



DEPARTMENT OF
LABOR

DIPÅTTMENTON HUMOTNÅT • Sam Mabini, Ph.D., Director • Cecile B. Suda, Deputy Director

EDDIE BAZA CALVO
Governor

RAY TENORIO
Lieutenant Governor

FAIR CHANCES HIRING PROCESS ACT

ADVISORY OPINION NO. 2018-001

July 27, 2018

Relative to:

1. Guidance for Interpreting Legitimate Business Reasons and Timely Submission of Clearances When Requested by an Employer
2. Defining the term "Close Proximity" with Respect to 22 GCA §6102(e)(3)

Request for Clarification:

The DOL ALPCD division, as the division overseeing supervised recruitment in connection to foreign worker petitions, seeks clarity on two issues:

1. Can ALPCD set a 3 working day requirement for the employer regarding submission of Police and/or Court Clearances in connection with supervised recruitment and would an untimely submission by an applicant justify a withdrawal of a conditional offer?
2. What does "close proximity" mean in the context of 22 GCA §6102(e)(3)?

Background:

The Fair Chances Hiring Process Act (P.L. 34-22), makes it unlawful for an employer to request an applicant's court and/or police clearance prior to making a conditional offer of employment. This law provides job seekers the opportunity to be considered for employment based on the merits of their experience and interviews without any undue bias that may have typically occurred prior to the passage of the law.

OPINION OF THE DEPARTMENT:

Issue #1 – Timely Submission in Connection with Supervised Recruitment

Applicable regulations:

22 GCA §6102(f) states: "Following the extension of a conditional offer of employment, an employer may only withdraw the conditional offer to an applicant for a legitimate business reason...."

17 GAR §6202(4)(B) states: "An employer may lawfully withdraw a conditional offer if the applicant fails to submit the required court/police clearance within 10 calendar days."

*17 GAR §7104(d) which states: **(d) Recruitment Verification.** As the agency principally responsible for regulating employment conditions in Guam, the Department of Labor will verify, to the best of its ability, that the objectives of a Temporary Labor Certification are met in the recruitment process. The Department of Labor may therefore both verify that information in the Application relating to prior recruitment efforts is accurate and ascertain through its own efforts that the objectives of certification are met.*

Additionally, 17 GAR §7104(d)(2) says: (2) The Department of Labor may undertake to recruit a U.S.-resident worker, through whatever means it deems appropriate, for any Job Opportunity offered by an employer submitting an Application for Certification. In the event that this process involves external costs, such as the costs of advertising, such costs shall be paid by the employer.

The question has two parts and answers are addressed separately below:

Q. Can ALPCD set a 3 working day requirement for the employer regarding submission of Police and/or Court Clearances in connection with supervised recruitment?

A. Yes, Temporary Labor Certification Program rules allow for supervised recruitment and contain certain timelines which must be met. The supervision of the recruitment process provides for sufficient applicant protection and the reduction from 10 days in 17 GAR §6202(4)(B) to 3 days would not adversely affect the applicant's chances to vie for the job.

Q. Would failure to submit clearances in a timely manner (under a 3 day submission deadline) be considered a "job related reason" for withdrawal of a conditional offer by an employer?

A. Yes, it is the opinion of the Department that should an applicant fail to submit a requested clearance to the employer in a timely manner, the employer may consider this a "job related reason" for withdrawal of their conditional offer of employment.

When government programs are involved, a reasonable timeframe for submission of documents may vary, based upon multiple factors, requirements and/or what the particular program may consider to be reasonable. Where program rules, regulations or policies cause confusion, the Department shall make a determination on a case by case basis to determine if a shortened period is justified.

For employers conducting unsupervised recruitment, the rules found at 17GAR §6202(4)(B) shall define what is considered a reasonable timeframe to submit requested clearances..

Issue #2 – Exemption from Fair Chances Hiring Process Act


22 GCA §6102(e)(3) states that “any position which requires that employee to work in close proximity of or provides programs, services or direct care to minors”, is considered exempt from the prohibition of this Act.

Q. What would be considered “close proximity”?

A. It is the opinion of the Department that “close proximity” in the context of FCHPA, shall be defined as “any job or position whose regular duties require that 75% of the worker’s time be spent in a work environment where minors are continuously present within 100 feet.

This Advisory Opinion is given pursuant to 17 GAR §6207(a), and shall remain in effect until amended or rescinded by the Director of Labor or if superseded by future statute or regulations.

Approved By:



CECILE B. SUDA
Director of Labor, Acting

JUL 27 2018

Date



SAM MABINI, Ph.D.
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DEPARTMENT OF LABOR

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GREG S. MASSEY
ALPCD Administrator

July 27, 2018

MEMORANDUM:

TO: Director

FROM: ALPCD Administrator

SUBJECT: Request for Advisory Opinion on FCHPA Issues

In the Temporary Labor Certification process, the employer is required to test the labor market through supervised recruitment. The main component of this labor market test is the posting of a job offer on the Guam Job Bank at hireguam.com. This job order is commonly called a Petition Job Order. The job posting is regulated by local and federal regulations and policies. Additionally, the job offer, duration of posting, benefits, conditions of employment and the employer's final employment decision is vetted by ALPCD case managers.

With the implementation of the Fair Chances Hiring Process Act (FCHPA), it is necessary to clarify how the labor market test relates to new FCHPA requirements. If the employer requests police and/or court clearances as a part of the job order, ALPCD caseworkers must first determine if that job requirement is justified based on business necessity and if FCHPA prohibitions apply.

APPLICABLE REGULATIONS:

Supervised recruitment in petition job orders is regulated by local and federal regulations. Such supervision is allowed by regulations at 17 GAR §7104(d) which states:

(d) Recruitment Verification. As the agency principally responsible for regulating employment conditions in Guam, the Department of Labor will verify, to the best of its ability, that the objectives of a Temporary Labor Certification are met in the recruitment process. The Department of Labor may therefore both verify that information in the Application relating to prior recruitment efforts is accurate and ascertain through its own efforts that the objectives of certification are met.

Additionally, 17 GAR §7104(d)(2) says:

(2) The Department of Labor may undertake to recruit a U.S.-resident worker, through whatever means it deems appropriate, for any Job Opportunity offered by an employer submitting an Application for Certification. In the event that this process involves external costs, such as the costs of advertising, such costs shall be paid by the employer.

Further 17 GAR §7104(a)(4) states:

(4) Compliance. The employer shall be in compliance with all other laws and regulations of Guam and the United States during its efforts in the recruitment of Temporary Alien Workers under this Chapter.

Other regulations set timelines on submission and processing of labor certifications which do not necessarily sync with timelines in the FCHPA regulations which allow for an employer to justifiably withdraw a conditional offer if an applicant does not provide the requested documents within 10 days. The 10 day timeframe would likely present problems to the employer and the division with respect to other regulatory timelines. In light of the extreme vetting and supervised recruitment conducted by ALPCD in petition job order scenarios, ALPCD would like to set informal policy until such time as this issue may be addressed in future updates to the GARR.

As the agency who supervises and regulates an employer's recruitment in a petition job order situation, ALPCD requests clarification through an Advisory Opinion on the following questions:

1. Can ALPCD set a 3 working day requirement for the employer regarding submission of Police and/or Court Clearances in connection with supervised recruitment and would an untimely submission by an applicant justify a withdrawal of a conditional offer?
2. What does "close proximity" mean in the context of 22 GCA §6102(e)(3)?

Please contact me if you have questions.



GREG S. MASSEY