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Employee's rights when an H-1B employer file lawsuits for money, A conversation with a journalist.

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See video transcription below.

For more information on this issue, see Rajiv's articles,

- [Employers, employees should beware visa abuses](#) [2], Los Angeles Daily Journal, Nov 2014
- [Liquidated damages clauses In H-1B visa \[3\]holders? employment contracts](#) [3], The Practical Lawyer, Oct 2012

Video Transcription

Employee's rights when an H-1B employer file lawsuits for money, A conversation with a journalist.

Question: You said this is an issue that comes up a lot and something that you see often. We want to do this story about H-1B employees who sign bonds and regret it. What is your perspective on this and if you have seen these cases, if you've dealt with clients who have got into legal fights with employer over this?

Answer: We've been dealing with these issues consistently and constantly for many years. It's a little difficult topic to get our hands around because it's a complicated issue. First of all, there are two kinds of situations. One situation is sometimes employees sign "bonds" for continued employment in their home countries. That is a lot more complicated than situations where they have signed "bonds" for continued employment in the United States. So if it is in a country other than the USA, our discussion would have to be very different because a lot depends upon the law of the country that we are talking about.

I always advise people and mostly I actually get contacted by other lawyers who are defending the employees getting sued or who are threatened to be sued. So if it is a country other than the United States, normally what I advise is that lawyers should argue that US laws disfavour these types of prohibitive contracts and because most nations will follow unless there is something so repugnant in the laws of the United States that it would be unconscionable for them to follow. They will follow US policies in this regard, so you could always state that the job was to be performed in the United States. This contract should be interpreted according to the laws of the United States. This also called conflict of laws. So that's one angle. If you get sued in your home country, have your lawyers contact us or somebody else who's familiar with this issue.

Number two, if you get sued in the United States or if you signed a bond in the United States, there are a couple of things that are problematic. First of all, in the US laws because contracts are a matter of state law unlike India. India has uniform laws for contracts all over the country. In the US, there are 50 states and 50 different sets of laws. They might be very close with each other. Most of them are built upon common law which is the British law, but there are still variations. But as a generic rule, contracts in restriction of employment are disfavoured even by courts. So there is the angle of state law. Most states will allow you to have what is referred to as liquidated damages. Liquidated damages is what is in the common parlance referred to as a bond, but they were meant for other lawyers so they tend to get a little legal, but the bottom line is that liquidated damages clauses are permissible but penalties are not permissible.

Question: What is the difference between the two?

Answer: A liquidated damages clause is designed to protect the employer in case of an employee leaving without fulfilling contractual obligations, so it's a protective clause.

Whereas a penalty clause is a weapon of offense. It is meant to hurt the employee if they leave employment. One is reasonable and the other one is not reasonable. So if it is unreasonable, it's likely to create a lot more problems for the employer than for the employee. I'll explain to you how that is. Now we are dealing with state law, now let us shift to US federal laws and whenever there is a conflict between state law and federal law, federal law prevails.

Federal law says US Department of Labor has the authority to ascertain whether a clause in a contract is a liquidated damages clause genuine, defensive clause, or whether it operates as a penalty and in which case employer can be reprimanded and sanctioned by the US Department of Labor, but I have pointed that out earlier in an opinion piece that it's troublesome to have the Department of Labor enter your premises as the employer because there's a whole slew of other things they can start looking at and it becomes quite difficult for the company to deal with it so the issue of what is allowed and what is not allowed itself can trigger some substantial investigations.

Lot of employees don't know that and employee's lawyers don't know that as in India now as all over the world what happens is lawyers tend to get pigeon-holed in their own practice areas. if you are a contracts lawyer, you only do contracts you don't step beyond your area. You will know of course most of the things that impinge upon your area, but you will never have the vertical expertise of somebody who practices somebody like me who does immigration law or an employment-based immigration law, but my background is in very many different bodies of the law including contract law, corporate law, international law, constitutional law. I've dealt with many different things and that gives you a certain perspective which is missing these days because we are so pigeon-holed in our own practice areas.

My thought was this that forewarned is forearmed when lawyers who are defending employees who are getting sued or about to be sued understand the power an employee has. Things become different. In fact employees have a lot of power they can challenge a lot of things that the employers are doing there are some cases on the books where employees

have consistently lost these cases and in all those cases that have been lost I have seen that this issue of what is permissible under US federal law was never argued simply because the lawyers defending these folks were not aware of the law so to go back to your question this lays the foundation of how the laws operate.

I will summarize very briefly factors that count in the determination of how strong the "bond" is we look at whether it is a bond in your home country or the United States. If it is in the home country you argue public policy, if it is in the United States you have to look at whether the contract is indeed a penalty or a defensive liquidated damages clause then remember that the Department of Labor has I would say even the obligation not just the right to determine whether a clause is a penalty or permissible liquidated damages. So that in a nutshell is the structure please go ahead with your questions.

Question: So if someone finds in their home country and the company affects their activities in the US do they take it to a court in India?

Answer: I have seen a very sleazy practice and actually I did help somebody find counsel in India to defend that what this company was doing was it's a large company they were not only making the employee sign promissory notes they were leveraging the promissory notes against the property owned by the employee, so it depends upon what kind of bond has been drawn and you should definitely have your lawyers contact proper appropriate counsel including us to determine what is the best thing to do we can certainly guide and provide the laws in the United States for supporting your case in your home country.

Question: What is the biggest misconception you come across when people are dealing with such cases?

Answer: I want to point one thing out that there is difference between actual damages and damages that are contemplated under a bond, now this is something it's a fine distinction but it's a world of difference. Let us say I promised that I will work with you and I will finish my project, there are two possible situations we signed "bond" for ten thousand dollars and I quit before performing you sued me for ten thousand that's where all the discussion comes in. Is it a penalty, is it permissible?

Examine another situation Instead of suing me on the contract you sue me for actual damages, you said look because you walked away I lost the project, I suffered an expense of forty thousand dollars on the project or two hundred thousand dollars or million dollars on the project or to replace you I have to spend seventy thousand dollars and now you owe me that money, that's called actual damages. There is never any prohibition against suing an employee for actual damages, keep that in mind. So we have to separate the two actual and penalty type damages.

Actual damages can always be sued upon. First misconception is that employees have no power, employees actually have lot of power.

Second misconception is the one that I described to you which is you can always be sued for the damages that you actually caused but when you get sued for a pre-determined amount such as penalty amount there you have also all sorts of defences that may not be commonly known so that's the second thing.

The third thing is and this could be part of more generic H-1B type discussion but the balance of power has shifted tremendously in favour of the employees. If an employee is not getting paid, if an employee is getting targeted, if an employee is not getting paid according to the promised amounts, they can pick up the phone and register a complaint with the Wage and Hour Division of US Dept. of Labor. They will always, I don't know any case where they have not investigated an employee's complaint and if money is owed to you they will collect your money and give it to you. You don't have to spend dollar on that. So that is not so much of misconception but it is an under estimation of your own power, one telephone from you can bring down a company if they are doing things in-correctly or illegally. So employees are in a much more powerful position than the employers are in this respect.

Question: In your experience is that when people has to leave these companies when they mistreated and then they get stuck with the bond?

Answer: I think there is problem on both sides. There are bad employees and bad employers. I consider employee to be bad if they don't live up to their commitment, and similarly I consider bad employer to be bad if they exploit their employees or don't live up to their commitments . So there are problems on both sides, but I will tell you this in the last five years I have seen employees get more and more aware and more and more alert about their rights and I see a far fewer instances where we can say that companies are getting away with exploited behaviour.

Another thing is beginning January 17th certain set of regulation were enacted which actually protects an employee who wants to leave a lot more. For example 60 days grace period to find another job, didn't used to be there. Secondly, if you leave much of your benefits of your Green Card go with you, so you are not losing any time or anytime on your Green Card. So I think the employees are in much better position than they were five years ago.

Question: Are these usually companies that deal with consulting or outsourcing?

Answer: Yes and no because there are companies who have for instance an in-house project or they are developing their product and they usually just have let's say a policy of getting liquidated damages clause in their contract not realizing that these are or could be problematic for them or the company. So it could be either way any company that we have been in touch with we have always discussed with them their liquidated damages clauses, make sure they are reasonable. They are being used for protection not for prohibition. So in my view it can be any company some of it basically ignorance of the law actually most of it is ignorance of the law.

Normally, employers are not allowed to pass on their normal business expenses to the employees directly or indirectly that's another argument lawyers should be making . By trying to collect the amount you spent on my H-1 you are committing an illegal act. So they should never sue you for money that they spent on the H-1.

Question: Can they sue you for money spent on air tickets, house or any legal expenses they had?

Answer: We have to make distinction between what is the normal business expense for an employer and what is not. For instance if the employer has the policy of paying for air ticket for their employees that's their normal business expenses, they can't sue me for that but if they don't usually do that and they made an accommodation for me, they can probably sue me for that.

Question: So they have to show that they are not part of their regular policy?

Answer: Actually, it is more of a job of a diffidence counsel to prove that the expenses are ordinary business expenses.

Question: I came across so many people who dealt with the issue of bond and people very knowingly sign their contract and then instantly regret their decision a year or later. Do you know why this is taking place. Is it because they overestimate the amount they will be earning or overestimate the experience with the company, and they have to leave.

Answer: I would not try to second guess the mind of so many diverse people but I can take an educated guess why people would be doing it. I have always maintained for people from India, and many countries from Europe the primary attraction of the United States is not economic as much as it is life style. USA has a better life style than almost any other country that I have lived in so far. So when people come to the United States one of the motivation is life style, some of them are economic, some of them are opportunities. Now people when people weigh that against the amount of money they would be giving away in balance they feel that the amount is worth it, that's what happens.

Question: Are there any red flag that should come up while looking at the contract something that jumped out of them employer that probably should not be dealing with?

Answer: Any employer who asks you to pay money upfront get away from the as fast as you can, because chances are they are sleazy employer , they are going to break the law to hurt you as well. Never ever go with an employer who asks you to pay any money.

Question: I wanted to ask you if employers can withhold wages when they are suing you?

Answer: On H-1B that is a complete ?No-No?. That is an independent ground of complaint. There are very strict rules, this is very highly choreographed area of law. When you want to deduct wages thy can only be deducted for the convenience of the employee at the written request of the employee. So for instance if the employee says, can you please take my health insurance cost directly from the pay check, you can do that but let's say that employee owes you twenty thousand dollars and his last pay check is seven thousand dollars, you should write the entire check out as an employer. Don't try to hold any money back from the pay check. You can sue separately, but no money should ever be withheld. If employees money withheld call the wage and hour division of the Department of Labor, they will fix it.

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