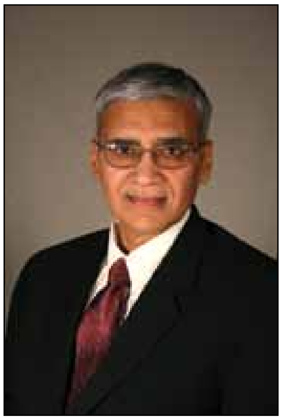
Liquidated Damages Clauses In H-1B Visa Holders' Employment Contracts



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The damages should be appropriate and the clause should never be punitive.

ONE OF THE most common mistakes made by lawyers, employers, and Human Resources professionals is assuming that the contracts for employment of employees holding H-1B status ("H-1B employees") are indistinguishable from other employees in the workforce. They are not, and the differences can expose the employer to substantial liability. The focus of this article is on one such difference: the liquidated damages clause.

Under immigration law, H-1B employees may not be subjected to penalties for leaving the sponsoring employer. In passing the law, Congress wanted to ensure that foreign professional workers are not subjected to servitude and coercion. While the liquidated damages/penalty distinction is the norm for all employees, immigration law imposes a further restriction that employers may not recover their normal business expenses from an H-1B employee. An impermissible recovery clause is not only unenforceable in court, it can lead to expensive company-wide investigations and penalties and punishment from the U.S. Department of Labor ("USDOL" or "DOL"). That obviously has serious implications for any of our colleagues involved in drafting, reviewing, or litigating such clauses. The penalties and sanctions apply even where there is an "attempted" enforcement.

COMMON LAW • Important common law sources affecting liquidated damages clauses include commonly understood definitions of liquidated damages as well as definitions and comments in section 356 of the Restatement (Second) of Contracts.

Black's Law Dictionary, *Liquidated Damages,* (9th Ed. 2009) 447

"An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. If the parties to a contract have properly agreed on liquidated damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages."

Restatement (Second) of Contracts, *Liquidated Damages and Penalties* (section 356 (1981))

"Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."

Comments

"a. Liquidated damages or penalty. The parties to a contract may effectively provide in advance the damages that are to be payable in the event of breach as long as the provision does not disregard the principle of compensation. The enforcement of such provisions for liquidated damages saves the time of courts, juries, parties and witnesses and reduces the expense of litigation. This is especially important if the amount in controversy is small. However, the parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy.

"b. Test of penalty. Under the test stated in Subsection (1), two factors combine in determining whether an amount of money fixed as damages is so unreasonably large as to be a penalty. The first factor is the anticipated or actual loss caused by the breach. The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches…Furthermore, the amount fixed is reasonable to the extent that it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss… The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty (see § 351), the easier it is to show that the amount fixed is reasonable. To the extent that there is uncertainty as to the harm, the estimate of the court or jury may not accord with the principle of compensation any more than does the advance estimate of the parties. A determination whether the amount fixed is a penalty turns on a combination of these two factors. If the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm. If, on the other hand, the difficulty of proof of loss is slight, less latitude is allowed in that approximation. If, to take an extreme case, it is clear that no loss at all has occurred, a provision fixing a substantial sum as damages is unenforceable.

"c. Disguised penalties. Under the rule stated in this Section, the validity of a term providing for damages depends on the effect of that term as interpreted according to the rules stated in Chapter 9. Neither the parties' actual intention as to its validity nor their characterization of the term as one for liquidated damages or a penalty is significant in determining whether the term is valid. Sometimes parties attempt to disguise a provision for a penalty by using language that purports to make payment of the amount an alternative performance under the contract, that purports to offer a discount for prompt performance, or that purports to place a valuation on property to be delivered. Although the parties may in good faith contract for alternative performances and fix discounts or valuations, a court will look to the substance of the agreement to determine whether this is the case or whether the parties have attempted to disguise a provision for a penalty that is unenforceable under this Section. In determining whether a contract is one for alternative performances, the relative value of the alternatives may be decisive."

Practice Pointers

Thus, under common law, the following practice points govern liquidated clauses:

- Provide a reasonable estimation of actual damages at the time of the contract;
- Keep in mind the principle of compensation, not punishment;
- Recite within the contract the fact and the reason why actual damages cannot be foreseen and how the stipulated damages are a reasonable measure of the actual damages likely to be sustained in the event of breach;
- Include in the recitals the fact and the reason the proof of damages is exceedingly difficult (for instance, intangible damages like loss of goodwill and future business opportunities);
- Remember that it is likely that the larger the amount stipulated as compensation, the stricter the judicial scrutiny will be; and
- Check the State law and the precedents from the local courts.

LIQUIDATED DAMAGES CLAUSES UNDER IMMIGRATION LAW • Penalties under immigration law target both the merits of the clause and the method used for its recoupment. Along with a company-wide investigation, an unenforceable and impermissible liquidated damages clause can lead to penalties of up to $1,000 for each violation. The Secretary of the DOL has the authority to impose this fine and issue an order requiring the employer to return any unauthorized amounts sought from the nonimmigrant employee.

It is also a violation of the law to attempt recoupment of damages through deductions from wages owed to the employee. DOL allows authorized deductions to be taken from the employee's paycheck, as long as the deduction meets the very stringent requirements under 20 C.F.R. section 655.731(c)(9), which is focused entirely upon deductions made for the convenience of the H-1 employee:

The Statute: 8 U.S.C. §1182(n)(2)(C)(vi)

"(I) It is a violation of this clause for an employer who has filed an application under this subsection to require an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Secretary shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

(II) It is a violation of this clause for an employer who has filed an application under this subsection to require an alien who is the subject of a petition filed under section 1184(c)(1) of this title, for which a fee is imposed under section 1184(c)(9) of this title, to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation of this clause for such an employer otherwise to accept such reimbursement or compensation from such an alien.
(III) If the Secretary finds, after notice and opportunity for a hearing, that an employer has committed a violation of this clause, the Secretary may impose a civil monetary penalty of $1,000 for each such violation and issue an administrative order requiring the return to the nonimmigrant of any amount paid in violation of this clause, or, if the nonimmigrant cannot be located, requiring payment of any such amount to the general fund of the Treasury."

USDOL holds that "the employer may not require the worker to pay a penalty for leaving employment prior to any agreed date. However, this restriction does not preclude the employer from seeking 'liquidated damages' pursuant to relevant state law. Liquidated damages are generally estimates stated in a contract of the anticipated damages to the employer caused by the worker's breach of contract." http://www.dol.gov/compliance/guide/h1b.htm.

The Regulation: 20 C.F.R. §655.731(c)(9)
" 'Authorized deductions,' for purposes of the employer's satisfaction of the H–1B required wage obligation means a deduction from wages in complete compliance with one of the following three sets of criteria....
(iii) Deduction which meets the following requirements:
(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);
(B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this "benefit of employee" standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (e.g., employee living at worksite in "on call" status));
(C) Is not a recoupment of the employer's business expense (e.g., tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H–1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H–1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);
(D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and
(E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 C.F.R. part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek."

The Regulation: 20 C.F.R. §655.731(c)(10)

"(10) A deduction from or reduction in the payment of the required wage is not authorized (and is therefore prohibited) for the following purposes (i.e., paragraphs (c)(10) (i) and (ii)):

(i) A penalty paid by the H–1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.

(A) The employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to an agreed date. Therefore, the employer shall not make any deduction from or reduction in the payment of the required wage to collect such a penalty.

(B) The employer is permitted to receive bona fide liquidated damages from the H–1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.

(C) The distinction between liquidated damages (which are permissible) and a penalty (which is prohibited) is to be made on the basis of the applicable State law. In general, the laws of the various States recognize that liquidated damages are amounts which are fixed or stipulated by the parties at the inception of the contract, and which are reasonable approximations or estimates of the anticipated or actual damage caused to one party by the other party's breach of the contract. On the other hand, the laws of the various States, in general, consider that penalties are amounts which (although fixed or stipulated in the contract by the parties) are not reasonable approximations or estimates of such damage. The laws of the various States, in general, require that the relation or circumstances of the parties, and the purpose(s) of the agreement, are to be taken into account, so that, for example, an agreement to a payment would be considered to be a prohibited penalty where it is the result of fraud or where it cloaks oppression. Furthermore, as a general matter, the sum stipulated must take into account whether the contract breach is total or partial (i.e., the percentage of the employment contract completed)."

Practice Pointers

Thus, deductions from an H-1B employee's wages can be made only if they meet all these criteria:

- The employee gives a voluntary, written authorization. Mere acceptance of employer's pre-existing practice is insufficient authorization;
- The deduction is principally for the benefit of the employee;
- The deduction is not a recoupment of "employer's business expense," such as attorneys' fees (almost anything the employer spends or should spend during the H-1B process is probably included in that phrase);
- The deduction amount does not exceed the fair market value or actual cost of the benefit associated with the deduction and the amount of deduction does not exceed applicable federal garnishment laws; in addition, amounts that are deemed a penalty must not be deducted from the wages; and
- It also appears that there is no easy way to deduct even liquidated damages from salary unless the deduction complies with the first five requirements. So, damages cannot be deducted without the H-1B employee's written, voluntary consent.

Excerpts From Notice Of Proposed Rulemaking ("NPRM") Comments Of DOL

The excerpt from 65 Fed. Reg. 80110, 80,173-80,200 (Dec. 20, 2000) that appears as the Appendix at the end of this article is instructive of Congressional intention and DOL's analysis. (In this excerpt, USDOL uses the word "Department" to refer to itself.) The discussion in the excerpt comprehensively sums up the positions of USDOL on the implicated issues and holds true as of the date of publication of this article.

Practice Pointers

- USDOL considers it a statutory obligation to determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law. Hence, any complaint is certain to result in an investigation.
- USDOL has considered and rejected suggestions from commenters about any abrogation of its obligatory jurisdiction.
- USDOL believes that it has no jurisdiction to create a new federal definition of "penalty," and that it has no authority to devise any kind of federal law on this issue, whether through regulations or enforcement actions.
- Even a complaint regarding an alleged attempt to enforce a penalty provision will be processed and investigated in the same way as any other violation. This provision conceivably could be triggered by as little as a discussion or an email.
- USDOL has left the door open for recovery of actual, compensatory and consequential damages.
- USDOL will resolve any conflict of law issue pursuant to the applicable State laws.
- USDOL will apply principles of administrative collateral estoppel (the legal principle limiting consideration of a dispute to only one court action), when appropriate, just as it would for any other employment law violation. Thus, one adverse ruling against an employer could open a Pandora's box for liability.
- Attorneys' fees may not be considered chargeable to the employer where an H-1B employee hires an attorney clearly to serve the employee's interest, to negotiate the terms of the employment contract, to provide information necessary for the H-1B petition or review its terms on the employee's behalf, or to provide the employee with advice in connection with application of U.S. employment laws. In its enforcement, the Department will look behind any situation where it appears that an employee is absorbing an employer's business expenses in the guise of the employee paying his or her own legitimate fees and expenses.

ADMINISTRATIVE AND JUDICIAL PRECEDENTS • The following precedents are indicative of how case law has developed in practically applying the stated intent of the law and the regulations.

Administrator, Wage & Hour Division, USDOL v. Novinvest, LLC

The employment contract required petitioner's employees to assume liability for a $5,000 investment fee. Captioned "Relocation Assistance," the provision stated: "The Company invests considerable time, effort and financial resources in organizing, assisting and transitioning the Employee to life in the US. The value of the Company's up-front investment (in order to hire, process and train Employee) is estimated as USD 5,000 (five thousand) per Employee. This investment is considered an interest-free loan from the Company to the Employee starting on the day employee arrives in the US. Every month, 1/12 (one twelfth) of the amount is forgiven by the Company, so that at the end of the Employee's first year with the Company the entire amount is forgiven. If the Employee leaves the Company's employment, for any reason, before the end of one year, or is terminated, the remaining balance becomes due, and the Employee must reimburse the Company."

The court ruled that employer was liable for the "investment fee" that was deducted from the employees' salaries because it was an early termination penalty.

Administrator, Wage & Hour Division, USDOL v. Novinvest, LLC, ARB No. 03-060, ALJ No. 2002-LCA-24 ARB July 30, 2004) available at www.oalj.dol.gov/PUBLIC?INA?DECISIONS?ARB_DECISIONS?LCA?02LCA24B.HTM

Kutty v. U.S. Dep't of Labor

Dr. Kutty (K) operated medical clinics in Tennessee, and hired 17 alien doctors, each of whom had a J-1 visa. K and his wife jointly own and operated this practice. K soon began reducing some of the doctors' salaries. It was held that K should pay the expenses for obtaining the H-1B visas and J-1 waivers of the doctors, because those fees qualify as "business expenses." Deductions that are "a recoupment of the employer's business expenses," and reduce the employee wages below the required wage are not permitted. "[O]btaining the J-1 waiver is necessary to secure approval of the H-1B petitions." It is the employer who files for the H-1B petitions and attests that he will comply with the responsibilities under the INA, not the employee. Hence, "[i]t is a reasonable interpretation of the statute to impose costs on the employer, not the employee." Furthermore, no fees were imposed on K for the work performed by the attorneys that were personal to the employee doctors.

Kutty v. U.S. Dep't of Labor, 2011 WL 3664476 (E.D. Tenn. Aug. 19, 2011)

Administrator, Wage and Hour Division, v. Greater Missouri Medical Pro-Care Providers, Inc.

The Court looked to the Second Restatement of Contracts in determining the difference between bona fide liquidated damages and an illegal penalty. "The Restatement of Contracts provides that, in order for a damages clause to be considered a valid liquidated damages provision: **'the amount fixed as damages must be a reasonable forecast for the harm caused by the breach; and the harm must be of a kind difficult to accurately estimate.'**" The two prongs are interrelated where "(i)f the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm." The mere fact that the parties refer to it as liquidated damages is not sufficient evidence that the clause is actually a liquidated damages clause.

Administrator, Wage and Hour Division, v. Greater Missouri Medical Pro-Care Providers, Inc. (2008-LCA-26), available at www.oalj.dol.gov/Decisions/ALJ/LCA/2008/WAGE_and_HOUR_DIVISI_v_GLOBAL_MULTI-MEDIA_P_2008LCA00026_(OCT_18_2011)_152546_CADEC_SD.PDF

THE BOTTOM LINE • Here is what we know about liquidated damages clauses for H-1B employees:

- The merits of the clause will be judged by applicable State law;
- Even an allegation by an aggrieved employee of misuse of the clause will lead to an USDOL investigation that can quickly become much wider and more expensive than you can anticipate;
- So, are we better off staying away from including liquidated damages clauses? Probably yes. Note that recovery of compensatory (damages sufficient in amount to indemnify the injured person for the loss suffered), consequential (losses that do not flow directly and immediately from an injurious act but that result indirectly from the act) or any other damages permitted by law is not prohibited by immigration law; and
- Recovery or lawsuits for damages other than liquidated are not a cause for USDOL investigation.

Reminders

If your client insists upon having a liquidated damage clause included in the employment contract despite knowing all the risks, keep this in mind while drafting and counseling:

- The clause must be narrowly tailored to protect the interest of the employer and must not be a device to prevent the employee from seeking alternate employment;
- Employer's internal procedures, including internal communications, emails, etc., must reflect a defensive, not an offensive bias. The corporate attitude must be that we are using this clause to protect the employer, not to punish the employee;
- No part of our attempted recoupment can be a business expense of the employer; and
- We must not provide for or attempt any deductions (other than those required by law, such as taxes) from the employee's wages.

APPENDIX

Excerpt from 65 Fed. Reg. 80110, 80,173-80,200 (Dec. 20, 2000)

J. What Actions or Circumstances Would be Prohibited as a "Penalty" on an H-1B Nonimmigrant Leaving an Employer's Employment? (§655.731(c)(10)(i))

Section 212(n)(2)(C)(vi)(I) of the INA as amended by the ACWIA prohibits an employer from "requir[ing] an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer." This section requires the Department to "determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law." As discussed in Sections L and M of the NPRM, section 212(n)(2)(C)(vi)(III) provides that the Department, after notice and opportunity for a hearing, "may impose a civil money penalty for each such violation and issue an administrative order requiring the return to the [H-1B worker] of any amount paid in violation * * *, or if [the H-1B worker] cannot be located, requiring payment of any such amount to the general fund of the Treasury.

Senator Abraham explained: "New clause (vi)(I) * * * directs that the Secretary is to decide the question whether a required payment is a prohibited penalty as opposed to a permissible liquidated damages clause under relevant State law (i.e. the State law whose application choice of law principles would dictate). Thus, this section does not itself create a new federal definition of "penalty", and it creates no authority for the Secretary to devise any kind of federal law on this issue, whether through regulations or enforcement actions."

144 Cong. Rec. S12752 (Oct. 21, 1998). Congressman Smith further explained that "[t]his provision was added because of numerous cases that have come to light where visa holders or their families were required to make large payments to employers because the worker secured other employment." 144 Cong. Rec. E2325 (Nov. 12, 1998).

In the NPRM, the Department proposed to prohibit employers from attempting to enforce any such liquidated damages provisions without first obtaining a State court judgment ordering the H-1B worker to make such a payment. The Department explained its view that State courts were better versed than the Department to resolve State law questions posed by such matters. The Department also stated its intention to make it clear that employers cannot collect the additional $500 petition fee in the guise of liquidated damages, and noted its concern that some employers might attempt to collect liquidated damages in situations where the employers' unlawful conduct may have caused the H-1B worker to prematurely leave the employment.

A number of commenters responded to the Department's proposals on this issue. Two commenters (Latour, Padayachee) endorsed the approach taken in the NPRM. Padayachee also expressed the view that only quantifiable liquidated damages should be claimable. A third commenter (TCS), generally agreed with the Department's approach, although noting some specific objections as identified below.

The view most frequently expressed by other commenters was that the Department's approach was contrary to the intent of the ACWIA. These commenters (Senators Abraham and Graham and other Congressional commenters, ACIP, AILA, and other employers and employer representatives) viewed the proposal as inconsistent with the role intended for the Department under the ACWIA, i.e., to determine whether or not a specific liquidated damages provision is legal under State law. Nallaseth and SBSC asserted that it would be discriminatory to require employers to first secure a State court judgment in enforcing an agreed damages provision against an H-1B worker when none is required to enforce a similar provision involving a U.S. worker. While some commenters recognized that the Department's concern about the difficulty of identifying and applying State law to a particular dispute was well-founded, it was their view that Congress intended the Department, not the State courts, to shoulder this burden. Senators Abraham and Graham asserted that the proposal that an employer obtain a State court judgment as a precondition to enforcing its contractual agreement — a practice, they stated, they were not aware of under any State's law — constituted an attempt by the Department to create federal law on this question in contravention of the statute's direction that State law was to be applied in resolving such matters. They stated that it was the intention of Congress not to require litigation over each such agreement, but instead to allow the Department to bring an enforcement action if it believes an agreement is punitive as a matter of State law.

Congressional commenters and Network Appliance objected to any requirement that employers obtain a state court judgment where there is no disagreement between the parties. ACIP asserted: "Requiring a state court judgment to enforce any part of a contract is an unreasonable intrusion upon the ability of parties to contract and limits their ability to settle disputes through mediation, arbitration or other forms of alternative dispute resolution. * * * [A]lthough we agree that individual state courts are much better versed in this area of their law for their state than the Secretary, it clearly was not Congress' intent to impose such a high burden on employers." TCS, on the other hand, asserted that a State court judgment should be a prerequisite to any finding of a violation by the Department, limiting its objection primarily to the Department's proposal that a State court judgment must be obtained, even where there is no dispute by the parties or they choose to resolve the dispute by settlement or otherwise.

As an alternative to the Department's proposal, ACIP, AILA, and SIA suggested that the regulation set forth examples of acceptable reimbursements and examples of prohibited penalties. AILA and TCS requested that the Department prohibit any class-based complaint or relief in the administrative proceeding, i.e., to limit the relief to the particular H-1B worker who initiated the complaint. In a similar vein, AILA and ACIP argued that whether a provision is a penalty or liquidated damages should be inferred from the facts and circumstances of the case; thus the fact that a penalty is found in one case does not automatically mean all similar provisions are void. TCS asserted that the Department should adopt a rule that an employer cannot be held in violation of the ACWIA unless a State court first holds that an agreed damage provision is a penalty, and, that even where a State court so holds, the Department should not find an employer in violation unless it fails to cure the violation within a reasonable amount of time. TCS also objected to any required notice to employees that would suggest that an employer's ability to enforce a damages provision contained in the employment contract is limited, expressing concern that such notification would encourage H-1B workers to disregard their contractual obligations. AILA encouraged the Department to avoid a presumption that any "agreed damage" is an unenforceable penalty. ACIP objected to the Department's statement that it would examine "attempts by employers to collect damages where their violations of the INA [the H-1B program], or other employment law may have caused the H-1B worker to cease employment" — apparently viewing this statement as suggesting that employers might contrive to get workers to quit their employment in order to collect contract damages.

Notwithstanding the Department's continued reluctance to identify and interpret State law, the Department now concurs with the view that Congress intended the Department to determine whether a provision is liquidated damages or a penalty. For the same reason, it believes there is no merit to the suggestion by TCS that the Department cannot find that an employer has violated the ACWIA's bar against punitive damages, unless a State court first rules that a violation has occurred. Furthermore, the Department agrees that it is unnecessary to obtain a court judgment or a ruling from the Department of Labor if an employee pays voluntarily or the matter is settled. The Interim Final Rule reflects the Department's revised position on this question.

Under the Interim Final Rule, a complaint regarding an alleged attempt to enforce a penalty provision will be processed and investigated in the same way as other complaints by aggrieved parties under Subparts H and I. Thus, an individual who believes that an employer has sought to enforce a penalty provision should file a complaint with the Wage and Hour Administrator. After investigation, Wage and Hour will issue a determination in accordance with its analysis of the relevant State law, and, where violations are found, may assess a civil money penalty of $1,000 for each violation and order the return of any money paid by the worker(s) to the employer (or, if the worker(s) cannot be located, to the U.S. Treasury). A party aggrieved by Wage and Hour's determination may request a hearing before an ALJ; a party may obtain review of the ALJ's determination by the Department's Administrative Review Board.

The Department agrees with the suggestion that the regulations contain some of the general principles applied in resolving whether a provision is a permissible liquidated damages provision or an impermissible penalty. It is drawn primarily from two legal reference publications (American Jurisprudence 2d; Restatement (Second) Contracts) that provide a general discussion regarding the differences between liquidated damage and penalty provisions. However, the decisional and statutory law of a particular State, as applied to the particular circumstances relating to the employment and contract at issue — not these general principles — will control the resolution of most disputes. Furthermore, we do not address other legal remedies that may be available to the parties to recover damages for an alleged breach of the employment agreement — matters outside the Department's charge under the ACWIA. Individual State law also will determine the particular state whose law will apply to the dispute, where significant aspects of the contract and employment relationship involve different States (or nations).

The Department has also incorporated into the Interim Final Rule its proposal to examine attempts by employers to collect damages where violations of employment law may have caused the H-1B worker's premature termination of his or her employment. It is the Department's expectation that where there is a constructive discharge, or the employer has committed substantive violations of the H-1B provisions directly impacting on the employee (such as wage and benefit violations), State law would not permit the employer to collect the payment.

The Department reiterates the point it made in the NPRM that, although State law will govern the enforceability of liquidated damage provisions in agreements, an H-1B employer nevertheless must comply with the requirements of Federal statute and regulation bearing upon the H-1B employment relationship. For example, irrespective of any contractual agreement to the contrary, an employer is prohibited from directly or indirectly allocating any of the $500 LCA fee (recently increased to $1,000) or other employer expenses to the H-1B worker (see Section 212(n)(2)(C)(vi)(II)). Thus an employer is barred from directly withholding the $500 or $1,000 fee from the H-1B worker's pay or from indirectly collecting the fee through a liquidated damages provision in the contract. The Department agrees that liquidated damages may encompass other costs the employer has borne on behalf of the employee, such as transportation and visa processing assistance. Employers should be aware that liquidated damages may be withheld from the required wage only if permitted under the criteria for allowable deductions at 20 C.F.R. 655.731(c)(7).
With regard to the suggestion that the Department issue a rule limiting the relief available to the particular worker rather than allowing a particular determination to affect other cases or other workers, the Department will apply principles of administrative collateral estoppel (the legal principle limiting consideration of a dispute to only one court action), where appropriate, just as it would for any other employment law violation.

The Department sees no merit to the proposal by TCS that an employer may be held in violation of the ACWIA' s punitive damages bar only where it fails to cure the violation within a reasonable time after a determination that an agreed damages provision is an unenforceable penalty. There is nothing in the language of the statute to suggest that penalties under this provision should be assessed differently than penalties under other provisions….

3. What H-1B Related Fees and Costs Are Considered To Be an Employer's Business Expenses? (§ 655.731(c)(9)(ii)&(iii), Previously in Proposed Appendix B, Section c)

Section 655.731(c)(7)(iii)(C) of the current regulations excludes from deductions which are authorized to be taken from the required wage those deductions which are a recoupment of the employer's business expenses. Paragraph (c)(9) further explains that where the imposition of the employer's business expense(s) on the H-1B worker has the effect of reducing the employee's wages below the required wage (the prevailing wage or actual wage, whichever is greater), that will be considered an unauthorized deduction from wages. These provisions were not open for notice and comment.

The Department sought comment on proposed Appendix B, which explains its interpretation of the operation of these provisions in the context of the H-1B petition process. The NPRM notes that the filing of an LCA and the filing of an H-1B petition are legal obligations required to be performed by the employer alone (workers are not permitted to file an LCA or an H-1B petition). Therefore the NPRM provides that any costs incurred in the filing of the LCA and the H-1B petition (e.g., prevailing wage survey preparation, attorney fees, INS fees) cannot be shifted to the employee; such costs are the sole responsibility of the employer, even if the worker proposes to pay the fees.

The NPRM further notes that bona fide costs incurred in connection with visa functions which are required by law to be performed by the nonimmigrant (e.g., translation fees and other costs relating to visa application and processing for prospective nonimmigrant residing outside of the United States) do not constitute an employer's business expense. The Department stated, however, that it would look behind what appear to be contrived allocations of costs.

The Department received 21 comments on this issue. All of the commenters (a number of whom were attorneys commenting only on this issue) opposed the Department's position in the NPRM. As a general matter, these commenters contended that the question of how fees are allocated between the employer and the H-1B worker is a question which should be decided between the employer and the employee.

Immigration attorneys and their professional association (AILA), as well as Senators Abraham and Graham, argued that the Department is interfering with the H-1B workers' right to counsel. AILA argued that how the H-1B petition is drafted is critical to an employee, since it may affect his or her maintenance of status and ability to stay in the United States. Another attorney (Freedman) stated that attorney representation of the alien has acted as a buffer against employer abuses, that there is no reason to imply that an attorney representing an employer is more competent or more impartial than an attorney suggested by an alien, and that employers may not be aware of the expertise necessary to file H-1B petitions. This attorney also suggested that the requirement that employers pay attorney fees would intimidate a potential whistleblower.

Many commenters (AILA, ACIP, and a number of attorneys, businesses and trade associations) argued, in effect, that since Congress, in drafting the ACWIA, specifically prohibited employers from imposing the additional petition fee on employees, the failure to prohibit the payment of other expenses by employees evidences an intention to allow their imposition by an employer.

ITAA and ACIP argued that the current law is directed toward prohibiting certain deductions from an employee's salary that will push it below the required wage rate. In other words, as long as the H-1B worker receives at least the required wage, it should not be a violation if the worker then spends that money for job-related matters such as fees. ACIP and ITAA stated that as a minimum, if the H-1B worker's wages minus the expenses equals or exceeds the required wage rate, there should be no violation. Latour agreed with the Department that if an H-1B worker's wage is below the prevailing wage, it would be a violation to deduct attorney fees from the worker's compensation, but stated that there is no basis for prohibiting the employer from having the employee handle the payment if the fees, when subtracted from the worker's pay, would not result in compensation less than the prevailing wage.

BRI pointed out that many employers provide payment of immigration expenses as a benefit to employees. Making it mandatory that all employers pay such fees will disadvantage those employers who offer payment of fees as a benefit. BRI also suggested that employer payment of fees would make H-1B workers more likely to take advantage of the system.

ACIP, AILA, and ITAA asserted that an employer should be able to collect these expenses as liquidated damages if the H-1B nonimmigrant prematurely terminates an employment contract. One attorney (Freedman) contended that by listing attorney fees as an employer business expense, the Department was establishing a regulatory basis for repayment as liquidated damages — thereby promoting the abusive actions for which the ACWIA was enacted.

Educational and research institutions (ACE, AIRI, University of California, Johns Hopkins) noted that the INS has determined that because ACWIA has allowed an exemption from the additional fee for H-1B petitions from higher education institutions, affiliated or related research institutions, and nonprofit and governmental research organizations, these institutions are also exempt from the requirement that employers pay the $110 filing fee. Thus, they stated that INS has determined that H-1B workers may pay the cost of the filing fee, as in the past. These commenters therefore urged that DOL accept this approach so there is no conflict between Federal agencies. The University of California also stated that an employer does not have an interest in a worker being in the United States prior to commencement of employment and therefore should not bear the cost of a change of status. Finally, three attorney commenters (Latour, Quan, and Stump) argued that forbidding legal fee payment by nonimmigrant workers will be especially onerous to small businesses, small private schools, and other financially-limited groups which are not familiar with the requirements of the H-1B program.

At the outset, the Department wants to clarify an apparent misconception by some commenters regarding the restrictions placed upon employers in assessing the employer's own business expenses to H-1B workers. An H-1B employer is prohibited from imposing its business expenses on the H-1B worker — including attorney fees and other expenses associated with the filing of an LCA and H-1B petition — only to the extent that the assessment would reduce the H-1B worker's pay below the required wage, i.e., the higher of the prevailing wage and the actual wage.

"Actual wage" is explained at §655.731(a)(1) of the existing regulations as "the wage rate paid by the employer to all other individuals with the similar experience and qualifications for the specific employment in question." The regulation continues by noting that "[w]here no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer."

The Department also wishes to emphasize, as provided in §655.731(c)(9) of the existing regulations (renumbered in the Interim Final Rule as §655.731(c)(12)), that where a worker is required to pay an expense, it is in effect a deduction in wages which is prohibited if it has the effect of reducing an employee's pay (after subtracting the amount of the expense) below the required wage (i.e., the higher of the actual wage or the prevailing wage). An employer cannot avoid its wage requirements by paying an employee a check at the required wage and then accepting a prohibited payment from a worker either directly, or indirectly through the worker's payment of an expense which is the employer's responsibility.

The Interim Final Rule continues to provide that any expenses directly related to the filing of the LCA and the H-1B petition are a business expense that may not be paid by the H-1B worker if such payment would reduce his or her wage below the required wage. These expenses are the responsibility of the employer regardless of whether the INS filing is to bring an H-1B nonimmigrant into the United States, or to amend, change, or extend an H-1B nonimmigrant's status. As stated in the NPRM, the LCA application and H-1B petition, by law, may only be filed by the H-1B employer. The employer is not required to seek legal representation in completing and filing an LCA or H-1B petition, but once it utilizes the services of an attorney for this purpose, it has incurred an expense associated with the preparation of documents for which it has legal responsibility.

H-1B nonimmigrants are permitted to pay the expenses of functions which by law are required to be performed by the nonimmigrant, such as translation fees and other costs related to the visa application and processing. The Department also recognizes that there may be situations where an H-1B worker receives legal advice that is personal to the worker. Thus, we did not intend to imply that an H-1B worker may never hire an attorney in connection with his or her employment in the United States. While the illustrative expenses (translation fees and other costs relating to the visa application) were not denominated in the NPRM as legal expenses, if they were provided through an attorney these costs and associated attorney fees would be personal to the worker and may be paid by the worker, rather than expenses that would have to be borne by the employer. Similarly, any costs associated with the H-1B worker's receipt of legal services he or she contracts to receive relative to obtaining visas for the worker's family, and the various legal obligations of the worker under the laws of the U.S. and the country of origin that might arise in connection with residence and employment in the U.S., are not ordinarily the employer's business expenses. As such, they appropriately may be borne by the worker.

An employer, however, may not seek to pass its legal costs associated with the LCA and H-1B petition on to the employee. With respect to the concerns regarding small employers who may not have familiarity with H-1B requirements and may not know an attorney specializing in this area of law, there is nothing to prohibit an H-1B worker from recommending to the employer an attorney familiar with the requirements of the H-1B program. In addition, if an applicant for a job hired an attorney clearly to serve the employee's interest, to negotiate the terms of the worker's employment contract, to provide information necessary for the H-1B petition or review its terms on the worker's behalf, or to provide the applicant with advice in connection with application of U.S. employment laws, including the various employee protection provisions of the H-1B program and its new whistleblower provisions, the fees for such attorney services are not the employer's business expense. In its enforcement, the Department will look behind any situation where it appears that an employee is absorbing an employer's business expenses in the guise of the employee paying his or her own legitimate fees and expenses.

Contrary to the view of many commenters, the Department does not read the ACWIA's proscription against an employer's assessment of the additional petition filing fee on the H-1B worker as evincing an intention that an employer may assess any other expenses against the worker. Neither the language of this provision, nor its place within the statute's larger context, allows a conclusion that Congress intended this provision to affect the ability of an employer to assess other costs to H-1B workers. The ACWIA prohibition against charging the H-1B worker for the filing fee is much more sweeping than the regulatory provision at issue. The ACWIA prohibits an employer from charging the fee, even where there would not be a resulting wage violation, and even as a part of the liquidated damages an employer may contract with a worker to pay for early termination.

The Department concurs with the comments that the ACWIA does not preclude the recovery of expenses in connection with the filing of the LCA and H-1B petition as liquidated damages. It is the Department's view that there is no basis for distinguishing attorney fees and other expenses in connection with these filings from other expenses which may be permitted, under state law, as liquidated damages. However, as set forth in IV.K, above, the Interim Final Rule provides that the $500/$1,000 filing fee may not be collected through liquidated damages.

As stated above, education and research groups stated that INS has taken the position that qualified education and research organizations who are exempt from paying the additional filing fee will not be required to pay the separate $110 petition filing fee themselves, but rather INS will accept payment made by the H-1B workers. The Department does not believe that this statement is inconsistent with its position, since, as discussed above, employers are not prohibited from requiring workers to make these payments where the workers are paid above the required wage. To the extent these commenters may be suggesting that the Department should create an exception for academic and research institutions, the Department sees no basis for this suggestion. The status of these institutions as exempt from the additional filing fee does not change the fact that they are employers who, as such, are required to file the LCA and the H-1B petition, and to pay the attendant costs if payment by the H-1B worker would bring the worker's wages below the required wage.

In the Interim Final Rule, the discussion of expenses of the H-1B program which the employer may not impose on H-1B workers has been removed from Appendix B and incorporated in the regulations at §655.731(c)(9)(ii) and (iii).