Wimberly Lawson Seale Wright & Daves, PLLC

Attorneys & Counselors At Law

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DRUG TEST FRAUD CAUSES STATES AND EMPLOYERS TO RESPOND

According to published reports, an internet search using the phrase "Beat A Drug Test" yields links to over 60,000 web sites offering products ranging from chemicals to foil a urine test, through sham-poos for hair tests, to clean human or synthetic urine for outright substitution. Web sites also post information about which companies are testing and how. Many states have responded to these developments by passing laws that target the purchaser who buys or uses the device, the retailer who sells it, and the manufacturer who makes it. Although the state laws are not identical, states having such laws include Illinois, Kentucky, Arkansas, Maryland, New Jersey, North Carolina, Virginia, Oregon, South Carolina, Pennsylvania, Louisiana, Texas, and Nebraska.

The federal government has also recently amended its rules in drug testing regulations which the U.S. Department of Transportation applies to some seven million employees. The new rules

that went into effect on November 1, 2004, set stricter cut-off levels for dilution and require testing for substitution and adulteration.

Employers can receive guidance by visiting the web site of the Institute for a Drug Free Workplace, www.drugfreeworkplace.org or the American Council on Drug Education, http://www.acde.org, which offer advice to employers. Such advice includes setting a policy on workplace drug use which states consequences for test fraud, and making sure employees know about applicable state laws which penalize drug test fraud.

FALSE STATEMENT OF "POSITION IS BEING ELIMINATED" GETS EMPLOYER IN TROUBLE

Many employers feel that a relatively safe and standard way to terminate an employee for various reasons, is to tell him or her that your "position is being eliminated." If this reason is false, such an explanation to the employee can get an employer in a lot of legal trouble, as shown in the recent case of Miller v. Eby Realty Group, 95 FEP Cases 65 (C.A. 10, 2005).

In Eby, the employer told the plaintiff that his position was being eliminated, and that his duties would be assumed by one of the owners. The next day, however, the employer hired another person 24 years younger to roughly the same position.

The plaintiff's theory of the case was that Eby's proffered reasons for his termination were a pretext for age discrimination. Pretext can exist when an employer does not honestly represent its reasons for terminating an employee. The U.S. Supreme Court has explained that "such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." The employer testified at trial that it had not decided exactly what they were going to do when the plaintiff was terminated, and that the plaintiff must have been lying about what he was told because the plaintiff's testimony as to what happened was objectively unreasonable. The appeals court found, however, that the jury was not required to accept either party's view of the evidence, so it could have accepted the plaintiff's explanation of what he was told and what happened. The appeals court went on to state that the employer is in the best position to explain its actions, and when it chooses to lie

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Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively.

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Inside.....

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Be Sure to "Save the Date" of October 13 and 14, 2005 for our Annual Labor & Employment Law Conference about its reasons for terminating an employee, it runs the risk that "the lie will lead the jury to draw an adverse inference." This is true even when there are possible legitimate explanations for the lie. "The fact that a lie could have multiple explanations, some of them well-intentioned, cannot and should not foreclose the finder of fact, at the hearing witness testimony and assessing the evidence as a whole, and deciding that the real motivation for lying was not innocent, but discriminatory."

Editor's Note - *This case vividly demonstrates the danger of giving an employee false or inaccurate reasons for a disciplinary action. Such statements not only risk the court allowing such a fact pattern to go to a jury for decision, but also some judges may not allow the introduction of other reasons into evidence to explain the disciplinary action. For these reasons, in a sensitive situation, the exact wording on the disciplinary or termination notice is extremely important.*

WHAT HAPPENS WHEN AN EMPLOYER CONDUCTS A BACKGROUND CHECK ON AN EMPLOYEE WHO HAS FILED AN EEOC CHARGE

An interesting fact pattern arose in Newton v. Meijer Stores Limited Partnership, 95 FEP Cases 123 (N.D. Ohio, 2004), where an employer conducted a criminal background check after the plaintiff filed an EEOC charge and requested to see his personnel file. The employee's job application asked the question whether he had ever been convicted of a crime, and also included a statement that any false statement or omission on the application would be sufficient cause for dismissal. The application further authorized the employer to use its personnel or any investigatory agency to investigate his employment record, education, criminal conviction record and financial record.

The employee was hired, and later filed an EEOC charge, and also requested to review his personnel file. When the request to review the file went to the corporate office, the supervisor noticed that his application indicated he had not been convicted of a crime, but the supervisor had been previously informed that the plaintiff had been convicted of a crime, so he contacted headquarters to conduct a criminal conviction record check. The record check revealed a history of criminal convictions, and the plaintiff was terminated. The persons making the termination decision, testified that the plaintiff was terminated solely for falsifying his application, and that at the time they decided to terminate him, they were not aware of or had no recollection that he had filed an EEOC charge.

In granting summary judgment for the employer, the court first reviewed the issue of whether the investigation into the plaintiff's criminal background is actionable, and found that since the investigation did not materially change the terms and conditions of his employment, it did not constitute an adverse employment action and thus was not actionable.

The court then examined whether the termination itself was actionable, noting that in order for there to be a retaliation case, those individuals who made the decision to take the adverse employment action must know or be aware of the plaintiff's protected activity, which in this case was a filing of a EEOC charge. The court found no admissible evidence showing that the individuals who made the decision to terminate knew of his EEOC charge when they made the decision to terminate, and granted summary judgment. The court further indicated that the employer articulated a legitimate, non-discriminatory reason for his termination - the falsification of his application.

Editor's Note - This case deals with an extremely sensitive fact pattern, where an employer conducts a background check after the claimant has filed a discrimination charge, and then terminates the claimant for falsification of information. The employer should first make sure that it has complied with all of the requirements of the Fair Credit Reporting Act, which include not only prior notice and consent to conduct the background investigation where conducted by an outside agency, but also the providing of the report prior to acting on the results, and in this case, the termination. Second, if the individuals who made the decision to terminate had known of the EEOC charge, the question remains whether they could have still lawfully terminated the claimant for falsification of his application. This question is extremely legally sensitive and advise of counsel is recommended.

BULLETS TO DODGE UNDER NEW WHITE-COLLAR EXEMPTIONS

The Atlanta newspapers (Fulton County Daily Report) recently interviewed Atlanta Wimberly and Lawson partner Larry Stine, as to his interpretation of some of the controversial aspects of the new white-collar exemption regulations. Larry is co-author, along with Atlanta partner Les Schneider, of the book "Wage and Hour Law: Compliance and Practice" published by West Publishing and served as Regional Counsel for the U.S. Department of Labor for many years.

It is well-established that to avoid the overtime requirement, employees must not only fall within an exempt category, but they must also be paid on a "salary basis" with a salary of at least $455 per week. This principle requires a fixed weekly salary that does not depend on how many hours the employee works, or the amount of his or her production (there are exceptions that allow exempt employees to be paid a salary plus extra money in certain circumstances). This means that if salaried workers are late or miss a portion of the day, salaried workers cannot be docked even if they do not work their required hours, because partial-day deductions destroy the

KNOW YOUR ATTORNEY

MICHAEL WARD JONES is a Senior Associate in the Nashville, Tennessee office of the firm, which he joined in 2001. His law practice includes an emphasis in workers' compensation, general litigation litigation, as well as insurance law. He received his Bachelor of Arts degree from Rockhurst College and his law degree from the University of Kansas. Michael is currently a Rule 31 Listed General Civil Mediator, Tennessee Supreme Court. He is a member of the Nashville and Tennessee Bar Associations and a member of the Mid-South Workers' Compensation Association.

salary basis required for the overtime exemption (there are exceptions whereby a salaried worker in some circumstances may have his accrued paid time off docked).

Larry points out that before the new regulations, some courts ruled that if an employer had a policy that allowed for improper deductions, the employer had the possibility of losing the overtime exemption for every exempt employee subject to that deduction policy, although the deduction never was taken. He points out that the new regulations allow a window of correction for truly isolated and inadvertent errors in payroll deductions. However, this new regulation also presents a trap for employers, because the window of correction policy has to be clearly communicated to the employees before you can use it. Plaintiffs in wage hour cases are going to find an awful lot of the employers who have not communicated the window of correction policy at all. If it is not in writing, it is going to be real hard to prove that it was clearly communicated. These so called "safe harbor" rules for the window of correction also must contain a complaint mechanism. The new provision in subsections 541.603(b) and (d) state that an employer that has an "actual practice of making improper deductions" will lose the exemption only for "the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions." And, if the employer has a "clearly communicated policy" that prohibits improper pay deductions, and has a complaint mechanism, reimburses employees for improper deductions, and makes a good-faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

The Department of Labor on its web site has posted a model payment policy that would qualify as a required policy to meet the safe harbor for the window of correction. www.dol.gov/esa/regs/compliance/whd/fairpay/modelpolicy. The policy generally summarizes the law (although the law may vary if the employer is located in a state whose laws differ from the federal law), and states in part as follows:

Circumstances in Which the Employer May Make Deductions from Pay

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions (see Company Policy on penalties for workplace conduct rule infractions). Also, an employer is not required to pay the full salary in the initial or terminal week of employment; for penalties imposed in good faith for infractions of safety rules of major significance, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. In these circumstances, either partial day or full day deductions may be made.

Company Policy

It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all company managers from making any improper deductions from the salaries of exempt employees. We want employees to be aware of this policy and that the company does not allow deductions that violate the FLSA.

What to Do If an Improper Deduction Occurs

If you believe that an improper deduction has been made to your salary, you should immediately report this information to your direct supervisor, or to [assert alternative complaint mechanism(s)].

Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made.

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CONFLICTING BENEFIT PLAN DOCUMENTS RESOLVED IN FAVOR OF EMPLOYEE

The claimant in a recent case successfully won eligibility in his employer's retirement program, despite the fact that the Summary Plan Description (SPD) clearly disallowed the employee to receive such benefits. Bergt v. Retirement Plan for Pilots, 293 F.3d 1139 (C.A. 9, 2002). The court looked to how other courts dealt with such conflicts, and found that other courts have ruled that it is unfair to have employees bear the burden of a conflicting SPD and plan master documents. Thus, most courts resolve the issue by deciding that the provision more favorable to the employee should control. In adopting such a rule, the court stated "The law should provide as strong an incentive as possible for employers to write the SPDs so that they are consistent with the ERISA plan master documents, a relatively simple task."

SAVE THE DATE
Labor & Employment Law Conference
October 13 - 14, 2005
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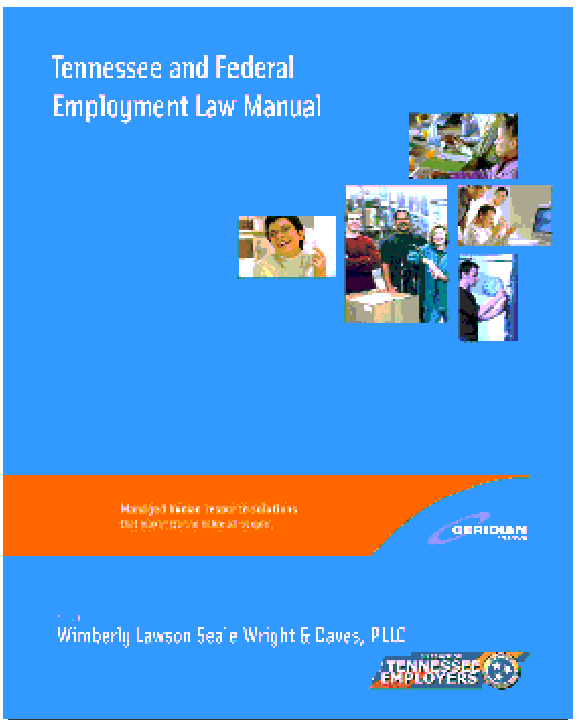

Prepared by the labor and employment law firm of Wimberly Lawson Seale Wright & Daves, PLLC, a firm listed in the Bar Register of Preeminent Lawyers.

The 2005 manual boasts over 400 pages of accurate, up-to-date Tennessee and Federal information to help you find immediate answers to your most troubling HR questions.

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LABOR & EMPLOYMENT LAW CONFERENCE

OCTOBER 13 – 14, 2005

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