

Bad-faith appeal = more sanctions

The appeals court found that, like the underlying litigation, PSW's appeal also was groundless and brought in bad faith and warranted sanctions in the form of attorneys' fees. Thus, PSW will likely have to pay another six-figure sum to the parties it baselessly sued. This decision provides both helpful guidance and a cautionary tale for Arizona employers contemplating litigation against employees who depart for competitors.

Jill Chasson is a partner at Coppersmith Brockelman PLC in Phoenix, Arizona. She regularly works with businesses of all sizes to develop workplace policies and resolve difficult personnel issues. When disputes arise, she represents employers before administrative agencies, in arbitration proceedings, and in state and federal court. She can be reached at 602-381-5481 or jchasson@cblawyers.com. ■

PAYROLL DEDUCTIONS

Employers: Take care when recovering overpayments, debt from employees

AK AZ HI NV OR WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

There are three broad categories of deductions employers make from employee paychecks. The first, legally required deductions, comes in the form of income tax and wage garnishments. The second, deductions on employees' behalf, is withholdings for insurance premiums or charitable contributions. The third category—and the focus of this column—is deductions for the employer's benefit. Employers may seek to take deductions for overpayment, employee theft, or docking for cash shortages and breakage. When doing so, you must follow both federal and state law to avoid possible penalties and liquidated damages.

Be proactive

Whether an employer will be successful in recovering an overpayment or a loan from an employee depends in large part on its diligence in implementing and maintaining the right policies and documents. For starters, employers should consider adopting policies that address deductions from pay for overpayments, loans, or employee theft.

The policies should explain that the employer will make deductions from employees' pay under these circumstances. While not required in Arizona, a best practice is to have employees sign an acknowledgment of receipt and understanding of this policy.

If the money an employee owes is a result of a loan, the employer should require the individual to sign a promissory note outlining the terms of the loan, the mechanisms for repayment (during and following employment), and the consequences for failure to repay the loan. The promissory note should also include an authorization to deduct "payments" during employment and that the employer will deduct the full amount permitted by law from the final paycheck if the loan remains outstanding when the employee ends employment.



Cutting-Edge HR

Poll finds more employees want a set schedule than leaders think. A recent Gallup poll asked a group of chief HR officers which style of work their employees preferred—splitting or blending. Splitters prefer a set schedule where work and life are separated, and blenders prefer to blend work and life throughout the day. The HR executives thought 24% of white-collar employees would be splitters and 76% would be blenders. But Gallup's poll of employees found that 45% of white-collar employees were splitters and 55% were blenders. The HR executives thought 54% of production/front-line employees would be splitters and 46% would be blenders, but the poll of those employees found that 62% preferred being splitters and 38% preferred being blenders. Gallup said the poll results show a "blind spot" that can make employees feel less likely to be respected, less likely to be engaged, more likely to suffer burnout, and more likely to be looking for a new job.

Study finds financial worry a major reason for anxiety among Gen Z. A report from Ernst & Young LLP finds that money is a growing concern for Gen Z. "As the generation moves into our prime workforce and consumer markets, several shifts are happening simultaneously," Marcie Merriman, EY Americas cultural insights and customer strategy leader, said of the findings. "The oldest Gen Z are aging out of their parents' health care plans this year, and they are feeling the impact of financial independence amid economic uncertainty. These factors are shaping their views of work and life and what success looks like." The report says less than a third (31%) of Gen Z feel financially secure, and more than half (52%) say they are very or extremely worried about not having enough money. The study also found that more than a third of the age group said they are very or extremely stressed or worried about making the wrong choices with their money, and 69% rate their current financial situation as only fair or worse.

Survey finds most employees seeking accommodations face hurdles. A survey from AbsenceSoft, a platform for leave of absence and accommodations management, finds that 52% of employees seeking workplace accommodations are met with difficulties. The company concluded that employers need to consider a more intentional approach to workplace accommodations. Many frontline employees and managers are unaware of accommodation requirements and programs at their workplace. Having training on accommodations and increasing company awareness helps mitigate many compliance challenges employers face. Training also can create an opportunity to foster a more engaging and supportive workplace for employees of all abilities, AbsenceSoft says. ■

Deductions must comply with applicable laws

The Fair Labor Standards Act (FLSA) allows employers to deduct wage overpayments from future wages even if the deduction causes the employee's wages to fall below the minimum wage. Depending on the state the employee resides in, some state laws may conflict with the FLSA for the employee's benefit.

For example, Arizona law only allows deductions from an employee's paycheck for overpayment so long as the deductions don't cause the worker's pay to fall below Arizona's minimum wage. If the deduction for the total overpayment would cause the employee's pay to fall below the minimum wage, the employer would need to take deductions over several pay periods to comply with Arizona law.

Recovering overpayment from former employees

Recovering overpayments from former employees can be tricky. Employers may need to make swift decisions if the final paycheck hasn't been issued. It's best to contact the former employee first to request the money, especially if the overpayment can't be fully deducted from the final paycheck.

Making payment arrangements may increase the likelihood of full recovery of the overpayment. If the employee ignores attempts to collect or refuses to pay back the overpayment, the employer will need to consider the next best course of action. If the final paycheck hasn't been issued, the employer can deduct the maximum amount permitted by law. If overpayment remains, the employer may need to consider whether legal action should be taken or whether to treat the overpayment as bad debt.

In deciding whether to take legal action, employers should consider employees' resources. If an employee doesn't have resources to collect, legal action may be useless and expensive. And this past December, Arizona made it increasingly difficult to collect on a judgment or garnish wages.

A word to the wise

Employers should be prepared to address overpayment, theft, or loans and how to collect the money, especially from a departed employee. Once the overpayment is discovered, priority one is to correct the problem. This will reduce the overpayment that needs to be recovered and prevents the recurrence of recover issues.

When in doubt about what you can deduct from an employee's wages and when, contact qualified legal counsel to obtain guidance on the proper course of action.

Jodi R. Bohr is a shareholder with Tiffany & Bosco, P.A., and a contributor to the Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on counseling employers on human resources matters, litigation, and workplace investigations. She may be reached at jrb@tblaw.com or 602-255-6082. ■

EXEMPT EMPLOYEES

Is it 2019 or 2016? DOL proposes FLSA exempt salary threshold increase

AK AZ HI NV OR WA

by John David Gardiner, Bodman PLC

On August 30, 2023, the U.S. Department of Labor (DOL) announced a much-anticipated notice of proposed rulemaking (NPRM) that, if implemented, would increase the minimum salary for exemption under the Fair Labor Standards Act (FLSA) by over 50% to \$1,059 per week (the equivalent of \$55,068 per year). The agency is also proposing adding an automatic updating mechanism to the regulations. Because the salary threshold amount referenced in the NPRM is based on 2022 data (which isn't yet finalized), it's likely that the annual salary threshold would be as high as \$60,000 by the time a final rule is issued.

Current proposal

This is what we can glean now from the DOL's NPRM:

- It would increase the standard salary level to the 35th percentile of earnings of full-time salaried workers in the lowest-wage census region (currently the South), which would be \$1,059 per week (\$55,068 annually) based on current data.
- It would apply the standard salary level to Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands and increase the special salary levels for American Samoa and the motion picture industry.
- It would increase the highly compensated employee (HCE) total annual compensation requirement to the annualized weekly earnings of the 85th percentile of full-time salaried employees nationally, which would be \$143,988 per year based on current data.
- It would automatically update the earnings thresholds every three years with current wage data to maintain their effectiveness.

Under the FLSA, an employer may elect to treat an otherwise exempt employee as nonexempt. Keep in mind that you may not go the other way and elect to treat a nonexempt employee as exempt.