COMMISSION PLANS AND CHARGEBACKS

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Background: Employers often run into problems when they attempt to pay their employees using a commission-based system. Complicating the issue further is when a company has several branches or offices in various states, which begs the question of which states' wage and hour laws regarding commission payments should be applied.

Employers' commission plans quite often do not comply with state law governing when commissions must be paid to an employee during the course of employment, after an employee is terminated or voluntarily leaves.

For example, in New York, unless there is a contract otherwise which provides for greater salesperson protections, a "commission salesman" is required to be paid his/her commissions the last day of the month following the month in which the commissions are earned, at the latest. Whether or not an individual is a "commission salesman" under the law is a very important determination. Moreover, in New York, if employment is terminated, the employer is required to pay any earned commissions, no later than the regular payday for the pay period during which the termination occurred.

Penalties: Due to absent or poorly drafted commission plans, disputes often arise between employees and employers in connection with how much and when commissions are earned. The penalties to employers can be severe, including an additional 25% of the amount owed to the employee, the employee's attorneys' fees for recovering the payment, as well as the charge of a misdemeanor for the first offense and felony charges for subsequent offenses!

Chargebacks Against Advanced Commissions: Generally speaking, an "advance" or "draw" may not be considered a wage under various states' laws because all conditions for performance have not been satisfied. For example, a company's pay plan may provide that although commissions would be paid at the time of the sale, the commissions are not in fact "earned" at that time. Therefore, if a company advances an employee a sum of money, the company may be entitled to "charge back" such employee if certain conditions are not ultimately satisfied, such as the sale on which the commission was earned not going through.

It is a good idea for employers to have an attorney draft and/or review its commission plan and for an employee to speak with a qualified employment attorney if there is a potential dispute regarding an earned but unpaid commission.

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