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EMPLOYERS AND THE LAW

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“PROMISING ILLUSORY BENEFITS IS A RISKY RECRUITING STRATEGY.”

Employers commonly lure prospective employees from competitors with predictions of pay increases, bonuses, promotional opportunities or other benefits. Although such representations may help swell the ranks of employees, employers should monitor their use. Employees making difficult decisions about career options will remember all such representations and expect them to be accurate. Employers cannot belatedly retreat from such these statements on the grounds they were estimates, or optimistic predictions. As made clear in a recent decision by the Court of Appeal for the Fifth District, a representation

regarding prospective compensation is, as a matter of law, a guarantee, and must be honored.

The facts of the Fifth District case, Helmer v. Bingham Toyota Isuzu (2005), illustrate the pitfalls employers face when discussing compensation with prospective employees. The employer, a Toyota dealership located in Fresno County, had a job opening in its parts department. One of the applicants for the position was Kevin Helmer, an employee at another dealership. Prior to taking the position, Helmer discussed his prospective compensation with a manager at the Toyota dealership. Helmer said he would not switch jobs unless the new position paid at least \$5,700 a month. The manager allegedly explained that Helmer would have received \$70,000 had he been employed with the dealership in the preceding nine months. Based upon

this representation, Helmer agreed to take the job.

During the next few months, Helmer's pay ranged between \$4,400 and \$5,100 per month. He complained to the controller of the company, who told him that the \$70,000 figure was inaccurate. Shortly thereafter, Helmer was terminated. He was unable to obtain comparable employment and, instead, took a position paying \$3,200 per month.

Helmer then sued, claiming the dealership broke its promise regarding pay for his position. The jury agreed with Helmer, awarding him \$500,000 for back pay and lost future wages, and \$1.5 million in punitive damages.

On appeal, the dealership argued that the manager's statements regarding compensation were not actionable because they constituted only “an opinion” as to potential commission earnings. It further argued that any

promise regarding potential earnings was too vague and indefinite to enforce.

The Fifth District strongly disagreed, holding that because the manager was apparently authorized to hire and fire and negotiate salaries, his "opinion" regarding the pay Helmer would have earned had he been employed at the dealership constituted a statement of fact. The Court further ruled that although a fraud claim cannot be based upon a promise of an unspecified salary increase, the manager's statements were enforceable because they referenced a specific dollar amount. It did not matter to the Court that Helmer understood that because his compensation was commission based, that it would vary from month to month. According to the Court, the dealership's manager likewise understood this fact and should have taken it into account when making statements about likely earnings.

Without explanation, the Court chose to ignore the fact that on the day Helmer started the new position, the

dealership provided Helmer a written summary of his actual salary plan. The court noted only that the manager included the summary in the packet of other papers Helmer was asked to sign as a new employee.

In light of this opinion, employers throughout California should immediately take stock of their current hiring and recruiting practices to ensure they avoid making misrepresentations regarding wages or potential earnings. Where recruiters and hiring managers are unfamiliar with an employer's compensation scheme, they should refrain from making any estimates whatsoever on employee income. Instead, all questions regarding compensation should be delegated to the person capable of accurately providing uninflated, accurate answers. Prior to formally extending an offer of employment, the employer should document his or her discussions with the applicant on compensation issues, should confirm the applicant's understanding of the compensation scheme and should confirm

the applicant is under no illusions about potential earnings.

In light of the time and cost involved in hiring and recruiting, it is always tempting to overstate the benefits of any compensation scheme, especially where earning levels depend upon commissions or other variable factors. As the Court makes clear in *Helmer v. Bingham*, however, such overstatements are illegal and will subject an employer to lawsuits for fraud and other claims. Where the employer fails to provide accurate information about the terms and conditions of employment, the courts expect the employer --- not the prospective employee --- to pay the price for any misunderstanding.

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