ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

AUGUST 2007

On October 16, 2007, employee commission agreements in New York will be subject to new requirements. Employers in New York should pay special attention to this and other upcoming changes to New York's Labor Law to ensure timely compliance.

East Coast Edition

A Littler Mendelson East Coast-specific Newsletter

Better Put that in Writing! New York Updates Its Law on Commission Agreements and Other Wage-Related Statutes

By David S. Warner

Governor Spitzer recently approved legislation designed to assist the efforts of the New York State Department of Labor (NYSDOL) to enforce various provisions of the state Labor Law. The first change, which goes into effect October 16, 2007, requires employers to memorialize in writing the terms of employment for commissioned salespersons. Other changes expand coverage of certain provisions of the Labor Law, raise the administrative penalties for failing to provide meal periods and one day of rest, and decrease the number of employees whose wages may be deposited directly into their accounts without written consent. These latter changes become effective on January 14, 2008.

Commission Agreements

Although employee commission agreements are commonly reduced to writing, it is not currently required by New York Labor Law. Effective October 16, 2007, section 191 of the Labor Law will require that the terms of employment for commission salespersons be reduced to writing, signed by both the employer and the employee.[1] It will also require that the employer retain the agreement for at least three years and make it available to the NYSDOL upon request. The written agreement must include a description of "how wages, salary, drawing account, commissions, and all other monies earned shall be calculated" and paid. If the agreement provides for a recoverable draw, then it also must state the frequency of reconciliation. It must further delineate how "wages, salary, drawing account, commissions and all other monies earned and payable" are to be paid in the event the employee is terminated or resigns.

Failure to follow these requirements could be damaging as the law will presume, in the absence of a written agreement, that the employee's recitation of the terms of his/her commission agreement is correct. As a result, employers in New York should promptly memorialize in writing the commission agreements with all of their salespersons. Employers should also ensure that these agreements are signed by all parties and state all of the requisite terms. To help minimize the risk of costly litigation, it is further recommended that employers include in the agreement an internal procedure for the employee to follow in the event that he/she feels earned commissions have not been paid correctly. As courts have taken different approaches on how commissions may be lawfully calculated, employers should consult with legal counsel when drafting these agreements.

Increased Meal Break and Rest Day Penalties

Section 161 of the Labor Law requires certain employers to provide certain employees with at least one day of rest every calendar week. Section 162 requires employers to provide a

[1] Commission salespersons are defined as "any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article of thing and whose earnings are based in whole or in part on commissions." N.Y. Lab. Law § 190(6). It does not include "any employee whose principal activity is of a supervisory, managerial, executive or administrative nature." *Id.*.

minimum amount of time for employee meal breaks. Currently, if an employer violates either of these two provisions, they may be subject to criminal prosecution under section 213 of the Labor Law, which prescribes a maximum fine of $100 for the first offense.

Finding this to be an ineffective deterrent, in part because it is rarely enforced by local prosecutors, the legislature decided to create higher monetary penalties for noncompliance. Effective immediately upon passage of the bill, section 161 and 162 are included as punishable offenses under section 218 of the Labor Law. This means that failure to comply with sections 161 or 162 may result in an administrative fine of up to $1000 for the first offense, $2000 for the second, and $3000 for the third.

Armed with these higher penalties, the NYSDOL is expected to intensify its enforcement efforts. Employers should therefore review their scheduling and meal break practices and policies, and consult with legal counsel as necessary, to ensure compliance with sections 161 and 162 of the Labor Law.

Expansion of Wage-Related Enforcement Actions and Other Changes

The NYSDOL considers persons employed in a bona fide executive, administrative or professional capacity who earn more than $600 per week to be exempt from the wage payment provisions of Article 6 of the Labor Law, according to the statement supporting the bill. The NYSDOL has thus declined to bring enforcement actions against employers for failing to provide benefits and wage supplements to such employees.[2]

In an effort to increase the number of persons for whom the NYSDOL may investigate claims and bring enforcement actions, the legislature decided to raise the weekly earnings threshold from $600 to $900, effective January 14, 2008. This change in Labor Law sections 190(7),[3] 192(2)[4] and 198-c(2)[5] is designed to reflect the current average weekly salary in the state. It does not, however, affect the requirement in New York that bona fide executives, administrators and professionals be paid a minimum of $536.10 per week to be exempt from the overtime requirements of state law.

According to some authorities, this change will mean that all bona fide executives, administrators and professionals who earn more than $900 per week will be exempt from the wage payment provisions of Article 6 of the Labor Law, a position supported by the history behind this legislation. According to others, it will mean only that: (1) such persons may be paid less frequently than semi-monthly; (2) such persons may be subject to mandatory direct deposit of their wages; and (3) employers will not be subject to criminal penalties for failing to pay such persons their benefits or wage supplements. Although the issue has not yet been settled conclusively, these legislative changes create a liability risk for those employers who relied on either interpretation to justify their pay practices with bona fide executives, administrators and professionals who earn between $600 and $900 per week. As the weekly earnings threshold for employees who qualify for the exemption will soon be elevated to $900, employers in New York should promptly reassess their pay practices with those employees who earn $900 or less per week.

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[2] Such benefits and supplements include expense reimbursements, health, welfare and retirement benefits, and vacation, separation and holiday pay.

[3] Section 190(7) defines "clerical or other worker" for purposes of Article 6 generally.

[4] Section 192 prohibits employers from directly depositing the wages or salary of certain employees without their advance written consent.

[5] Section 198-c imposes criminal penalties for failure to pay agreed-upon benefits or wage supplements to certain employees.