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# HAZARDS OF VARIOUS FORMS OF LEAVE AT THE POINT OF TERMINATION OF H-1B EMPLOYMENT

*Posted on May 16, 2017 by Michelle S. Velasco*

In most cases, termination of H-1B employment by either the at-will employer or employee is fairly straightforward. Once termination takes place, the employer in most cases is required to offer to pay the reasonable costs of the H-1B worker's return transportation abroad, and the employer also should inform USCIS of the termination in order to withdraw the H-1B. For further details about the employer's obligations at the point of termination, see Employer Not Always Obligation To Pay Return Transportation Costs Of An H-1B Worker. Since USCIS published its Final Rule "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers" in January 2017, workers in H-1B status can now benefit from a 60-day grace period during which they may try to get employment at another company or prepare to leave for their home countries. See 8 CFR 214.1(2).

And then there are the unique situations that require a more nuanced look at the rules and laws around various forms of leave. What happens when there is a contract for a garden leave, non-compete, or long-term notice period? How do various forms of employment contracts affect this? How does the recent USCIS announcement of increased fraud investigations affect how employers and workers alike prepare for potential site visits? These are questions that H-1B employers and employees alike should explore.

USCIS has long recognized leaves of absences for H-1B employees to be valid, and these employees would still maintain status even during a lengthy leave of absence. Legacy INS policy is that an alien employed by the H-1B employer may take an extended leave and still be considered to maintain status ( See Letter of Efren Hernandez II, Director, then Business and Trade Services Branch of the

Office of Adjudications, to Wendi S. Lazar, Esq. (March 27, 2001), reprinted, 78 INTERREL 616, Appx. II (Apr. 2, 2001)). So long as the employer-employee relationship exists, the employee will maintain in status, and "the employer-employee relationship continues to exist when there is an identifiable tie between the employer and the alien." Thus, paid or unpaid leaves of absence, such as maternity or paternity leave, or for health or other personal reasons, would be recognized and the H-1B worker can maintain status throughout the leave so long as the employer-employee relationship continues.

As a policy memo or advisory letter does not have the same effect as a statute or regulation, USCIS could still decide that even an employee who is fully compensated while in non-productive status has failed to maintain lawful nonimmigrant status. In fact, in a 1999 advisory opinion concerning reductions in force, USCIS indicated that a severance package that offered terminated H-1B and L-1 employees their normal compensation and benefits for a 60-day period did not preserve the beneficiaries' nonimmigrant status. Specifically, Branch Chief Simmons wrote, "An H-1B nonimmigrant alien is admitted to the United States for the sole purpose of providing services to his or her United States employer. Once H-1B nonimmigrant alien's services for the petitioning United States employer are **terminated**, the alien is no longer in a valid nonimmigrant status" (See Letter of Thomas W. Simmons, Brach Chief, Business and Trade Branch to Harry J. Joe, HQ 70/6.2.8, HQ 70/6.2.12, *reprinted in* 76 NO. 9 Interpreter Releases 378 (March 8, 1999)). However, an H-1B worker who has not been terminated, but is on leave, can distinguish his or her situation from one who has indeed been terminated.

Non-compete clauses or restrictive covenants are common in highly competitive industries where intellectual property is extremely valuable. They are sometimes also called garden leaves when the employee, usually highly compensated, is paid throughout the non-compete period. Non-compete agreements restrict employees from directly or indirectly engaging in employment with any competitor during a certain agreed-upon time period. Although non-compete arrangements are frowned upon when they apply to lesser compensated employees who are not paid during the restricted period, thus preventing them from taking new jobs, these garden leave arrangements are distinguishable as they apply to highly compensated employees who are fully paid during the restricted period and who possess valuable knowledge of the company. They are often enforced after termination of employment,

meaning they can adversely affect nonimmigrant workers who cannot start employment at a competing firm for upwards of 12 months in some cases. Although an H-1B employee subject to a 12-month non-compete might be able to stay in the U.S. during the 60-day grace period, after that time, he would no longer have status in the U.S. because H-1B employment has been terminated and he could not violate the non-compete agreement by starting work at a competing firm. That H-1B employee would have to leave the U.S., upend his life, and move himself and perhaps family members abroad to wait out the non-compete period. This can cause tremendous chaos and uncertainty. And it matters not whether the employee is being paid by the employer during the non-compete period: if it is taking place after termination of the H-1B employment, the employee has no choice but to leave the U.S. or else risk being in violation of status and even accrue unlawful presence once the 60-day period lapses. Ideally, non-competes enforced after termination of employment should last 60 days so that the grace period can cover it. If at all possible, H-1B employees should negotiate down the non-compete periods if they wish to avoid having to leave the U.S. for an extended amount of time to wait out the non-compete.

In some cases, the non-compete period takes place before formal termination of employment. In essence, the H-1B worker is in the U.S. not permitted to work for her employer, yet also not permitted to seek employment at a competing firm. Usually the employee is also paid the H-1B wage throughout this period. In such a situation, even if the leave is in connection with an eventual termination of employment, it is nonetheless arguably permissible so long as the H-1B worker is treated as an employee and receives the regular paychecks. In the event the worker is terminated before the H-1B petition expires, the 60-day grace period begins and the worker maintains H-1B status in that time. The employer at that point should effectuate a bona fide termination by offering the return transportation, if applicable, and sending notification to the USCIS regarding the termination.

Further, this unique situation begs the question: must the employer pay the H-1B worker throughout this pre-termination non-compete period? The answer is “yes’, according to this author. The DOL “no benching rule” requires employers to pay the H-1B worker who is not working due to a nonproductive status brought about at the direction of the employer (benching because of lack of work or a lack of permit/license). See 20 C.F.R. §655.731(c)(7)(i); INA

§212(n)(2)(B)(vii). But if the nonproductive period is due to conditions unrelated to employment at the employee's voluntary request and convenience, such as to take care of a sick relative, or maternity leave, employers do not have to pay a salary. Id. Non-competes may not necessarily fit neatly into either category since this was not a period requested voluntarily by the employee and it is also not similar to a stop in the employment for lack of work. However, since the employer considers the H-1B worker to still be employed and is the party imposing the non-compete, the employer should be paying the salary in order to avoid being held liable for back wages during the non-compete period. Is it also problematic that someone is being paid an H-1B salary for effectively not working for many months? It seems counterintuitive to allow this to occur because much of the H-1B's regulations are meant to ensure that foreign workers do not displace or hurt the wages or working conditions of U.S. workers. However, under the LCA regulations, there is no violation so long as the H-1B worker continues to be paid the required H-1B wage as listed on the LCA, whether or not the individual is performing the tasks of the position.

Recently the USCIS announced that it would increase site visits to find H-1B visa fraud and abuse. The approach involves targeting H-1B dependent employers and instances where employers have placed their H-1B workers at customer or client worksites. Increased site visits will likely mean that sometimes they will involve the H-1Bs of workers who might be spending time in a non-compete or garden leave period. During such a site visit, the employer must be prepared to answer questions about all of its nonimmigrant employees, including those who may be away from the office due to an enforced non-compete. If possible, the employer should present copies of the non-compete agreement in writing, whether it was a clause in the employment agreement or a separately negotiated contract. The employer should also monitor the date the non-compete period started, and also have ready access (if possible) to pay statements in order to demonstrate that the H-1B worker is still paid the required LCA wage and remains employed.

Lastly, it should be noted that the H-1B worker who is subject to a non-compete should be very careful about travel. Even with a valid visa and ongoing salary payments, it would be difficult for an H-1B worker to explain upon reentering the U.S. that he or she is not going to be performing work, even if employed at the H-1B employer. On the other hand, if the still employed H-1B worker can justify that he or she is maintaining H-1B status even under the non-compete,

then the H-1B worker has a good argument to being admitted into the United States in H-1B status. While the law relating to H-1B status at the point of termination is grey, this blog points out situations that allow nonimmigrant workers to compete with US workers for highly compensated jobs, and thus participate in its rewards and risks, including being able to maintain status during paid garden leave. The same logic can apply to highly compensated nonimmigrant workers in other statuses such as L-1, TN, O-1, E-3 or H-1B1.

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