Lose Money in the Financial Market? Maybe You Didn't Get the Best Advice

By William R. Hart, Esq. & Richard P. Gerber, Esq.

Have you ever made a securities investment on the advice of a broker or investment advisor and then questioned whether their advice was the most suitable for your personal financial situation?

There are two requirements that a broker should meet in order to give their clients the best possible advice. The broker must be familiar

with not only their client's individual financial situation but their investment objectives as well. Every professional broker should engage in an interactive dialogue with the client to determine their annual income and net worth, investment experience, capacity to understand the risks of any investment, their financial ability to absorb a loss and their specific investment objectives.

Failure to perform a suitability analysis can be expensive for the client. For example, the client's account might be subject to frequent in-and-out high risk option trading, resulting in excessive commissions being generated from the large number of trades. Although option trading may be suitable for the aggressive investor with a high risk tolerance, it would be unsuitable for an inexperienced investor with a lower risk tolerance.

Suitability issues arise when a broker recommends high risk, high commission, investment products such as limited partnerships, commodity futures, or initial public offerings, knowing (or not knowing) that their client is a conservative investor who needs to preserve principal coupled with moderate income growth potential.

When an unsuitable security is sold to an investor, both the broker and the brokerage firm could face potential liability. Failing to identify an investor's investment profile and objectives, constitutes a breach of fiduciary duty and breach of duty of care and loyalty by the broker. The broker's employer could face potential liability for failing to adequately train and supervise that broker.

An investor may be able to recover damages if they are the victim of unsuitable trading. The "Out-of Pocket or Trading Losses Theory" recognize that damage to the client is more than just commissions paid, but also constitutes loss of the value of the account. The "Loss of Bargain Theory" permits recovery of the value of the account, had it been properly managed.

Any investor who is concerned that one or more of their broker recommended investments were not suitable based upon factors such as risk tolerance and financial objectives, may have recourse against their broker, supervisor and the brokerage firm.

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If you or your business have been negatively impacted by the economic crisis, the attorneys at Hart, King & Coldren are available to assist you. Please call 714-432-8700 for a consultation or visit us online at www.hkclaw.com.

The Expanded Liability of Failing To Do Lunch

By Robert G. Williamson, Jr., Esq.

While statutory requirements vary from state to state, wage and hour laws require that minimum break and meal times are to be provided to non-exempt hourly employees. In California, employers must provide non-exempt employees who work for a period at least five hours per day, with a meal period of not less than 30 minutes. If employees work 10 hours or more, a second meal period of not less than 30 minutes must be scheduled. Amazingly, there is still controversy over something as simple as whether employees received a legal "meal period," because the potential liability - one hour of pay per employee per day - can be significant. Unfortunately, a recent court decision has made this potential liability of even greater concern to employers.

Prior to May 2007, courts considered the meal period "penalty" just that, a penalty limited to payment at the regular hourly rate without the potential of affecting other wage or liability concerns and with liability cut off at one year. But in May 2007, the California Supreme Court determined that the meal period "premium" is actually a wage and not a penalty. Consequently, employers must add likely penalties for underpayment of wages, prejudgment interest and a statute of limitations of up to four years.

Unfortunately, the California State courts give mixed signals on whether the employer or employee is responsible for ensuring employees are provided a meal period. One court has suggested it is the employer's obligation to ensure the meal period is provided. Another found that it is sufficient if the employer did not forbid or prevent meal periods. The federal courts have determined that the employer's only obligation in this regard is to make the meal period available.

The lesson here for California employers, given the potential liability exposure, is to implement policies and procedures that ensure that non-exempt employees are provided with at least (assuming an eight hour shift) a 30 minute meal period and that they actually "do lunch."

Robert G. Williamson, a partner with Hart, King & Coldren, represents mobilehome park owners and managers with their various legal issues. He may be reached at 714-432-8700 or rwilliamson@hkclaw.com.

Investigation of Sexual Harassment Claims

By Jock Marlo, Esq.

A recent United States Supreme Court decision, Crawford v. Metropolitan Government of Nashville and Davidson County, has clearly defined what an employer may or may not do during its investigation of a sexual harassment claim by an employee.

In the Crawford case, the Court held that an employee who answers questions during the employer's internal investigation of such claims is protected against retaliation by the employer. In this case, Employee No. 2 was being asked questions about Employee No. 1, who she claimed had sexually harassed her. This was the first time Employee No. 2 had made this allegation, and it was only revealed during her response to questions asked by the employer. Soon thereafter, Employee No. 2 was fired for embezzlement. She sued the employer for wrongful termination, alleging that the employer was retaliating against her for reporting Employee No. 1's behavior.

The Court held that the anti-retaliation protection of the applicable employment law, applies to an employee who speaks out about discrimination, not on their own initiative, but in answering questions during an employer's internal investigation.

This case is a testament to the important procedural safeguards an employer must undertake in conducting any investigation into sexual harassment claims by an employee.

For more information on employment issues, please call Jock Marlo at 714-432-8700 or email jmarlo@hkclaw.com.

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