

H-1B Worker Must Pay Employer Damages for Quitting Employment Early, Administrative Judge Rules

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What remedy does an employer have when an H-1B employee terminates his or her employment before the agreed upon date for the conclusion of employment? Deciding in favor of the employer, a U.S. Department of Labor Administrative Law Judge (ALJ), in *In The Matter of Administrator, Wage and Hour Div. v. Greater Missouri Med. Pro-Care Providers Inc.*, concluded that an appropriate provision in the employment agreement would entitle the employer to liquidated damages from the worker. No. 2008-LCA-26 (Oct. 18, 2011).

The Agreement

The employment agreement contained the following provision, which required the H-1B employee to pay damages to Greater Missouri Medical in the event of early termination:

*Additionally, **Employee** agrees to pay liquidated damages to the Company in the event of early termination of this Agreement by the **Employee**, through no fault of Employer, according to the following schedule: \$10,000.00 if **Employee** terminates this Agreement before the end of 6 months from the first day of employment; \$7,000.00 if **Employee** terminates this Agreement after the first six months of employment but prior to the end of the 12 months from the first day of employment; \$4,000.00 if **Employee** terminates this Agreement after the end of 12 months but prior to the end of one and one-half years from the first day of employment, and \$3,000.00 if **Employee** terminates this Agreement after one and one-half years but prior to the end of two years from the first day of employment.*

Greater Missouri Medical's president explained the liquidated damages provision as follows:

1. The set amounts were based on three considerations:
 - A. Damage to the employer and its need to protect its overall investment and interest as a going concern, and investment of the company in securing the services of the employee;
 - B. Direct and indirect costs incurred in bringing the H-1B employees to the U.S. and the amount of profits expected to be derived from each worker (\$1,000 per worker per month); and
 - C. The "Market Perspective" value of such employees to other employers who may seek to hire such workers away from the employer and pay the damages because of the market demand for such workers.

In later agreements, the employer increased the levels of the early termination damages provision because of increasing costs in securing H-1B workers.

Available Damages

Under the law, an employer may not require an H-1B employee to pay a penalty for ceasing employment with the employer prior to a date agreed upon between the employer and employee. 20 CFR 655.731(c)(10). However, the employer may receive bona fide liquidated damages from the H-1B nonimmigrant worker who ends employment with the employer early.

The distinction between allowable liquidated damages and non-allowable penalty is to be made on the basis of the applicable state law. These laws uniformly hold that liquidated damages are amounts fixed or stipulated by the parties at the inception of the contract. The amounts should be reasonable estimates or approximations of the anticipated or actual damages caused to the injured party by the breaching party. In addition, the level of damages in the agreement should take into account whether there was a total or partial breach, as evidenced by a sliding scale in the amount claimed based on length of employment prior

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to termination.

Judge Awards Liquidated Damages

The Administrative Law Judge, taking into consideration the testimony at the hearing, found that the early termination damages provision was not a penalty for early termination, but a bona fide liquidated damages provision. Therefore, the employer could recover liquidated damages.

Jackson Lewis attorneys are available to assist employers with H-1B and other visa issues.

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