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IMMIGRATION IN-DEPTH

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The H-1B Stinger

LCA Liability After The Termination Of Employment

by Philip C. Curtis

This article explores "tail-end" LCA liability and how to avoid it. We also discuss the related question of whether, and to what extent, employers should provide special accommodations to laid-off (or otherwise discharged) H-1B workers in an effort to preserve the H-1B status of those employees.

A cornerstone of the H-1B petition process is the Labor Condition Application (LCA), in which the petitioning employer promises, among other things, to pay a specified wage to the prospective H-1B employee "during the period of authorized employment."[1] One of the less understood aspects of the LCA is when this wage obligation ends. Employers may reasonably assume that their obligation to pay the wages of an H-1B worker ends when that individual's employment is unequivocally and forever terminated: pink slip, exit interview, severance pay if applicable, perhaps some career counseling. Those employers would be wrong, and could find themselves liable for back wages to former H-1B employees even in circumstances where everyone clearly understands that the employment relationship has terminated.

POST-EMPLOYMENT LCA LIABILITY

When Does The Wage Obligation End?

The Immigration and Nationality Act (INA) requires that an H-1B employer file an application with the Secretary of Labor stating that the employer "is offering and will offer during the period of authorized employment . . . wages that are at least" the "actual" or "prevailing wage", whichever is greater.[2] This obligation is further defined in the H-1B regulations, which state that the H-1B petitioner must submit, as part of the petition, a "statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay".[3] An employer reading the statute and H-1B regulations might justifiably conclude that its LCA wage obligation terminated with the end of the employee's "authorized stay", and thus might invest time trying to determine what constitutes this

point in time. Much has been written about when an H-1B nonimmigrant is or is not in a period of authorized stay, but the generally accepted conclusion is that an individual's H-1B status, and hence period of authorized stay, terminates when that individual no longer provides services to the H-1B employer.[4] The termination of employment obliges an H-1B employer to take certain steps – the employer must "immediately" notify CIS of the change in circumstances[5] and discharge its liability for return transportation[6] – but an individual's "authorized stay" is not contingent on these events taking place, nor can it be extended beyond termination of employment where an employer fails to take these steps.

If the LCA wage obligation extends to the "period of authorized employment," might an H-1B employer then determine that its obligation ceases with the clear termination of employment and equally apparent end of the employee's authorized stay? No. Regulations of the U.S. Department of Labor (DOL) state that the employer's wage obligation begins on the date that the individual "enters into employment"[7] with the employer and does not end until "there has been a bona fide termination of the employment relationship."[8] The DOL regulations point out, in this context, that "DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled . . . and require the employer to provide the employee with payment for transportation home under certain circumstances."[9] A bona fide termination of employment for LCA purposes therefore might not occur unless and until the employer has notified CIS and satisfied its obligation to provide return transportation.

The Amtel Case

The Administrative Review Board of the U.S. Department of Labor recently reached precisely this conclusion in Amtel Group of Florida, Inc. v. Rungvichit Yongmahapakorn, ARB No. 04-087, ALJ No. 2044-LCA-006 (ARB Sept. 29, 2006). Amtel operated a hotel in Florida and employed Ms. Yongmahapakorn ("Rung") as an internal auditor pursuant to two consecutive H-1B petitions and their underlying LCAs. Rung began working for Amtel on March 1, 2000; the H-1B petition in effect at her termination provided for a period of authorized stay ending November 28, 2004, and the underlying LCA was valid from November 29, 2002 through November 28, 2004. All of the documents stated that she would be employed as an internal auditor. The LCA stated that the prevailing wage for the occupation was $52,041 annually, and in the H-1B petition Amtel stated that it would pay Rung an annual salary of $49,500.[10]

Rung asked for and was granted a leave of absence from May 10 through June 1, 2003 to travel to Thailand. She took the trip, and on her return to the hotel was notified that her employment was terminated. Amtel did not notify CIS of the termination or pay Rung's return transportation costs.[11] Rung filed a complaint with DOL's Wage and Hour Division on July 23, 2003, alleging several LCA violations including the "wrongful" termination of her employment. The DOL's Wage and Hour Division Administrator investigated Rung's complaint and issued an order finding certain LCA violations but not of the termination provisions. The Administrator concluded that Rung's termination was bona fide because she had received notice of her termination.[12] Indeed, there is no dispute as to the certainty and finality of Rung's discharge: on June 1, 2003, Rung signed and dated a memorandum from Amtel officials notifying her that she had been terminated.[13]

Rung appealed and received a hearing before an Administrative Law Judge of the DOL. The ALJ reversed the Administrator on the issue of termination and held that Amtel had not effected a bona fide termination under the INA because there was no "legal justification" for her termination. The ALJ ordered that Amtel

pay Rung's wages until the petition termination date of November 28, 2004, plus interest. In addition, the ALJ ordered that Amtel notify all of its employees, by certified mail, that Rung was not properly terminated and post a copy of the letter in a conspicuous place for one year from the date of the ALJ's order.[14]

On Amtel's appeal of the ALJ's decision, the Administrative Review Board held that to effectuate a bona fide termination under the INA, and thereby end its obligation to pay the required wages to the H-1B employee, "an employer must notify the INS that it has terminated the employment relationship with the H-1B employee and provide the employee with payment for transportation home" (emphasis added).[15] Because Amtel had not effectuated a bona fide termination, its required LCA wage obligation continued until the petition end date – in this instance, a year and a half after everyone concedes that Rung's employment actually ended.[16]

Advising Clients After Amtel

After Amtel, one thing is clear but the other actually is not. With respect to notice, it is plain that LCA wage liability is not extinguished until an employer notifies CIS that the H-1B employment has terminated. There is no grace period expressed or implied in the Amtel holding, and prudent immigration lawyers will counsel their clients to notify CIS of the termination on the day that it happens. To do otherwise is to risk back wage liability from the date of termination until the date of CIS notification. The situation with respect to return transportation is considerably murkier. Amtel plainly states that the employer must "provide" the employee with payment for transportation home, but in the real world terminated H-1B employees do not always wish to leave the United States. Must an employer provide the cash equivalent of a ticket even though the former employee has no intention of purchasing one? What about purchasing an airline ticket with an expiration date that the individual cannot cash in or exchange? Is it sufficient to notify the employee that the employer is aware of its obligation and is prepared to purchase a ticket upon proof that the employee will use it?[17] Given that the reasonable cost of air or ground transportation pales in comparison with months or perhaps years of back wage liability, it is in the employer's obvious best interest to be as clear as possible in acknowledging the return home obligation and establishing a mechanism for carrying it out.

SPECIAL POST-EMPLOYMENT ACCOMMODATIONS TO H-1B WORKERS

Under the current regulatory scheme, termination of an individual's H-1B employment results in the immediate loss of that person's nonimmigrant status. There is no grace period and no acknowledged period of compassion. To avoid going out of status, the unfortunate employee would have to file a request for change of nonimmigrant status or an extension of stay with another H-1B employer on the day that she loses her job. Given this harsh reality, it is no surprise that immigration attorneys and their employer clients are often asked to structure or agree to arrangements designed to maintain H-1B status without the employee actually working. A common request is for a period of unpaid leave to tide the employee over until he or she finds another H-1B employer. Another is for lump-sum severance to be stretched over a period of weeks or months to make it appear that the employment relationship is continuing.[18] A third might be a plea to continue working beyond the date of a planned layoff involving many employees because the adverse immigration consequences make the impact of unemployment worse for the H-1B nonimmigrant than for his or her fellow U.S. workers.

Whatever the arrangement, employers and their counsel should think carefully before agreeing to any period of nonproductive status for an H-1B worker about to lose his or her job. In addition, employers should be aware of the possible liability in treating nonimmigrant employees differently than similarly situated U.S. workers.

The same rules that give us Amtel make it almost impossible to accommodate requests for unpaid leave surrounding a discharge. If an H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer or any other reason not specified in a narrow list of exceptions, the employer is required to pay the employee's full wage or salary.[19] The only circumstances under which wages need not be paid are periods of nonproductive status due to conditions "unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request or convenience" or render the nonimmigrant "unable" to work.[20] In the event of a complaint, an employee's request for an unpaid leave of absence made in the context of job loss will not be considered voluntary by the DOL's Wage and Hour Division. The employer who wished to be accommodating will face almost certain liability for the employee's full salary and benefits during the nonproductive period.

Employers can avoid LCA liability by paying employees not to work, but that usually defeats the purpose of terminating employment. In addition, treating nonimmigrant employees more beneficially than U.S. workers can result in a discrimination charge under the Immigration Reform and Control Act of 1986 (IRCA).[21] Under IRCA, certain individuals are protected from "unfair immigration-related employment practices".[22] These "protected" individuals include U.S. citizens or nationals, permanent residents, and individuals admitted as refugees or granted political asylum.[23] It is an unfair immigration-related employment practice to discriminate against such an individual with respect to the hiring, recruitment, or discharging of that individual because of his citizenship status.[24] Creating special benefits or arrangements that are available to nonimmigrants and not to U.S. workers therefore discriminates against U.S. workers on account of their citizenship status and violates IRCA's nondiscrimination provisions.

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FOOTNOTES

[1] 8 C.F.R. §214.2(h)(4)(iii)(B).
[2] INA §212(n)(1)(A)(i), 8 U.S.C. §1182(n)(1)(A)(i).
[3] 8 C.F.R. §214.2(h)(4)(iii)(B)(2).
[4] An H-1B nonimmigrant is admitted to the U.S. for the duration of the H-1B petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. 8 C.F.R. § 214.2(h)(13)(i). An employer is required to immediately notify the Service of any changes in the terms and conditions of an H-1B beneficiary's employment which may affect eligibility for H-1B status. 8 C.F.R. § 214.2(h)(11)(i)(A). Notification to the Service that the H-1B petitioner no longer employs the beneficiary results in an automatic revocation of the H-1B petition. 8 C.F.R. § 214.2(h)(11)(i)(B). For interpretation of these regulations, please see Letter of Thomas W. Simmons, INS Branch and Trade Branch Chief, to Harry J. Joe, Esq., *reprinted in 76 No. 9 Interpreter Releases 378* (March 8, 1999), stating that an H-1B nonimmigrant is no longer in valid H-1B status once the nonimmigrant's services are terminated because the alien is no longer providing services for the petitioning employer. Mr. Simmons stated that, regardless of any arrangement for severance pay, an H-1B nonimmigrant is not maintaining a

valid nonimmigrant status once terminated. Expanding on this issue, in Letter of Efren Hernandez, Acting Director, INS Business and Trade Services to Bernard P. Wolfsdorf, *reprinted in 77 No. 8 Interpreter Releases 243* (February 8, 2000), Mr. Hernandez determined that, in the case of an extended leave, an H-1B nonimmigrant is maintaining status as long as the employer-employee relationship exists between the petitioner and the alien. Mr. Hernandez noted that this relationship "continues to exist" if there is "an identifiable tie between the employer and alien." Further clarifying his position, in Letter of Efren Hernandez, Director, INS Business and Trade Services to Wendi S. Lazar, Esq., *reprinted in 78 No. 13 Interpreter Releases 608* (April 2, 2001), Mr. Hernandez differentiated between a "laid off" nonimmigrant worker and a "fired" nonimmigrant worker. Mr. Hernandez noted that a laid off nonimmigrant worker is simply in inactive status due to work slowdowns, extended time in between contracts, sick leave, or vacation, and that the alien is not out of status as long as the employment relationship continues. Applying Department of Labor "benching" rules located at 65 FR 80110 to this context, Mr. Hernandez indicated that an employer must continue to pay inactive-status H-1B nonimmigrants the required wage or, alternatively, must terminate the employment. In contrast, Mr. Hernandez noted that, once an employer terminates or "fires" an H-1B nonimmigrant, the employment relationship ceases to exist and the alien is no longer in valid H-1B status "upon the moment of termination." Moreover, such an alien is immediately deportable under INA 237(a)(1)(C)(i) as an alien who "failed to maintain the nonimmigrant status in which the alien was admitted."

[5] 8 C.F.R. §214.2(h)(11).
[6] 8 C.F.R. §214.2(h)(4)(iii)(E).
[7] 20 C.F.R. §655.731(c)(6). The DOL's concept of "entering into employment" is expansive and would surprise many employers. For LCA purposes, an individual enters into employment when he or she "first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter." Lawyers will no doubt be interested to hear that under these rules, studying for the bar exam would have been a compensated activity.
[8] 20 C.F.R. §655.731(c)(7)(ii)
[9] *Id.*
[10] *Amtel Group of Florida, Inc., v. Rungvichit Younmakapakova*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 2-3 (ARB Sept. 29, 2006).
[11] *Id.* at 3.
[12] *Id.* at 3, 9.
[13] *Id.* at 10.
[14] *Id.* at 4. The ALJ's entire decision, much of which was overturned by the ARB, makes interesting reading. One of the more surprising aspects involved the ALJ's calculation of back pay liability. Rung testified that although her job title was internal auditor, she had actually performed the duties of a vice president and should receive back wages at that rate. No such H-1B petition had been filed on her behalf. The ALJ agreed and awarded back pay according to an LCA filed for the position of vice president that did not appear to relate to Rung and expired more than a year before her discharge.
[15] *Id.* at 11.
[16] *Id.* at 12.
[17] *See, e.g.*, Y. Robertson, "Avoiding the Abyss: H-1B Strategies When Facing Reductions in Force", 2001-2002 Immigration and Naturalization Law Handbook, v.2 , 76-83 (AILA, 2001).
[18] This accommodation to a terminated H-1B worker, which is known in human resources terminology as "extended compensation severance," is a potential trap in three ways. First, in our firm's experience with DOL wage hour audits, the DOL has construed the payment of "extended compensation severance" to a terminated H-1B worker merely as satisfaction of the employer's existing wage obligation under an LCA, and not as a benefit at all. Consequently, in an LCA audit the DOL could conclude that an H-1B worker who received "extended compensation severance" remained employed pursuant to the LCA and was entitled to the severance benefit upon the *bona fide* (under the *Amtel* rule) termination of employment. Second, if an employer offers "extended compensation severance" at what appears to be a reduced wage, and that reduced wage falls below the actual or prevailing wage for the job, the employer will likely have back wage liability to the terminated H-1B worker. Finally, the practice of offering "extended compensation severance" to H-1B workers and not to U.S. workers could be viewed as discriminatory and could expose the well meaning H-1B employer to employment discrimination allegations. In consideration of these issues, immigration counsel should align U.S. immigration law advice to an H-1B employer with the employer's employment law counsel, particularly if there is pressure on the employer by the terminated H-1B worker to make special accommodations with respect to the employer's existing benefits and severance programs.

[19] 20 C.F.R. §655.731(c)(7)(i).
[20] *Id.* at (ii).
[21] 8 U.S.C. §1324a.
[22] 28 C.F.R. §44.200.
[23] 28 C.F.R. §44.101(c).
[24] 28 C.F.R. §44.200(a)(1)(ii).