THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
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THE GARNISHMENTS OF MODERN TIMES

Despite what news sources and government numbers are telling us, daily life says that economic times are still tough. And with tough times can come an increasing number of garnishments. Over the last year or so, we've seen dramatic increases in the numbers of garnishments that employers receive as well as circumstances leading employers to seek their own garnishments of former employee's wages. So what does a company do if it finds itself in either of these circumstances?

If you're seeking a garnishment, you must first obtain a monetary judgment against the individual. That means that employers have to file *and win* a lawsuit. Then, courts can issue a garnishment order pursuant to the judgment. After an employer receives an entry of judgment in a case, it can then ask the clerk of the court to issue a writ of continuing garnishment.

Colorado recognizes three distinct types of garnishments: (1) a writ of continuing garnishment, which garnishes an individual's earnings as long as those earnings are not exempt under certain laws; (2) garnishments to collect child support or maintenance; and (3) garnishments to collect money owed due to an individual's participation in fraudulently obtaining public assistance benefits or in retaining public assistance overpayments. Employers and other creditors may only obtain general writs of continuing garnishment.

Colorado permits judgment creditors (*i.e.*, any individual or organization that has obtained a judgment) to garnish wages of either employees or independent contractors, but the law requires the creditor to serve a copy of the writ of continuing garnishment on both the individual and on the garnishee (his/her employer or other organization that provides compensation to the individual). Once an employer serves a writ of continuing garnishment on a garnishee, the garnishee must respond within certain time limits regarding the amount of earnings that it may withhold under the law.

A writ of continuing garnishment is valid for 180 days. If the amount of your judgment is not satisfied within 180 days, you may ask the clerk of the court for another writ of continuing garnishment and continue doing so until the judgment amount is paid in full. But it is important to remember that

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you cannot serve multiple writs of continuing garnishment regarding the same individual upon the same garnishee (*e.g.*, the individual's employer) during the 180-day period. If a writ of continuing garnishment is satisfied in full during its 180-day life, then the writ automatically expires.

If you receive a writ of garnishment for your employee, be sure to comply with all directions on the writ documents. Second, check to see whether you previously received any other writs of garnishment for this employee. If you have, investigate what type of writs you previously received. A writ of garnishment for child support or maintenance holds priority over garnishments for public benefit fraud, which itself holds priority over garnishments pursuant to judgments. So if your employee's earnings are garnished pursuant to a writ of continuing garnishment and you later receive a writ of garnishment for child support, you must immediately stop withholding earnings for the continuing garnishment and start withholding wages for the child support garnishment. In this hypothetical scenario, you must also let the parties involved in the writ of continuing garnishment know why you stopped withholding earnings and that you will resume withholding earnings as soon as the garnishment for child support ends.

If you have any questions about what to do to obtain a garnishment or to withhold wages pursuant to a garnishment, be sure to consult with an attorney.

MINIMUM WAGE INCREASE

Because Colorado uses a minimum wage formula tied to an annual adjustment for inflation, "Happy New Year" in Colorado brings a new minimum wage. On January 1, 2012, Colorado's minimum wage will increase from $7.36 per hour to $7.64—an increase of 28 cents. The tip credit remains at $3.02 per hour, which means that wages paid to tipped employees increase from $4.34 to $4.62 per hour.

The increase in the minimum wage rate translates into an annual raise of $582 for full-time workers, with the weekly pay for these workers going from $294 to $305, or $15,891 per year in 2012. Overtime pay for Colorado workers at the minimum wage level will also rise to $11.46 per hour. Colorado is one of eight states raising their minimum wage rates in 2012, with Washington seeing the biggest bump of 37 cents. The federal rate was last increased in 2009, when it rose by 70 cents to its current level of $7.25. The federal minimum wage is not expected to increase in 2012.

NLRB POSTPONES EFFECTIVE DATE OF POSTER TO APRIL 30

The National Labor Relations Board (NLRB) agreed to postpone the effective date of its employee rights notice-posting rule at the request of the federal court in Washington, DC hearing a legal challenge regarding the rule. The new implementation date is April 30, 2012. Most private-sector employers will be required to post the notice. The notice is available from the NLRB through its website, www.nlrb.gov.

CAN AN EMPLOYER CONSIDER A BANKRUPTCY FILING IN HIRING?

In April, 2009, Jill voluntarily filed for bankruptcy, and a short time later her debts were discharged by the Bankruptcy Court. In January, 2011, Jill completed an application with the XYZ Bank for a full-time position as a teller. Jack, an employee of the bank, contacted Jill to ask her to

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come in for an interview. Jill thought the interview went well and was encouraged when Jack told her that she was moving on in the interview process. As part of the initial interview, Jill completed the bank's Fair Credit Reporting Act release, allowing the bank to do a credit check. The next day, Jack telephoned Jill and informed her that she would not be hired. Jill later learned that the bank performed a check on her credit history. Jill filed a discrimination complaint against XYZ, arguing the bank discriminated against her because of her prior bankruptcy. Can Jill win? That's a very good question.

Personal bankruptcy filings in Colorado increased 17.2 percent in 2010. More than $1 trillion in student-loan debt is also putting pressure on credit markets, given that many recent graduates are struggling to find jobs. And weak housing markets have forced many borrowers to seek bankruptcy protection to remove second mortgages that property values can no longer support. This means that businesses can expect to receive an increasing number of applications from people with a bankruptcy in their credit history—applications from people like Jill.

Section 525(b) of the federal Bankruptcy Code prohibits a private employer from discriminating against an individual with respect to employment solely because he or she previously filed for or received bankruptcy protection. Rejected applicants with a record of bankruptcy have sued employers based on this law with varying results.

In *Rea v. Federated Investors*, 627 F.3d 937 (3rd Cir. 2010), the court held that because Congress did not include language specifically prohibiting a private employer from denying employment to a person that has been bankrupt, a private employer can legally consider a prior bankruptcy when making a hiring decision. Courts in the Fifth and Eleventh Circuits reached similar conclusions. But in *Leary v. Warnaco, Inc.*, 251 B.R. 656 (S.D.N.Y. 2000), the court reached a contrary conclusion, allowing a plaintiff, like Jill, to proceed with a lawsuit against a prospective employer based on a theory of discrimination because of a prior bankruptcy.

None of these cases were decided by Colorado courts or the 10th Circuit, and therefore, are not binding precedent for courts in Colorado. So, we don't know which way Colorado courts will go on this issue. Employers who refuse to hire solely because of a bankruptcy could provide the applicant and his or her enterprising attorney with a "test case" opportunity. But no employer wants to be a test case. Further, it is clear that under Colorado law employers cannot fire an employee for engaging in legal activity off the job and off the premises, which would include filing for bankruptcy.

Jill's situation brings up another potential claim Jill might have against XYZ. It does not appear that the employer told Jill before making its decision to reject her application that the decision was based on information provided in the credit report, nor did it provide her with information about the consumer reporting service that provided the credit report. Perhaps this is because the employer didn't refuse to hire Jill due to information in the credit report. But if it did, the employer could have liability under the Fair Credit Reporting Act for not following proper procedure when making an adverse employment decision based on a consumer report. If an employer is going to make an adverse employment decision against an applicant based on a credit report it must first give the individual notice of its intent to make this decision and identify the

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consumer reporting agency and the report, so that the individual can contact the agency and dispute the accuracy of the report.

Finally, there may have been reasons why the employer didn't hire Jill other than filing bankruptcy. So employers in such a situation would be wise to document the clearly legal reasons for not hiring the individual.

WHY DOCKING THE PAY OF EXEMPT EMPLOYEES IS ALWAYS DANGEROUS

Earlier this year, in *Camera v. Attorney General*, 458 Mass. 756 (Mass. 2011), the Massachusetts Supreme Court considered whether an employer that docked the pay of workers as punishment for causing a preventable accident acted illegally. In prohibiting such action the Court disregard the fact that the employees were only docked a modest amount, and that the workers signed a written policy agreeing to the deduction. Instead, the Court focused on the purpose of the State's Payment of Wages Law, which prohibits employers from withholding wages from exempt employees' pay.

Similarly, the court in the Southern District of Texas denied a motion this year by Power Line Services Inc. to dismiss a Fair Labor Standards Act class action alleging that the company improperly docked employee paychecks. The claim arose out of a company policy permitting it to make payroll deductions for any charges made on a corporate credit card for which an employee fails to provide an itemized receipt.

You might say that Texas and Massachusetts aren't Colorado, and that their problems (thankfully) aren't ours. But these lawsuits highlight the danger of docking an exempt employee's pay. Docking an employee's pay for loss or destruction of company property is a fairly common practice among employers. Some states, like California, Connecticut, Iowa, Massachusetts, Minnesota, New Jersey, and New York specifically prohibit deductions from employees' wages in the event of cash shortages, loss of equipment, misconduct, the destruction of company property, and various other occurrences. These restrictions apply to all employees—exempt and nonexempt alike.

In Colorado, absent a written agreement to the contrary, employers may not make deductions from an employee's wages for the cost of damage to the employer's property. For example, an employer may not typically deduct the cost of damage to a company car from an employee's wages, unless a legal, enforceable written agreement exists between the employer and employee. Deductions made pursuant to a written agreement may be taken for loans, pay advances, goods or services, and equipment or property. The agreement must be in writing, enforceable, and not in violation of the law (*e.g.*, it must not take the employee's effective wage rate below the minimum wage). Further, employers may not deduct fines from an employee's earned wages based upon employee behavior or performance. For example, an employer may not typically deduct the cost of a meal in the event that a customer does not pay the bill from the wages of a waitress.

Another concern with this practice is the risk that exempt employees may be reclassified as nonexempt when an employer docks an exempt employee's wages. The United States Department of Labor issued an opinion letter in 2006 stating that "any employer policy that requires deductions from the salaries of its exempt employees to pay for the

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costs of lost or damaged tools or equipment" constitutes an improper deduction, which invalidates the exempt status of affected employees. The Department's letter made clear that employee consent to such a deduction has no bearing on whether the deduction is proper. Although the opinion letter only addressed certain deductions based on lost or damaged equipment, employers can expect the Department to take a similar stance with respect to any deductions resulting from infractions of company policy.

Employers are best served by maintaining a policy of disciplining, rather than docking the pay of, employees who are responsible for lost equipment or a violation of company policy. Employers should consider that the potential liability for the loss of an employee's exempt status (*i.e.*, unpaid overtime, penalties and attorney fees) will likely outweigh the cost of any lost or damaged property.

TRYING TO TURN HOME INTO WORK

Greg Kuebel worked for Black and Decker, and his primary duty was to ensure that B&D's products were properly stocked, priced, and displayed in various stores within his sales area. B&D's policy, as permitted by the Fair Labor Standards Act and the Portal-to-Portal Act, was not to pay employees for normal home-to-work travel (*i.e.*, the time spent traveling from the employee's home to the office). Kuebel, though, claimed that B&D owed him compensation for his commute to work because every morning he would perform some administrative duties at home (*e.g.*, checking work emails, checking voice mails, printing and reviewing sales reports). So, Kuebel claimed that by performing work, his workday started at home and his commute time should be considered travel within the workday, which is compensable time under the FLSA. Fortunately for B&D, the 2nd Circuit Court of Appeals disagreed with Kuebel.

Initially, the Court determined that the fact that Kuebel performed some administrative tasks at home, on his own schedule, did not make his commute time compensable any more than it makes his sleep time or his dinner time compensable. A critical fact in this decision was that B&D did not require Kuebel to perform these tasks at a particular time or at his home. So, the Court held that simply because Kuebel "may have frequently chosen to perform his at-home activities immediately before and after his commutes does not mean that B&D must pay him for the first hour of those drives" as that time was, instead, normal home-to-work travel.

But while the Court dismissed Kuebel's claim for travel pay, it refused to dismiss his claim that B&D did not compensate him for the time spent working while at home. That is, Kuebel claimed that B&D was aware that he was working at home, but that it refused to compensate him for such time. After all, an employer that has actual or constructive knowledge that an employee is performing work off-the-clock is required to compensate that employee for such time, unless the employee is exempt. So, while B&D was able to convince the Court to dismiss Kuebel's travel time claim, it must now go to trial to determine whether it had constructive knowledge that Kuebel worked off the clock.

Practical Tip. The decision in *Kuebel* emphasizes the importance of not permitting employees to work off-the-clock. Further, employers should clearly instruct their nonexempt employees that they are only permitted to perform work when they are, quite simply, working and not when they are supposed to be off the clock.

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Q & A

Q. Our office was closed December 26th for Christmas and our employees received 8 hours of holiday pay. During the following workweek, one employee worked 35 hours. Now, that employee claims that we need to pay her overtime because she received more than 40 hours of pay (35 hours of work time, 8 hours of holiday pay). So, do we?

A. The Fair Labor Standards Act requires employers to pay its employees at the overtime rate of time-and-a-half when the employee works more than 40 hours in a workweek, not when the employee receives compensation for more than 40 hours. So, since the employee in question only worked 35 hours during the workweek, you are not required to pay the employee at the overtime rate for those hours over 40.

Q. Recently, an employee complained that he was sexually harassed by a co-worker. Both employees involved offered to take a polygraph test. Should we let them take those tests?

A. No. The Employee Polygraph Protection Act of 1988 prohibits most private employers from using lie-detector tests to screen job applicants or to test current employees unless they reasonably suspect that the employee was involved in a workplace theft or other incident causing economic loss to the employer. The Act authorizes civil suits by the secretary of labor as well as employees and job applicants to enforce the Act, and gives federal courts power to award legal and equitable relief. The Act also states that employers who use polygraph testing instruments as a means of threatening employees but who do not actually test employees are also in violation of the law.

Q. One of our employees is working on a political campaign after work. Unfortunately, due to the time he's spending on it, he's been sleeping during work hours. Can we fire him for working on the campaign?

A. No. C.R.S. §8-2-108 makes it unlawful for an employer to infringe upon its employees' participation in politics. Additionally, C.R.S. §24-34-402.5 makes it unlawful for an employer to terminate an employee for off-the-job, off-the-premises, legal activity. But no Federal or Colorado law prohibits an employer from terminating an employee for sleeping on the job. In fact, Colorado's unemployment statute states that employees terminated for sleeping on the job will be disqualified from benefits. So, terminate the employee for sleeping on the job, not for participating in the political campaign off the job.

Q. An employee informed us today that he hurt his back a month ago. He went to his doctor and now wants workers' compensation benefits. This is our first notice that he was injured. Can we just tell him he is too late to make a claim?

A. No. You must file a first report of injury within 10 days after having knowledge that an employee has a work-related injury, even if the employee did not comply with the four-day notice requirement. The penalty to the employee for failing to comply with that requirement is that he may lose up to one-day's compensation for each day he failed to report the injury. Further, if you previously designated a physician for treating work-related injuries and your employee received treatment elsewhere, he may also be denied reimbursement of medical expenses incurred before reporting the injury.

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