Fenwick Employment Brief

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Employer Lawfully Recovered Unearned Commission Advances

The Los Angeles Times' practice of recouping advances to employees against unearned commissions by way of paycheck deductions does not violate California law, a state court of appeals recently ruled. In *Steinhebel v. L.A. Times Communications*, the court ruled that the Times' policy, whereby it gave a commission advance to telesales employees who secured a newspaper subscription, but recovered the advance (through a deduction from the employee's paycheck) if the subscriber canceled the order within 28 days, did not constitute a withholding of wages.

The policy, to which employees expressly consented, provides that a commission is not "earned" unless and until the customer keeps a subscription for 28 days, and that the payment salespersons receive following order placement is an advance, not an earned commission. While the court acknowledged that commissions are "wages," it explained that employers may impose reasonable contractual requirements before an employee earns a commission. Thus, the court rejected plaintiffs' claim that the arrangement violates the California Labor Code, which places very strict limits on deductions from employee wages. The advances received by the employees were not wages because all conditions for earning the wages had not been satisfied.

Despite the positive result for the L.A. Times, this case serves as a cautionary reminder to employers to ensure that commission plans (and specifically the definitions for "earned" commissions) are clearly drafted and acknowledged by employees in writing. Because any deduction from wages or other effort to recoup monies from employees is risky, we encourage readers to consult with counsel before implementing such deductions.

Employer's Stray Remarks about Age Enable Older Worker to Proceed to Trial on Discrimination Claim

A recent ruling from the Fifth Circuit Court of Appeals (covering Texas and other Southern states), highlights the risks employers face when they make careless statements that can lead to an inference of age discrimination.

In *Machinchick v. PB Power, Inc.*, the plaintiff Fred Machinchick sued his former employer for violation of the Federal Age Discrimination in Employment Act, following the termination of his employment. Machinchick worked for PB Power for approximately five years as a Business Development Director, with no indication during that time of any performance problems. Four months before his termination, Machinchick began reporting to a new supervisor. In their first meeting, the supervisor asked Machinchick when he planned to retire. Shortly thereafter, PB Power issued a new business plan which memorialized the company's intention to "hand-pick employees whose mindset resides in the 21st Century . . . " A few months later, Machinchick's supervisor announced in an email to several employees his intention to strategically hire younger workers in various groups within the company. One week after his email, the supervisor terminated Machinchick for poor performance, based in part on his belief

that Machinchick had a "low motivation to adapt" to change.

Machinchick alleged that PB Power's stated reason for his termination – poor performance – was pretextual based in part on the argument that his supervisor's remarks, coupled with the revised business strategy document, supported an inference of age discrimination. The trial court disagreed and dismissed Machinchick's claim, but the Fifth Circuit reversed and ordered the case to trial. The court held that the supervisor's comments about retirement and low motivation, although arguably "innocuous," constituted evidence that gives rise to an inference of a discriminatory motive, especially when coupled with the "21st Century mindset" themes that ran through the revised business plan. The court's reversal was also driven by the absence of any significant evidence of Machinchick's alleged poor performance.

Although PB Power may ultimately prevail at trial (by establishing that it had a legitimate, non-discriminatory basis to terminate Machinchick), the reversal represents a significant setback for the company. Employers should exercise caution when commenting on business strategy and employee motivation to avoid the inevitable parsing of their words by a court or a jury for evidence of age discrimination.

Cingular Agrees to Pay $ 5.1 Million to Settle "Off-The-Clock" Overtime Claims

In response to a lawsuit filed in an Illinois federal court, Cingular Wireless agreed to pay $5.1 million in back wages to more than 25,000 customer service representatives who allegedly worked "off the clock" without compensation. In *Chao v. Cingular*, a federal Department of Labor ("DOL") investigation at Cingular call centers revealed that customer service representatives sometimes began work before the start of their scheduled shifts and occasionally worked beyond the end of those shifts, but were not paid for such extra work. The DOL filed suit on behalf of the Cingular employees, and thereafter the parties pursued a settlement. If approved by the court, the settlement will cause Cingular to pay back wages (ranging from $20 to $2,889) to workers at 25 call centers.

The Cingular settlement follows a similar settlement last year by T-Mobile USA Inc., who agreed to pay $4.8 million in back wages to over 20,000 employees for work they performed prior to the start of their shifts.

The DOL lawsuits demonstrate the government's renewed interest in pursuing claims against employers who fail to monitor and/or affirmatively permit "off the clock" work. Even where such work is *de minimus* in nature, the legal exposure can be substantial if the problem persists for a long period of time and across a large employee population.

Fourth Circuit Affirms Extension of Age Discrimination Laws to Apprenticeships

In a further expansion of the reach of federal age discrimination laws, the Fourth Circuit Court of Appeals (covering Virginia and other mid-Atlantic states) upheld an Equal Employment Opportunity Commission ("EEOC") regulation extending the protections of the Age Discrimination in Employment Act ("ADEA") to apprenticeship programs. In *EEOC v. Seafarers Int'l Union*, a suit brought on behalf of more than 40 applicants denied entry into an apprenticeship program, the EEOC relied on a 1996 regulation whereby it extended ADEA protection to apprenticeship programs.

The appeals court held that that the regulation was a permissible implementation of EEOC authority. It remanded the case for trial to determine whether the apprenticeship program's practice of limiting applications to individuals between the ages of 17 and 35 violated the regulation and discriminated against applicants over the age of 40.

In upholding the regulation, the court observed that: (i) age discrimination in apprenticeship programs

could hinder older workers from gaining employment; (ii) apprenticeship programs are frequently a workplace entry point; and (iii) failing to extend protections to older workers would be at odds with the statute's underlying principles.

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