the job is advertised as remote and open to residents of any state, recruit nationally online, place job orders with the SWAs in the headquarters and employee-location states, and apply the higher applicable wage.
- **Relocation rule.** Let the employer attest to the employee's location at filing, and require that the wage meet or exceed the prevailing wage for any new location after a move, without requiring a new application.
- **Onsite threshold.** The DOL's mention of a minimum onsite-work requirement suggests treating roles with a stated amount of onsite work as telework, with only fully remote roles under special rules.

Under any of these options, the DOL has already proposed electronic posting of the notice of filing for remote roles, which would address one practical problem.

Recruitment records submitted with every application (§§ 656.10, 656.17(f))

Today employers retain recruitment records and produce them if audited. Under the proposal, every application would be required to include the notice of filing, the advertisements, applicant resumes, and a detailed recruitment report. The report would have to list each advertisement's URL and platform confirmation number, each U.S. applicant's disposition, and the name and title of each employee who screened or interviewed the applicant. Incomplete filings would be returned unprocessed, without a filing date or appeal rights, rather than denied.

Longer and broader notice of filing (§ 656.14)

The notice would be posted during the 10 business days before filing and remain up until USCIS approves or denies the employer's I-140 petition, or the employer withdraws it. The current rule requires 10 consecutive business days of posting before filing, and no continuing posting after that. Notice would be required in at least two conspicuous locations, or electronically where an employer uses an employee-facing website for workplace notices. It would also extend to third-party worksites and to bargaining representatives at every place of employment.

Closer review of job requirements (§§ 656.3, 656.19)

The job's actual minimum requirements must be normal for the occupation. On audit, the DOL would compare them to the employer's postings for non-PERM jobs in the same or substantially comparable occupations during the prior 12 months. The employer must justify any materially stricter requirement as a business necessity.

Attestations, signatures, and enforcement (§§ 656.4–656.6, 656.13, 656.20–656.21, 656.30–656.31)

- **Attestations.** Under penalty of perjury, employers would attest, among other things, that the job remains open to qualified U.S. workers until USCIS decides the I-140 petition, that U.S. workers (including current employees in similar positions) receive terms no less favorable than the foreign national, and that the employer complies with Title VII, 8 U.S.C. § 1324b, and the Fair Labor Standards Act.
- **Signatures and representatives.** The employer would be required to sign every submission, even when represented by counsel, and counsel may not sign for it. Attorneys and agents must retain their engagement agreements and could be debarred independently of the employer. Successors in interest could inherit a debarment.
- **Debarment.** A debarment of up to three years from PERM would extend to all DOL labor certification and labor condition application programs, including the H-1B program. The DOL asks whether the maximum should be five or even ten years.

- **Information sharing.** DOL would route audit and supervised recruitment findings to DOJ, the EEOC, the Department of Homeland Security, and the DOL Inspector General.
- **One use per certification.** A certification could support only one initial I-140 petition, which DOL says closes a practice of reusing it after a denial. Employers would keep records for five years from the USCIS decision.

Process changes (§§ 656.10, 656.26, 656.27, 656.40)

Electronic filing would be mandatory, although the DOL reports that 99.61 percent of applications are already filed that way. The prevailing wage determination would have to be obtained before recruitment begins. The separate prevailing wage redetermination step would be eliminated, so employers would go directly to Center Director review. Appeals would be codified, with BALCA applying an "arbitrary and capricious" standard of review, and an unclear appeal request would default to reconsideration by the Certifying Officer.

Prevailing wage determinations (§ 656.40)

The proposal would codify much of the DOL's current PWD practice and make several changes:

- **Request and review.** The employer would file an Application for Prevailing Wage Determination electronically with DOL's National Processing Center, which would review the job's duties, requirements, and worksite locations. If information is missing, DOL could issue a request for information with a 7-day response period, and an unanswered request could lead to the application's being deemed abandoned and returned.
- **Wage.** For jobs not covered by a union agreement or sports league rules, the wage would be the arithmetic mean from the DOL's Occupational Employment and Wage Statistics survey for the area, or from an acceptable employer survey. Surveys that report only a median wage would no longer qualify.
- **Validity and sequence.** A PWD would be valid for 90 to 365 days. It would have to be obtained before recruitment begins, and recruitment would have to start within the validity period. A request for review would make the PWD invalid until the DOL decided it. The separate redetermination step would be eliminated.

Same title, different requirements. Under § 656.40(b)(3), the DOL would return without review a new request where a valid PWD already exists for the same employer, the same job opportunity, and the same area of intended employment in the same wage year. A single PWD could support multiple PERM applications for the same job opportunity. The proposal does not define "same job opportunity," but the preamble describes reuse of one PWD for positions with the same duties and requirements in the same area.

Our reading is that roles with the same title and description but materially different skill requirements would be different job opportunities that need separate requests. The proposal does not say so expressly, which creates these risks:

- The DOL could treat the second request as a duplicate and return it without review.
- Using one PWD for both roles could yield a wage that does not reflect the added requirements, and modifications after filing are prohibited.

Employers can reduce the risk by stating each role's actual minimum requirements precisely, keeping records that explain the differences, and asking the DOL in comments to define "same job opportunity" by duties, requirements, and location.

Current rule versus proposed rule

According to the preamble to the proposed rule, the current-rule descriptions below follow 20 CFR Part 656.

Topic	Current rule	Proposed rule
Occupation tracks	Separate recruitment rules for professional and non-professional occupations; Schedule A and sheepherder shortcuts; optional process for college teachers	One recruitment standard for all occupations; Schedule A and sheepherder procedures eliminated (exceptional-ability cases face an "equally qualified" standard); optional competitive process kept for teachers and extended to professional athletes and coaches
Required recruitment	30-day job order and two Sunday print ads; professional roles add three steps chosen from a list of 10	Job order(s), employer website(s), one outside job site, social media if customary, and one job fair, campus event, or placement office listing; no print requirement
Duration	30-day job order; no minimum for other steps	At least 90 days for the first four methods, or the employer's customary period for comparable non-PERM jobs if longer
Timing	Recruitment within the 180 days before filing, with mandatory steps at least 30 days before	Recruitment finished 30 to 60 days before filing; application filed within 30 days after recruitment ends
Comparison with non-PERM hiring	Good-faith attestation; no express comparability requirement	Same channels, locations, application methods, and duration as comparable non-PERM roles; applicant tracking system must capture PERM applicants; virtual interviews
Recruitment records	Retained by the employer; submitted only on audit or request	Submitted with every application, including a detailed recruitment report and all U.S. applicant resumes
Layoffs and third-party placements	Layoff in the area within 6 months before filing triggers a duty to notify and consider laid-off workers	Filing barred after a layoff of U.S. workers in the same or similar occupation within 2 years; after filing, report within 5 business days, offer the job, and update the report; no placement with other employers that have had such layoffs; new "temporary staffing agreement" condition in the definition of permanent employment
Notice of filing	Posted for 10 consecutive business days, 30 to 180 days before filing	Posted within 10 business days before filing and kept up until USCIS decides the I-140 petition; two locations or electronic posting; third-party worksites; bargaining representatives at all places of employment

Topic	Current rule	Proposed rule
Remote and roving work	1994 guidance: "various unanticipated locations" plus headquarters address; full address for remote roles	Preamble describes new approaches (nearest office for roving; employee's city, county, ZIP code, and BLS area for remote) and asks for comments regarding whether to exclude fully remote roles
Attestations	Attestations on the application form	Expanded attestations in new § 656.13 and Appendix E under penalty of perjury, including U.S. worker parity and job openness until USCIS decides the I-140 petition
Signatures and representatives	Employer signs the application and recruitment report	Employer signs every submission; counsel keeps engagement agreement; attorneys and agents debarred independently; successor-in-interest liability
Debarment	Up to 3 years from PERM	Up to 3 years across all DOL labor certification and labor condition application programs, including H-1B; new grounds; DOL asks about 5 or 10 years
Use of a certification	Valid 180 days to file the I-140 petition; some employers reuse it after a denial	Valid for one initial I-140 petition only
Record retention	5 years from the filing date	5 years from the USCIS decision, or from expiration, denial, or withdrawal if no I-140 petition is filed
Filing and prevailing wage	Electronic filing not mandated; incomplete applications denied; recruitment may begin before the prevailing wage determination is obtained	Mandatory electronic filing; incomplete applications returned and not appealable; prevailing wage determination required before recruitment begins; redetermination step eliminated; duplicate requests for the same job opportunity and area in a wage year returned
Appeals	Reconsideration or BALCA review within 30 days; standard of review not stated in the rule	Reconsideration process codified; unclear requests default to reconsideration; "arbitrary and capricious" standard; BALCA may remand
Effective date	Not applicable	60-day delayed effective date plus 30-day transition; applications that are filed on or after day 90 follow the new rule

Impact on employers

The DOL presents the proposed rule as a way to give U.S. workers a fair and visible opportunity at jobs for which employers seek permanent foreign labor. Because the labor market test is a statutory feature of the program, employers should expect agencies, applicants, and the public to view their recruitment through that lens. The practical effects, if the rule is adopted as proposed, fall into the following areas:

- **A longer runway.** Under the proposal, recruitment would need to start at least about 120 days before filing, and the prevailing wage determination must come first. Today the minimum is roughly 60 days (a 30-day job order plus a 30-day wait before filing), and recruitment may begin before the PWD issues. Sponsorship planning for key talent would need to start earlier.
- **Human resources and talent acquisition become central.** PERM recruitment would have to replicate ordinary hiring for the same kind of role. Employers would need to coordinate career

pages, job boards, social media, campus recruiting, and applicant tracking systems, and document each step with URLs, confirmation numbers, and the names and titles of everyone who screened applicants.

- **Layoff planning becomes an immigration issue.** A reduction in force affecting a given SOC code in a metropolitan area could bar PERM filings for that occupation there for two years. The bar applies whether or not the employer planned a filing at the time, so human resources, legal, and immigration counsel would need to coordinate on workforce reductions. A layoff after filing triggers a five-business-day report, a job offer to affected workers, and an updated recruitment report.
- **Obligations continue after filing.** The notice of filing would stay posted, and the job would have to remain open to qualified U.S. workers, until USCIS acts on the I-140 petition. A qualified U.S. applicant before filing still means the labor market test failed and the application cannot be filed, as under the current rule. The proposed attestation (§ 656.13(a)(3)) goes further and states that U.S. workers who were rejected for reasons that were not lawful or job-related "have been or will be hired," language the preamble does not explain and whose effect on applicants after filing is unclear. Employers must also offer the job to laid-off U.S. workers, and must keep records for five years after the USCIS decision.
- **Pay and terms parity.** Employers would attest that U.S. workers, including current employees in similar positions, receive terms no less favorable than the sponsored employee, and would need documentation to support that. Employers should expect compensation and benefits to be examined.
- **Greater enforcement and discrimination exposure.** Audit findings could be shared with the DOJ and the EEOC, and recruitment through a less accessible channel is presumed not to be in good faith. The preamble points to prior DOJ resolutions with Apple (2023) and Facebook (2021) over PERM recruitment practices, and states that PERM compliance is not a defense under Title VII or 8 U.S.C. § 1324b.
- **Cross-program consequences.** A PERM debarment would extend to every DOL labor certification and labor condition application program, so a PERM violation could also affect an employer's H-1B filings.
- **Costs.** The DOL estimates that the rule would save employers about $164 million per year, almost all from eliminating print newspaper ads. The DOL puts the added employer costs it can quantify, such as signatures, longer notice postings, and expanded attestations, at about $13 million in the first year. The analysis treats several significant provisions, including the layoff bar and the one-use limit on certifications, as costs it cannot quantify. The quantified items are short tasks valued at human resources wages, such as 15 minutes per application for the longer notice posting and 30 minutes for the new attestations. The analysis does not separately estimate staff time for 90-day postings across several channels, applicant tracking changes, monitoring and reporting layoffs after filing, updated recruitment reports, offers to laid-off workers, monitoring client-site layoffs, pay parity documentation, outside counsel fees, or the cost of a longer timeline. Employers and commenters may argue that these recurring tasks,

which continue until USCIS acts on the I-140 petition, make the administrative burden substantially larger than the DOL estimates.

Industries and employer types most affected

- **Health care.** Hospitals, nursing facilities, and staffing agencies that rely on Schedule A for nurses and physical therapists would have to complete full PERM recruitment and file with the DOL.
- **Higher education and research.** Institutions sponsoring faculty could continue the competitive recruitment option. Those sponsoring researchers or artists of exceptional ability would face the "equally qualified" standard.
- **Technology, staffing, and consulting.** Employers with recent layoffs, client-site placements, or remote workforces face the most direct effects, including the layoff bar, notice at third-party worksites, and restrictions on certain staffing arrangements.
- **Early-stage companies.** The proposed ability-to-pay attestation refers to "existing, internally-available, non-contingent" resources, which could be difficult for companies that depend on future financing.

Cases in the pipeline

If the rule is finalized as proposed, applications submitted before the 90th day after the final rule is published would be processed under the current regulations. Employers should identify which pending and planned cases would fall on each side of that line. Nothing in the proposal changes current requirements today.

Questions and inconsistencies

A proposal of this length will contain points that need to be reconciled before it is finalized. The items below come from the proposal's own text and are the kinds of issues commenters, and potentially courts, may focus on.

- **Schedule A: authority versus practice.** The DOL's lead rationale is that the INA gives it no authority to exempt occupations from the labor market test. The DOL has maintained and revised Schedule A since 1965, and in 2023 it asked the public whether to expand it. Its second rationale applies "even if" it had the authority. The preamble's discussion of employers' reliance on Schedule A is brief.
- **Preamble and regulatory text do not always match.**

  - The definition of "permanent employment" adds a third condition, that the employer will not enter into a temporary staffing agreement placing the foreign national with third-party clients. The preamble describes only two conditions.
  - The definition of "employer" requires at least one full-time employee at the place of business. We did not find a discussion of that requirement in the preamble.
  - The ability-to-pay attestation is described as a clarification tied to DHS rules, but the text limits qualifying resources to existing, internally available, non-contingent funds.
  - The applicant tracking system requirement appears in § 656.17(e)(1) of the text but not, as far as we could find, in the preamble's explanation.
  - In the text, § 656.17(f)(2) refers to outreach to "potentially qualified" laid-off workers, while § 656.13(e)(2) requires offering the job to laid-off workers without that qualifier.
  - The preamble describes the layoff bar both by reference to the places of employment and by reference to the broader area of intended employment. The text uses the broader area.

- **Third-party placements.** The proposal contemplates continuing client-site work in several places: notice at third-party worksites (§ 656.14(b)), the roving-employee discussion, and the layoff rule for placements (§ 656.13(f)). The new bar on temporary staffing agreements sits uneasily with those provisions, and the final rule will need to clarify which arrangements remain permissible.
- **Cost analysis.** The projected $164 million in annual net savings rests almost entirely on the assumption that each of the 108,786 certified applications per year pays $1,362 for print ads. The analysis assumes no added cost for advertising on job search sites or at job fairs, does not separately estimate the cost of 90-day postings, and values Schedule A recruitment at one hour of human resources time per case. It lists the layoff bar, the one-use limit, record retention, and universal recruitment report submission as unquantified. The DOL invites comment on these assumptions. The layoff-notification estimate also uses the Schedule A petition count (23,835 per year) as the number of notices, although the duty would apply to all PERM filers. Separately, the annualized Schedule A cost at 7 percent is lower than at 3 percent, the reverse of every other line item.
- **Breadth of the justification.** The preamble's evidence centers on technology-sector layoffs, staffing and outsourcing firms, and H-1B practices. The rule applies to every PERM filer, and DOL's own data list restaurants, private households, and colleges and universities among the ten most common industries of PERM employers.
- **Matters described as under consideration.** The preamble invites comment on excluding fully remote positions, raising the debarment maximum to five or ten years, requiring outreach to current employees, requiring contracts between employers, and posting notices of filing on a public DOL webpage. None of these topics appear in the text of the proposed rule. If any is adopted, a court would ask whether the final rule is a logical outgrowth of the proposal.

- **Existing certifications.** The DOL describes the one-use limit as a clarification of the current rule, while its cost analysis acknowledges that employers who relied on a different reading would incur new costs. The transition provision addresses only applications submitted before the cutoff and does not say how the limit applies to certifications already issued.
- **Prevailing wage reuse.** The proposal limits an employer to one valid PWD for the same job opportunity and area in a wage year, but does not define "same job opportunity." It is unclear how roles with the same title and duties but different skill requirements are treated.
- **Citation and cross-reference errors.** The preamble cites Presidential Proclamation 10973 with two different dates (September 19, 2025 and September 18, 2026). It refers to the severability provision as both § 656.50 and § 656.39, and it refers to § 656.13(b) and (c) where context indicates § 656.31(b) and (c).

Legislative and Regulatory History: Why it matters

The labor certification requirement comes from Congress, and its original design placed the burden on the party seeking the visa. Under the 1952 Immigration and Nationality Act, former section 212(a)(14) excluded foreign workers only if the Secretary of Labor affirmatively certified that their entry would harm U.S. labor. The 1965 amendments (Pub. L. No. 89-236, § 10(a), effective December 1, 1965) reversed that approach and required foreign workers to obtain an affirmative certification from the Secretary. The DOL's own administrative law judges' benchbook states that the legislative history shows Congress intended for the burden of proof to rest on the employer seeking the worker's entry.

Congress has since made relatively minor adjustments over the years. According to the preamble to this week's proposed rule, a 1976 amendment added an "equally qualified" standard for college and university teachers and for individuals of exceptional ability in the sciences or arts. The Immigration Act of 1990 created today's employment-based preference structure, recodified the requirement at INA section 212(a)(5)(A), and added the statutory notice-of-filing requirement. Nearly everything else that employers experience as "PERM" is regulatory, including Schedule A (first established by DOL rulemaking in late 1965), the recruitment menu, and the audit process.

Comments, timeline, and likelihood of litigation

Publication of the proposed rule on Tuesday opens a formal rulemaking process. Nothing in the current regulations will change until the DOL issues a final rule and it takes effect, assuming that happens. The expected sequence is as follows:

1. **November 17, 2026.** DOL formally published the proposal in the *Federal Register*. (Linked at the beginning of this article.)
2. **January 19, 2027.** Deadline to submit comments about the proposed rule. Comments can be submitted via this link.

3. **After the comment period.** The DOL will review the comments and may revise the proposed rule. There is no deadline for a final rule to be issued.
4. **Final rule plus 60 days.** The final rule would take effect 60 days after publication of the final rule (not the current proposed rule).
5. **Final rule plus 90 days.** Applications and prevailing wage requests submitted 90 days or later after publication of the final rule (not the current proposed rule) would be required to follow the new rule. Earlier submissions would be processed under the current rule.

The DOL invites comment on every aspect of the proposed rule, and specifically on the two-year layoff period, remote and roving work, the visibility of the notice of filing, the length of the transition period, and the recruitment methods. Comments are available to the public, so they should not include confidential business information or personal data. They also form the administrative record that a court would later review.

Separately, in March 2026 DOL proposed raising the prevailing wage levels used for H-1B and PERM cases. This article does not address that proposal, but employers should consider the two together. See our earlier analysis.

Likelihood of litigation (generally)

A proposed rule is generally not reviewable in court, but a final rule issued substantially as proposed is likely to be challenged under the Administrative Procedure Act. A federal court vacated a 2020 prevailing wage interim rule that the DOL issued without prior notice and comment. Because the current proposal is being issued with notice and an opportunity for comment, it does not share the procedural defects of the 2020 interim rule. However, the current proposal, if it becomes final, could be challenged on other grounds by business associations, universities, health care employers, staffing firms, and others. The likely grounds include the following:

- **Statutory authority.** Courts no longer defer to an agency's reading of an ambiguous statute and instead exercise independent judgment (*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)). DOL's Schedule A rationale would reverse a position that the DOL held for roughly 60 years. The two-year layoff bar does not require a finding that U.S. workers are available for the job at issue. However, the statute speaks of availability at the time of the visa application and at the place of work.
- **Reasoned decision-making.** An agency that changes position must acknowledge the change and weigh the reliance interests it affects (*DHS v. Regents of the University of California*, 591 U.S. 1 (2020); *FCC v. Fox Television Stations*, 556 U.S. 502 (2009)). The cost analysis, and its reliance on print advertising savings, would also be examined.
- **Notice.** Matters that appear in the preamble only as questions, such as excluding remote positions or longer debarment periods, would raise a "logical outgrowth" question if they appear in the final rule.

- **Transition.** The treatment of certifications issued before the effective date is unclear and could be contested.

Provision-specific analysis

Assuming the substantive provisions of the final rule are the same as, or very similar to, the provisions in the proposed rule, here are the substantive provisions that are most likely to result in legal challenges:

Elimination of Schedule A (§§ 656.5, 656.15, 656.16)

Statutory authority. The DOL's position has statutory support. Section 212(a)(5)(A) bars admission of any foreign worker unless the Secretary of Labor has determined and certified that it (1) has no authority under the INA to exempt occupations from the labor market test and (2) has no reliable, objective method for deciding which occupations are in shortage. The DOL has placed the burden of proof on the employer since 1965. A "standing list" of occupations is not a determination tied to a particular time and place.

That said, challengers have strong counterarguments. The statute does not say how the Secretary must make the determination, and the Supreme Court has upheld agencies' use of rules to resolve recurring issues categorically (*Heckler v. Campbell*, 461 U.S. 458 (1983)). Schedule A has been in place since 1965, the DOL retained it when it implemented the 1990 Act, and Congress has amended the statute since without disturbing it. A court may also be reluctant to give much weight to an interpretation that the DOL adopted only after reversing its own long-held position.

The alternative policy argument. The DOL says that, even with authority, it cannot justify Schedule A without a reliable methodology for determining whether there is in fact a shortage of U.S. workers. This rationale is reviewed under the "arbitrary and capricious" standard, in which the courts generally defer to the judgment of the governmental agencies. Even so, here are some reasons why this argument may not be upheld by the courts:

- **Reliance interests.** An agency that reverses a long-standing policy must consider, and weigh, the interests of those who relied on it (*DHS v. Regents*, 591 U.S. 1 (2020)). The preamble to the proposed rule addresses reliance in one paragraph and concludes that reliance does not outweigh the DOL's interest in adherence to the statute. Its cost analysis values Schedule A recruitment at one hour of HR time per case and does not quantify added delay, which could matter most to hospitals and other employers who need to fill positions quickly.
- **Alternatives.** The Supreme Court in *Regents* also said that an agency should consider options within the ambit of the existing policy. The preamble to the proposed rule addresses only recruitment changes. It does not consider retaining or narrowing Schedule A -- for example, by keeping the nursing and physical therapy occupations while declining to expand the list.
- **Evidence.** The preamble rests largely on the absence of a methodology from commenters. It does not analyze labor market data for nurses or physical therapists, and it acknowledges that

the DOL lacks comprehensive data on Schedule A use. A court could ask whether a failure of commenters to propose a method justifies abolishing the list.

- **Consistency.** The DOL asked in 2023 how to expand Schedule A but now says it lacks authority to maintain it. The agency must acknowledge the change and give good reasons for it (*FCC v. Fox*; *Encino Motorcars v. Navarro*, 579 U.S. 211 (2016)).

The Group II rationale (which applies to employers sponsoring individuals of exceptional ability in the sciences or arts -- that Schedule A was designed for occupations rather than classes of workers and that the DHS decides exceptional ability -- is a reasoned policy explanation that may be easier to defend than the Group I rationale (which applies to employers sponsoring physical therapists or professional nurses). A court reviewing the action can sustain it only on the grounds DOL invoked (*SEC v. Chenery Corp.*, 318 U.S. 80 (1943)), so the way DOL presents and records these reasons in the final rule will matter. Because the proposal includes a severability clause, a court could set aside the Schedule A provisions while leaving the rest of the rule in place.

Layoff provisions

The DOL's rationale is that a layoff of available U.S. workers in the same occupation prevents it from making the statutory finding that no sufficient U.S. workers are available, that the current 180-day period is too easily avoided by delaying a filing, and that a longer bar discourages displacement and encourages retraining. Some of these rationales are more defensible than others.

- **Post-filing notice and offers (more defensible).** These extend the current duty to notify and consider laid-off U.S. workers. The statute speaks of availability at the time of the visa application, which gives the DOL a basis for a continuing obligation, and courts have recognized the program's purpose of protecting the domestic workforce. The more contestable point is the DOL's authority to impose and enforce duties through the I-140 stage, after it has issued its certification. According to the DOL, this is based on its consultation role with USCIS under INA section 204(b).
- **The two-year bar (less defensible).** The statute requires a finding about workers who are able, willing, qualified, and available at the place of work. The two-year bar in the proposed rule would apply without regard to whether the laid-off workers are qualified, interested, or still available. It would also apply to any involuntary separation without cause, and across the whole area of intended employment. Challengers would be expected to argue that the proposed rule substitutes a categorical presumption for the statutory finding. The DOL would be expected to respond that agencies may resolve recurring questions by rule (*Heckler v. Campbell*) and that a layoff is strong evidence of availability.
- **Evidentiary support.** An agency must base its choices on a reasoned explanation (*State Farm*). The support for the two-year period in the preamble to the proposed rule consists largely of news reports and policy commentary about technology-sector layoffs. We were unable to find an analysis of how often PERM filers lay off U.S. workers in the same occupation and area, or why two years is necessary rather than a shorter period. The DOL asks commenters whether two

years is appropriate, and treats the costs of the bar as unquantified. Courts often accept qualitative reasoning where quantification is not feasible, but the gap invites scrutiny.

- **Comparison to other programs.** The DOL's H-2B rule uses a 120-day layoff window, and Congress's H-1B displacement provisions for certain employers use 90 days. Challengers would be expected point to those shorter periods. The DOL would be expected to argue that PERM is different because it involves permanent placement, which justifies a longer period.
- **Third-party placement prohibition.** The same arguments apply, and the proposed rule has no geographic limit on a client's layoffs. Undefined terms, such as "similar occupation" and "affiliate," also invite a fair-notice objection, because attestations are made under penalty of perjury and violations can lead to debarment.

In sum, we would expect the post-filing obligations to be easier to defend than the two-year bar, with the bar's breadth and thin evidentiary record the most likely points of attack. Because the proposal includes a severability clause, a court could strike or narrow the bar and leave the rest of the rule in place.

Remote-work exclusion, if adopted

If remote work is excluded under the final rule, challengers would be expected to argue that the statute applies to every foreign worker who will perform skilled or unskilled labor, does not authorize excluding a category of jobs, and that difficulty administering a rule is not a reasoned basis for denying access to the process. The DOL would be expected to respond that, with remote work, there is no valid method for testing a national labor market and setting a wage. Because the exclusion appears in the preamble to the proposed rule only as a question, a court would also ask whether a final rule adopting it is a logical outgrowth of the proposed rule.

Possible outcomes generally

The proposed rule includes a severability clause (§ 656.50), so a court that struck one provision could leave the rest in place. Employers should therefore plan for several outcomes:

- The final rule could be essentially the same as the proposed rule and could take effect as written.
- The final rule could be narrowed or revised before it is finalized.
- The final rule could be stayed, or set aside in part or in whole.

What employers should consider now

Again, the proposed rule is not final, and current requirements continue to apply. However, employers who sponsor foreign nationals for permanent residence can take preparatory steps now:

- **Consider submitting comments.** Employers can comment directly, through counsel, or through trade associations. The DOL asks for data on recruitment costs, layoff patterns, and operational

concerns. Specific, well-supported comments are the most useful, although as noted above, employers should not include any confidential or proprietary information in their comments.

- **Assess layoff exposure.** Identify reductions in force over the past two years by SOC code and metropolitan area, and review planned reductions with human resources and immigration counsel before they are announced.
- **Review how roles are advertised.** For occupations that typically involve sponsorship, document the channels, posting durations, and applicant tracking settings used for ordinary hiring, and note whether any PERM-specific process exists today.
- **Identify remote, roving, and client-site roles** among sponsored positions, and any staffing or contractor arrangements that place employees at other companies.
- **Review pay and terms** for sponsored roles against similarly situated U.S. employees, and make sure the supporting documentation is in order.
- **Plan for Schedule A cases.** Health care employers and others who rely on Schedule A should assess the added time and recruitment steps of the PERM process.
- **Keep recruitment practices neutral and consistent.** The DOJ and the EEOC already enforce anti-discrimination rules in PERM recruitment. Everyone who screens or interviews applicants should understand the employer's obligations to U.S. workers.
- **Determine which rules apply.** After a final rule is published, employers will need to decide which cases can be filed under the current rules and which will be subject to the new ones.
- **Review prevailing wage requests.** Where similar roles carry different skill requirements, make sure each request states its actual minimum requirements precisely.

Sources

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