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A Win for New York Employers (If They Have Proper Employment Agreements)

By Ari Karen

New York employers have been on edge since a federal court interpreting New York law ruled that employers could not deduct wages from an employee's pay once those wages were considered "earned." The court also ruled that absent specific agreements to the contrary, an employee's commission would be considered "earned" at the earliest opportunity when a substantial amount of the work entitling the employee to commission was completed. Hence, upon securing a revocable order for goods, a salesperson would be entitled to an inalienable right to commission from the sale, even if the sale was never actually consummated. Furthermore, no deductions from the sale would be permitted, meaning that expenses associated with advertising, lead fees, and similar costs could not be subtracted from the earned commission.

The federal court's ruling, however, was certified to the New York Court of Appeals for final determination. In ruling that New York's laws prohibiting deductions from wages applied to all employees -- including executives -- the court clarified that unless specifically exempted from a labor law, the statutory wage-payment protections applied to all employees, regardless of their rank or position. Furthermore, the court ruled that deductions for expenses associated with business activities and/or uncollected billings, or other lost revenue or costs, are not permissible once an employee's wages are "earned." The court also ruled that as soon as a client made a commitment to purchase the employer's services, the right to commission was deemed earned, thus triggering the prohibitions on deductions from compensation. Accordingly, without an agreement defining when commission was earned, the employer risked substantial liabilities for common deductions from commission pay.

In a silver lining for employers, the court ruled, however, that deductions were permissible with respect to wages that were not "earned." The court expressly ruled that nothing in the labor laws prohibited employers from entering into agreements with employees defining when commission was earned. Thus, by properly defining when the agreement was earned the employer may be permitted to deduct various expenses and charge-backs from the commission. While not mentioned in the Court's opinion, any such definition would certainly need to comply with other New York laws, which prohibit forfeitures of pay for reasons in violation of public policy (such as termination of employment absolving the need to pay commission). Furthermore, the court ruled that implied agreements established by an extended course of dealing could also be the basis for determining that commissions were not earned. Thus, under the right circumstances, if the parties' historical relationship established a mutual understanding as to when commission was earned, deductions prior to the earning of the commission were permissible.

The decision by the New York court should not be viewed as reversing the federal court's decision, but rather as refining it. The unequivocal point of this decision is to instruct employers that they have the ability to control when and how commissions can be calculated. As long as a contract establishes when the commission has been earned, the employer is free to implement any deductions and/or withholdings prior to the point the commission rights have vested. Moreover, an employer may be able to create a contractual agreement retroactively, based upon the historical understandings as illustrated by the course of conduct with its employees. Hence, even employers with poor contracts or no contracts can take advantage of their historical practices and confirm those understandings in a proper written agreement. In sum, employers who choose to develop and implement proper contracts are free to take those measures they perceive to be best suited for their business, without the risk of liability. On the other hand, employers who do not develop and maintain proper contracts risk thousands of dollars in damages for engaging in practices that could have been lawful if they had been reduced to a proper written agreement.

Venable LLP Labor & Employment Attorney Patrick Clancy Hosts "Employment Law Compliance: Disciplining or Terminating a Workers' Comp Claimant" Teleseminar

August 25, 2008
1:00pm - 2:30pm EST

Whether due to legitimate injury or goldbricking, there is no debating that employee absences cost employers in lost productivity, missed deadlines, supervisor stress and tension among co-workers who are required to pick up the slack. Often an employer’s plan to discipline or discharge is put on hold when the employee goes out on leave. How can employers deal with these situations? This teleconference will review when you may legally discharge or layoff an employee who is on leave due to a compensable workplace injury or other reason. As a result of this teleconference, you will understand the restrictions imposed on discipline and discharge of employees while on worker’s compensation, as well as how those restrictions may be affected by other statutes such as the Americans With Disabilities Act and the Family Medical and Leave Act.

Sponsored by Lorman Education Services, this teleconference is geared towards human resource managers, attorneys, benefits managers, safety directors, compliance officers, insurance professionals, business owners and managers, payroll professionals, accountants and controllers.

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Ron Taylor Named Fellow of the College of Labor and Employment Lawyers

On June 13, 2008, the Governors of the College of Labor and Employment Lawyers elected Ron Taylor as a Fellow of the College. The title distinguishes Mr. Taylor as an outstanding professional who has made a sustained contribution to labor and employment law. Mr. Taylor met the standards of integrity, professionalism and character to be awarded this honor.

The College of Labor and Employment Lawyers, headquartered in Washington, D.C., was founded in 1995 on the 60th anniversary of the National Labor Relations Board and the 30th anniversary of Title VII and Executive Order 11246. It is a non -profit professional association honoring the leading lawyers nationwide in the practice of labor and employment law.