

D&G Legal Development Alert: Employment

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NEW YORK'S HIGHEST COURT PERMITS DEDUCTIONS OF BUSINESS COSTS IN CALCULATING COMMISSIONS

In *Pachter v. Bernard Hodes Group*, the Court of Appeals, New York's highest court, clarified last Tuesday that parties may establish, by agreement, how commissions are calculated and when they are "earned" for purposes of Article 6 of the New York Labor Law.

In the case, which was successfully litigated by Davis & Gilbert, the plaintiff was a former vice president who alleged that her former employer made improper deductions from her commission earnings. Pachter had worked for Hodes for over 11 years, during which time her commissions were based on a percentage of the amount billed to her clients minus particular business costs. The commission formula included deductions for things such as finance charges for late client payments, losses attributable to errors in placing advertisements, uncollectible debts, travel and entertainment expenses, and half of the salary paid to her assistant.

The New York Court of Appeals held that the parties' express or implied agreement determines when a commission is earned and becomes a wage for purposes of Article 6. Therefore, parties may agree to subtract particular business expenses, including those deducted in *Pachter*, in calculating commission formulas. Critically, the parties' agreement may also determine that commissions will not be "earned," and thus protected under the Labor Law, until after the specific deductions are made.

In ruling that the commissions were not earned until after the deductions were applied, the Court effectively held that Hodes had not violated the Labor Law and Pachter was not entitled to additional payments.

The Court further stated that “if no [express or implied] agreement exists, [when commissions are earned is governed] by the default common-law rule that ties the earning of a commission to the employee’s production of a ready, willing and able purchaser of the services.”

The Court also affirmed that executives are covered “employees” under the substantive provisions of Article 6, including section 193, except where the statute explicitly excludes them.

Why This Case Matters To You

This case is important because it held that parties may agree to how commissions will be calculated and that agreed-upon business expenses can be deducted as part of a commission formula. Thus, the terms of the agreement are of vital importance. Employers are well-advised to review their written commission agreements and commission programs to make sure that any deductions used in the calculation are clearly stated.

This case is also important because, although a recent Labor Law amendment requires that commissions and other employment terms for commission salespeople be in writing, such a written instrument may not be required for other types of employees. However, as the *Pachter* Court held, without an express or implied agreement, the common-law default rule controls. Therefore, any employers who are paying employees commissions or formula-based incentive pay without a written document should put the terms of such arrangements in writing, both to comply with the Labor Law (for commission salespeople) and to clarify their commission formulas in light of *Pachter*.

For more information, please contact Howard Rubin at (212) 468-4822 // hrubin@dglaw.com, Allie Lin at (212) 468-4868 // alin@dglaw.com, Laurie Morrison at (212) 468-4830 // lmorrison@dglaw.com, Peggy Chen at (212) 468-4902 // pchen@dglaw.com or the D&G attorney with whom you have regular contact.