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DOL FAILS TO SIDE WITH H-1B WORKER WHO CLAIMED BACK WAGES AGAINST EMPLOYERS AFTER BEING TERMINATED

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By Cyrus D. Mehta and Kaitlyn Box*

H-1B workers can file complaints against employers to the Department of Labor if they are not paid the promised wage. One H-1B worker filed complaints against two of his employers, Metromile, Inc, and Hinge Health, for back wages. When the worker was not satisfied with the initial decisions, he appealed them to an Administrative Law Judge (ALF). The ensuing decisions of the ALJ limiting back wages to the worker are instructive as the DOL will not always side with H-1B workers who claim back wages against their employers on grounds that they had not been properly terminated under technical DOL rules.

In *Jain v. Metromile, Inc*., ALJ Case No. 2021-LCA-00018 (July 19, 2022), the worker sought back wages after being terminated by his employer, Metromile. He accused his employer for not effectuating a bona fide termination, which required the employer to continue to pay him the wage. Under the Labor Condition Application that is submitted with the H-1B petition, an employer must pay the required wage that has been promised in the LCA until the employer terminates the H-1B worker.

Earlier, in *Amtel Group of Fla., Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-0006 (ARB Sept. 29, 2006), the Administrative Review Board (ARB)) held that an employer must meet three requirements to effectuate a bona termination of the relationship under 20 CFR 655.731(c)(7)(ii): (1) the employer must expressly terminate the employment relationship with the H-1B worker, (2) the employer must notify USCIS of the termination so that the USCIS can

revoke its prior approval of the employer's H-1B petition under 8 CFR 214.2(h)(11), and (3) the employer must provide the H-1B worker with payment of return transportation home under INA 214(c)(5)(A) and 8 CFR 214.2(h)(4)(iii)(E). The ARB in *Amtel* held that an employer can still be obligated to pay an H-1B worker back wages if it explicitly terminates his employment but fails to notify USCIS of the termination and/or pay for the employee's return transportation.

Metromile had not paid for the worker's return transportation to India and did not notify USCIS that his employed had been terminated until long after the fact. A few months after the worker was fired by Metromile, a second employer, ForeThought, filed an H-1B change of employer petition on his behalf, which got approved. The ALJ held that a "bona fide termination of employment can occur and end back wage liability for an employer that proves it (1) expressly notified an H-1B employee that it terminated the H-1B employment, and (2) thereafter, the H-1B employee secured USCIS's approval for a 'change of employer'." Because the worker was aware that he had been terminated by Metromile and had no present need to leave the United States given that he was to begin work for a new employer in H-1B status, the ALJ did not find his previous employer liable for his return transportation costs. Moreover, the court held that Metromile was liable for back wages only for the period from the worker's termination until the change of employer petition filed by ForeThought was approved, at which time a bona fide termination had been effectuated.

Jain v. Metromile reinterprets *Amtel Group of Fla., Inc. v. Yongmahapakorn*. The ARB in *Amtel* held that an employer can still be obligated to pay an H-1B worker back wages if it explicitly terminates his employment but fails to notify USCIS of the termination and/or pay for the employee's return transportation. In a previous blog, we discussed *Vinayagam v. Cronous Solutions, Inc*., ARB Case No. 15-045, ALJ Case No. 2013-LCA-029 (ARB Feb. 14, 2017), which had previously modified the ARB's holding in *Amtel*. In *Vinayagam*, the ARB held that an employer's failure to pay return transportation costs for a terminated H-1B employee was not fatal when the worker voluntarily decided not to return to her home country but instead remained in the U.S. and sought H-1B status through a new employer.

In *Jain v. Metromile*, the ALJ held that the "*Amtel* definition is not the only means of making a bona fide termination." Citing *Batyrbekov v. Barclays Capital*, ARB

No. 13-013, ALJ Case No. 2011-LCA-025, slip op. at 10 (ARB) July 16, 2014, the ALJ held that when there are multiple H-1B employers, a strict reading of *Amtel* would render a former employer liable for back wages even if the H-1B worker changes employers, and this former employer would remain liable until the H-1B worker was provided the return transportation costs. Thus, when USCIS approves a "change of employer" petition, the back wage claim against the former employer stops accruing. *Batyrbekov v. Barclays Capital* involved an H-1B worker who was terminated by Barclay's Capital, which failed to notify USCIS of the termination. Though another employer filed an H-1B petition on his behalf, Batyrbekov never began working for this employer. Batyrbekov sought back wages, but the Administrative Review Board (ARB) found that Barclays' liability ended on the date that an H-1B petition filed by a new employer was approved on Batyrbekov's behalf. The ARB held that "the *Amtel* definition of a bona fide termination cannot be strictly applied to cases involving multiple H-1B employers". The ARB further opined that a bona fide termination can occur when an employer expressly notifies an H-1B worker that his employer is terminated and a new employer then files an H-1B "change of employer" petition for the worker that is approved by USCIS.

In January 2020, the worker began working for a third employer employer, Hinge Health. *See Jain v. Hinge Health, Inc.*, ALJ Case No. 2021-LCA-00015 (July 19, 2022). Hinge Health terminated theworker in October 2020 and he filed a complaint to the DOL, which found that Hinge Health had failed to pay the worker the required back wages in violation of 20 C.F.R. § 655.731 and had failed to either "offer equal benefits or equal eligibility for benefits or both" in violation of 20 C.F.R. § 655.731(c)(3). The worker appealed, arguing that Hing Health owed him additional back pay. The worker alleged that the company failed to pay for his return transportation to his home country, failed to inform USCIS of his termination, and did not timely notify him of the withdrawal of his LCA. Shortly after his termination, the worker had signed a "Confidential Severance and General Release Agreement" in which he agreed to absolve Hinge Health of any claims under federal or state law. The ALJ found that this broad waiver precluded the worker from pursuing any of the claims he had raised, including the alleged LCA violation, and accordingly dismissed the case. The ALJ relied on *Gupta v. Headstrong*, ARB Case Nos. 15-032, 15-033 (ARB Jan. 26, 2017), which involved a claim for back wages by a terminated H-1B employee who had signed a similarly broad release agreement. In *Gupta*, the

ARB held that the release agreement was valid and barred recovery, noting that it "did not have authority to adjudicate collateral attacks on a facially valid contract and that Gupta had 'evoked no statute, regulation, or precedent authorizing' it to do so". Additionally, the ALJ found that Hinge Health had fulfilled its duty to inform USCIS that Mr. Jain's employment had been terminated, even though it did so several months after the fact. Hinge Health was not required to pay for Mr. Jain's return transportation because he never intended to leave the country. Even if the release agreement is not upheld, the ALJ found that Hinge Health would not be liable for the worker's return transportation costs because he did not intend to return to his home country and instead had immediately begun seeking new employment in the United States following his termination. Interestingly, the ALJ in both cases found that the worker was not a credible witness. In *Jain v. Hinge Health*, the ALJ determined that the worker's testimony regarding whether he had hired attorney to assist him and the timeline in which he found another job was unreliable. Similarly, in *Jain v. Metromile*, the ALJ did not find the worker's statements regarding when his complaints were filed to be credible.

Both the decisions limited liability for the employer where the H-1B worker claimed that his termination was not effective by not following the steps set forth in *Amtel*. In *Jain v. Metromile*, an employer is no longer liable for back wages once the H-1B employee obtains an approval of an H-1B change of employer petition even if the employer did not notify the USCIS or provide return transportation costs prior to the transfer to the new employer. In *Jain v. Hinge Health*, a properly drafted release agreement can absolve the employer of liability under the LCA.

*** Kaitlyn Box is a Senior Associate at Cyrus D. Mehta & Partners, PLLC. She is admitted to practice in New York.**

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