Fenwick Employment Brief

November 17, 2009
Daniel J. McCoy Editor 650.335.7897
Saudra L.M. Riley Editor 650.335.7170

Fenwick
FENWICK & WEST LLP

FORFEITURE OF RESTRICTED STOCK PRIOR TO VESTING NOT VIOLATIVE OF CALIFORNIA LABOR CODE

The California Supreme Court recently upheld the forfeiture of a departing employee's restricted stock and the money used to purchase it, rejecting the employee's claim it amounted to an unlawful forfeiture of wages. In *Schachter v. Citigroup*, plaintiff David Schachter sued his former employer Citigroup, alleging the forfeiture provisions of its voluntary incentive compensation plan ("Plan") violated the California Labor Code.

Through the Plan, Citigroup allowed employees to elect to receive up to 25% of their total compensation in the form of shares of restricted stock. Employees could purchase the stock at a discount on its then-current fair market price; the stock could not be sold or transferred for two years; however, employees held voting rights and could receive dividends during that time. Further, the shares were subject to a two-year vesting period, such that employees who resigned or were terminated for cause forfeited all unvested shares of restricted stock and the money used to purchase them.

Schachter participated in the Plan by directing 5% of his wages to purchase shares of restricted stock during select periods. He resigned before the shares vested and thus forfeited the stock and the purchase price. Schachter sued Citigroup, claiming he should have been paid, upon separation, the purchase price. The trial court dismissed the suit and an appellate court affirmed (reported in the 02/08/08 FEB). On review before the California Supreme Court, Schachter's claim failed again.

First, the court found Citigroup actually paid employees the wages they designated for purchase of restricted stock. The court found no meaningful distinction between the at-issue transaction and a multi-step transaction whereby Schachter would first receive his wages in full and then use them to purchase restricted stock (other than the significant tax benefit Schachter enjoyed as a result of the pre-tax deferral). Moreover, the court concluded that, at most, Citigroup's omission of the interim step of delivering the money to Schachter prior to the stock purchase amounted to an authorized – and lawful – deduction from wages.

Second, the Court found that, even if Schachter was paid, in part, in shares of restricted stock, the wages were not unlawfully deferred or withheld. The Labor Code does not limit an employee's right to negotiate for compensation packages in many forms, potentially including a conditional future interest in a valuable asset. Thus, Schachter received something of value: the then-present right to direct the vote of his shares, the potential to receive regular dividends, and a conditional future interest in a public company's shares.

Finally, even under Schachter's characterization of the Plan, he did not earn the money or the shares of restricted stock. The Plan expressly required continued employment through the vesting period, as is customary of most incentive plans. Assuming, as Schachter contended, that he had not been paid the funds used to purchase the shares of restricted stock, "then he necessarily agreed his compensation would consist of cash payments and a retention-based conditional interest in the shares, with the latter being earned only if he remained with [Citigroup] for two years." Schachter resigned before the vesting dates, and therefore never earned the shares or the funds used to purchase them. Thus, he did not forfeit any earned wages, and his claim was properly dismissed.

This decision affirms an employer's ability to place reasonable restrictions, including vesting and forfeiture, on incentive compensation and underscores the importance of documenting such restrictions.

NEW FMLA LEAVE ENTITLEMENTS

On October 28, 2009, President Obama signed into law legislation that expands Family and Medical Leave Act ("FMLA") protections related to "qualifying exigency" and military caregiver leave. The law does the following:

- **Expanded Eligibility for "Qualifying Exigency" Leave:** Under the FMLA, employers must allow eligible employees to take up to 12 workweeks of unpaid, job-protected leave during the 12-month designated period for any "qualifying exigency" due to the employee's spouse, child, or parent being on or being called to activity duty (or impending notice of same). Previously, "qualifying exigency"

leave had been limited to families of members of the National Guard and Reserves, but the law extends the entitlement to families of all active duty military. The law also eliminated any requirement that the call to duty (or notice of impending call or order) be related to contingency operations. Thus, covered active duty includes instances when members of the military, whether regular or reserve, are deployed to any foreign country.

- **Expanded Military Caregiver Leave:** Under the FMLA, employers must allow eligible employees to take up to 26 workweeks of unpaid, job-protected leave during a single 12-month period to care for a covered servicemember, who is the employee's spouse, child, parent, or next of kin, with a serious illness or injury. The law extends this protection to veterans if the veteran's illness or injury qualifies under the law and the veteran was a member of the Armed Forces at any time during the five-year period immediately prior to undergoing the medical treatment, recuperation, or therapy.

- **Expanded Definition of Covered "Serious Injury or Illness":** The law expands this definition to include conditions (1) that existed prior to, but were aggravated by, the service member's active duty or (2) that manifested before or after the member became a veteran.

NEWSBITES

Ninth Circuit Approves Shifting Base Pay Rates Based On Schedule

In *Parth v. Pomona Valley Med Ctr*, Louise Parth sued her employer for alleged Fair Labor Standards Act ("FLSA") violations arising from the defendant's practice of paying different pay rates for different shifts. Pomona implemented a voluntary, alternative work schedule with 12-hour shifts for its nurses, and Parth elected the 12-hour shift schedule. The 12-hour shift was designed to give nurses more flexibility (in Parth's case, the 12-hour shifts allowed her to pick up extra shifts, care for her mother and pursue a second job).

Nurses working the 12-hour shifts were paid a lower base pay rate than those working the 8-hour shifts (although, when overtime was taken into account for those on 12-hour shifts, both groups essentially received the same total pay). Parth challenged the pay differential as violative of the FLSA on several grounds, but the Ninth Circuit Court of Appeals rejected all of them. The court concluded that Pomona's pay practices were "perfectly reasonable, were requested by the nurses . . ., and [were] the result of a bargained-for exchange between the hospital and [the nurses' union]." Specifically, the court recognized the general rule that employers are free to establish the regular (non-overtime) rate of pay in any manner they see fit so long as statutory minimum wage rates are respected, and held that Pomona lawfully altered the base pay rate to provide nurses with a desired schedule. The court also reaffirmed the principle that employees may be paid different rates for different shifts.

This common sense decision provides welcome clarity about the permissibility of adjusting base pay rates in connection with alternative work schedules.

Singular Failure to Allow Restroom Break Violated FEHA Disability Protections

When Albertsons failed to allow its employee, A.M., to use the restroom facilities, causing her to wet herself while working at the checkout stand, A.M. successfully sued Albertsons in a California court for failure to accommodate her disability and recovered $200,000 in damages. A.M.'s cancer treatments resulted in dry mouth, causing her to drink large amounts of fluids and to use the restroom frequently. Albertsons accommodated A.M.'s needs for over a year by allowing her to drink at her station and covering for her during restroom breaks. However, one evening a new manager, unaware of the arrangement, refused to relieve A.M. from duty, resulting in A.M. wetting herself at the checkstand.

On appeal, Albertsons argued it had not failed to accommodate A.M. because she did not inform the new manager of her arrangement, and the store had successfully accommodated A.M.'s conditions on all other occasions. The court rejected both arguments, holding that the employee had no ongoing duty to inform management of the accommodation, and that a single failure to accommodate, which "can have tragic consequences for an employee who is not accommodated," may violate the Fair Employment and Housing Act's disability protections.

Employer Blocks Retaliation Claim and Overcomes "Cat's Paw" Doctrine

In *Long v. Teachers' Retirement System of Illinois*, the Seventh Circuit (covering Illinois and other Midwest states), affirmed the dismissal of a former payroll clerk's claim that her employer retaliated against her for taking intermittent FMLA leave. In doing so, the court relied heavily on the fact that warnings about excessive absenteeism, and its impact of Long's performance and her co-workers' morale, predated any intermittent leave and the final decision maker, the executive director, based his decision on member complaints and misdirected checks. The court rejected Long's claim that her supervisor's alleged bias tainted the executive director's decision and should have been imputed to him as a matter of law (the so-called "Cat's Paw Doctrine"). The court found that the executive director consulted multiple sources in addition to the supervisor in reaching the decision and there was no evidence the supervisor exerted particular influence over the decision.

Arizona Supreme Court Rules Metadata Subject to a Public Records Request

The Arizona Supreme Court held in *Lake v. City of Phoenix* that its public records laws apply to metadata – hidden data embedded in electronic records that may reflect creation and revisions dates, as well as version authors. A Washington court reached a similar result last year, finding that metadata in an email sent to a city's deputy attorney was a public record. (*O'Neill v. City of Shoreline*, Wa. Ct. App.) However, unlike Arizona's law, the Washington law specifically states that data is subject to disclosure. That case is now pending before the Washington Supreme Court. Employers who submit documents electronically to a state or federal agency (for example, the EEOC) should be aware that the agency may be compelled to disclose metadata in those documents.

Scheduled Expiration of COBRA Subsidy

The American Recovery and Reinvestment Act of 2009 provides that otherwise COBRA-eligible employees who are involuntarily terminated between 9/1/08 and 12/31/09 (and their qualified beneficiaries) will be eligible for a COBRA premium subsidy for up to 9 months. However, many individuals who are involuntarily terminated in December 2009 will actually not be eligible for the subsidy.

Not only must an individual be involuntarily terminated in December, his or her loss of coverage (and subsequent eligibility for COBRA) must also take place on or before December 31. Many employers maintain group health plans that provide coverage in monthly increments, such that when such a group health plan purchases coverage for December 2009, a plan participant who is terminated in the middle of the month would not lose coverage until January 1, 2010. As a result, the participant would not be eligible for the subsidy. Employers should review their group health plans, and if plan coverage is determined on a monthly, prospective basis, they should ensure that employees terminated in December 2009 are not led to believe that they will be eligible for the COBRA subsidy.