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Ingrate employee v. cheapskate employer: Let the bonus wars begin

On employment law

In the current economic climate, companies are seeking to reduce the costs of doing business while avoiding layoffs. With hopes of a recovery in the near future, employers don't want to fire the same employees they may soon need. So, to avoid layoffs yet still protect the bottom line, employers are increasingly relying on a number of methods — one of which is to tie payroll costs to performance.

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When the company does well, and the employee is productive, the employee shares in the wealth. However, when profits plunge, or the employee fails to satisfy certain standards, employers may decide to reduce or all-together refuse to provide the bonuses or commissions (the "variable pay") they have promised.

But when employers choose such course, they run significant risks under federal and state law. Just as an employer's decision to terminate is fraught with legal risk, the decision to reduce or refuse the payment of bonuses and commissions has its own legal risks.

Waxing and waning

Employers are increasingly turning to variable pay options to reward employees and spread the economic risks of hiring. In 2001, the percentage of workers receiving variable pay was 10.8 percent of the total workforce.

But as the economy has soured, variable pay has begun to evaporate. Some economists have estimated that the loss of variable pay alone, not including disappearing stock option income, could cost the U.S. economy as much as $40 billion in the first and second quarters of this year.

Most notably, employees for Ford Motor Co. and Texas Instruments Inc. won't receive any bonus this year, something which in boom times increased some workers' pay by as much as 10 percent to 70 percent.

With statistics like these, the number of disappointed employees will certainly be high. Practically speaking, employees who have received negligible or no bonus, in contrary to representations made to them, may be quite willing create legal trouble for their employer, particularly if they subsequently lose their job.

While this article is not intended to provide an exhaustive review of the subject, the following is a discussion of the legal options available to employees in order to secure payment for an unpaid bonus or commission, and the risks that presents to employers.

Wage Act claims

One available option for an employee is to bring an action under Maryland's Wage Payment and Collection Act (Wage Act), which considers bonuses and commissions wages when they are promised in exchange for services rendered. Thus, the Wage Act presents an enormous risk to employers who fail to pay bonuses or commissions, as it provides employees with a private cause of action and authorizes up to treble damages, costs, and attorney fees when there is no "bona fide dispute" that the "wages" claimed were due.

The reduction of bonuses or commission payments, along with the lure of a treble damage award, has significantly increased the number of reported cases brought under the Wage Act.

In the last few years, Maryland's appellate courts have been forced to decide a multitude of issues under the Wage Act; for example,

- whether a bonus which was not "promised for services," but was more in the nature of a "gratuity," was a "wage" within the meaning of the Wage Act (it is not);
- whether an employer may condition the payment of a commission upon continued employment on the date of payment, if the employee has otherwise met the requirements (it may not); and
- whether employees must prove fraud in order to demonstrate a lack of a bona fide dispute and thus be eligible to recover treble damages (they do not).

Future cases will undoubtedly deal with the issue of whether bonuses or commissions that are not based on clearly ascertainable formulas, are recoverable. Given the remedial purpose of the statute, it is unlikely that an employer who fails to set forth a bonus or commission formula, but who nevertheless promises to provide one to its employees, will be able to defeat an action brought under the Wage Act.

Please See Next Page

Other options

There are other laws that impact an employer's decision to reduce or refuse to pay a bonus or commission. For instance, the National Labor Relations Act (NLRA) may require a unionized employer to bargain with the union before discontinuing a bonus or commission payment.

The NLRA may also protect employees from discipline or termination, if they collectively protest about the loss or reduction of variable pay. This is true even if the employer is not unionized.

But what if an individual is fired for protesting the loss of a bonus? The risks to an employer are just as real. True, individual protests may not have the protection of the NLRA, but the individual employee may seek to rely on the Wage Act as the "public policy" necessary to sustain an abusive discharge claim.

Employers also risk being charged with discrimination in the administration of their bonus and commission plans. For example, an employer that bestows lavish amounts on certain employees, while neglecting others, runs the risk of a Title VII employment discrimination claim or an Equal Pay Act claim.

To reduce this risk, employers should be prepared to state a legitimate, nondiscriminatory reason why certain employees are being paid certain amounts while others are not.

For instance, a legitimate reason to fail to pay a bonus could be poor sales performance. But this may not eliminate the risk altogether, as potential litigants may blame their employer for assigning them to a disfavored sales route, product line, or otherwise making it impossible to achieve performance or productivity standards.

The payment of commissions itself may present a risk to an employer under the Fair Labor Standards Act (FLSA). One of the biggest fallacies among employers and employees alike is that payment to employees of strict commission somehow exempts that employee from the overtime requirements of the FLSA. Actually, the issue is more complicated than that, as it depends what the employee is selling, and on whether the employee is guaranteed a certain "draw." An employee who is not exempt under the FLSA may also have a right to have bonuses and commissions factored into his regular rate of pay, for purposes of calculating overtime.

The bottom line: FLSA liability can really come as a surprise to an employer, and can be ruinous for a business. It has been said that nine out of ten employers fail to comply with the FLSA, in one way or another. According to a recent article in Lawyer's Weekly, plaintiff employment lawyers increasingly view the FLSA as the action to bring when no other action can be brought.

Conclusion

It should come as no surprise to an employer, when, after a promised bonus or commission is reduced or not paid, an employee is willing to sue. After all, the employment relationship is itself a commercial relationship (albeit one in which the parties are not exactly equal). Employers should take heed that variable pay options — which appear to spread economic risks to employees — may only compound their legal risks.

Employers who seek to reduce those risks should draft and administer a variable pay program fairly and appropriately. To further reduce their risks, employers should contact an attorney with experience in providing risk management services to employers.

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