Fenwick Employment Brief

June 14, 2011
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COURT UPHOLDS COMMISSIONED SALESPERSON EXEMPTION

In California, certain commissioned salespersons may be properly classified as exempt from overtime. To qualify, the employee must be paid on a commission basis, in addition to other requirements. State law defines "commissions" as wages based "proportionately upon the amount or value" of property or services sold by the salesperson. In *Harris v. Investor's Business Daily* (2006), a California state court held that employees paid on a point system based on the number of newspaper subscriptions sold were **not** paid on a commission basis, as the point values were not proportionately tied to the subscription price.

However, in *Areso v. Carmax*, a California court of appeal recently approved a commission plan that paid car salespersons a uniform amount of $150 for the sale of each automobile, and thereby upheld the exempt status of the salespersons. The employer justified the flat payment to avoid having its sales staff push higher priced vehicles to maximize their own commissions. Rejecting the plaintiffs' argument that the flat payment was akin to the point system struck down in *Harris*, the court ruled that the flat payment was proportional to the number of vehicles sold, albeit a "one to one proportion," and therefore a "commission" under California law. The court explained that the compensation was proportional because the salesperson's "compensation will rise and fall in direct proportion to the number of vehicles sold."

It is difficult to reconcile the court's explanation of commissions in *Areso* with the holding in *Harris*. Stay tuned for needed clarification by the California Supreme Court. In the meantime, employers should carefully evaluate whether their sales commission plans afford employees a lawful "commission" under California law as to support exempt status.

NLRB CONTINUES STRING OF ACTIONS OVER EMPLOYEE USE OF SOCIAL MEDIA

In the latest in a series of National Labor Relations Act ("NLRA") enforcement actions related to employee use of social media such as Facebook and Twitter, the NLRB issued an Advice Memorandum re: *Lee Enterprises* in Arizona, concluding that an employee's Twitter postings were not protected concerted activity. The employer terminated one of its newspaper reporters in response to the reporter's Twitter postings wherein he called TV people "stupid," and made inappropriate and insensitive comments about local murders. Finding no violation of the NLRA, the memo observed that the tweets did not relate to terms and conditions of employment nor did the employee seek to involve other employees in issues related to employment.

In contrast, the NLRB issued complaints against *Knauz BMW* in Chicago and *Hispanics United* of Buffalo, NY. In *Hispanics United*, an employee posted to her Facebook page an assertion that workers did not do enough to help the organization's clients. This generated other employee responses defending their performance and criticizing working conditions. The employer discharged all involved for "harassment." The NLRB alleged that all engaged in protected concerted activity over working conditions. Similarly, in *Knauz BMW*, an employee posted on his Facebook page criticism over the food and beverage (hot dogs and bottled water) served to customers at a BMW dealership sales event, complaining that employee sales commissions would be hurt by such a plebian affair. The NLRB alleged that terminating the employee over these postings violated the NLRA protection for concerted activity.

NEWS BITES

Complaint To Media Not Protected Under SOX

In a favorable decision for employers, the Ninth Circuit, in *Tides v. Boeing Company,* upheld a lower court's dismissal (http://www.fenwick.com/publications/6.5.4.asp?mid=56&WT.mc_id=EB_061411_web) of a Sarbanes-Oxley Act ("SOX") whistleblower action, holding that SOX does not protect employees who leak information to the news media. Plaintiffs, two auditors at Boeing, had spoken with newspaper reporters about alleged SOX violations at Boeing. Boeing discharged both employees for disclosing nonpublic company information without approval. Rejecting their claim of wrongful termination in violation of SOX, the court held that SOX did not protect their disclosure of information to the press, and that Boeing lawfully terminated plaintiffs for violating company policy prohibiting unauthorized disclosure of company information to the media.

Employer Properly Accommodated And Lawfully Discharged Disabled Employee

In an example of how to lawfully interact with and accommodate a disabled employee, the Ninth Circuit Court held in *Department of Fair Employment and Housing v. Lucent Technologies* that the employer lawfully discharged the plaintiff after fully interacting

with him and accommodating his disability. Carauddo worked for Lucent as a telecommunications installer until he suffered a back injury on the job. Rejecting the failure-to-interact claim, the court pointed out that plaintiff was in regular contact with Lucent yet failed to bring to the company's attention any possible accommodations that it had not already considered. The court blamed any failure to interact on plaintiff. The court also concluded that Lucent had implemented every reasonable accommodation and that plaintiff had failed to request additional accommodations. Indeed, Lucent had notified Carauddo of his right to apply for an additional six month leave of absence at the conclusion of his leave, and plaintiff failed to do so. Further, the court held that Lucent lawfully discharged Carauddo after his disability leave had expired as plaintiff's own doctors opined that Carauddo could not perform the essential functions of the job.

Software Account Manager Ruled Administrative Exempt Under FLSA

In *Verkuilen v. MediaBank*, the federal Seventh Circuit Court of Appeals (covering Midwestern states including Illinois) held that an account manager for a software company that provided complex software to advertising agencies was exempt from overtime under the administrative exemption of the federal Fair Labor Standards Act. Described by the court as a "picture perfect example" of a worker who is not entitled to overtime wages, plaintiff served as the liaison between customers and the employer's software engineers, spending much of her time on customers' premises training staff on use of the software, interpreting and communicating the customer's needs to the software developers, and assisting customers in implementing solutions suggested by the software engineers. By way of comparison, the court explained that plaintiff was not a nonexempt "salesman for Best Buy or a technician sitting at a phone bank fielding random calls from her employer's customers."

Federal Prohibition On Bankruptcy Discrimination Does Not Cover Hiring

In *Myers v. Toojay's Mgmt. Corp.*, the Eleventh Circuit held that a federal Bankruptcy Code provision prohibiting termination of and discrimination against employees for filing bankruptcy does not cover hiring decisions. Plaintiff was offered a job as a restaurant manager conditioned upon a background check. The employer rescinded the job offer allegedly because plaintiff had filed for bankruptcy. Rejecting his refusal-to-hire claim, the court held that although private sector employers are prohibited from discriminating against an employee during employment, or discharging an employee on account of having filed for bankruptcy, the Bankruptcy Code does not cover a refusal to hire. Employers should not be quick to add bankruptcy inquiries as part of the hiring process because financial selection criteria, such as screening for bankruptcy or examining credit history, even if lawful under the Bankruptcy Code, may be unlawful under Title VII and California FEHA if using such criteria has a disproportionate adverse impact on protected individuals.

No Privacy Violation By Touching Employee's Shoulder

In *DaPonte v. Ocean State Job Lot*, the Rhode Island Supreme Court ruled that a company president did not violate an employee's privacy by touching her shoulder. During an inspection of a company store, the president expressed displeasure with an incorrect price sticker on merchandise by forcefully attaching the sticker to the shoulder of an employee. Plaintiff sued alleging a violation of her privacy over the president's intrusion into the employee's "personal space." Rejecting the claim, the court held that the president's "public, boorish touching" of plaintiff's shoulder did not support an invasion of privacy claim.

U.S. Supreme Court Enforces Arizona Immigration Law

In *Chamber of Commerce v. Whiting*, the U.S. Supreme Court held that an Arizona statute, whereby the state could revoke the business licenses of Arizona businesses that employed illegal aliens, was not preempted by federal immigration laws. Federal law bars local laws regulating immigration except that states are permitted to enact and enforce laws related to licensing. Sanctioning employers through licensing laws therefore did not violate this federal preemption principle. In addition to federal immigration law compliance obligations, employers will also need to comply with any future local rules.

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