New York State Department of Labor
David A. Paterson, *Governor*
M. Patricia Smith, *Commissioner*

September 2, 2008

[redacted]

Re: Request for Opinion
Definition of Earned Wages
File No. RO-08-0110

Dear [redacted]

This is in response to your e-mail of July 3, 2008 regarding the *Pachter v. Bernard Hodes Group, Inc*., 10 NY3d 609 (2008) decision. Please be advised that you have not provided enough information for a response to the question posed in your e-mail.

Your statement that the holding in *Pachter*, "seems to turn on the fact that the employee at issue was a commission salesperson as it is only in this context that there is uncertainty as to when compensation is 'earned'" is not accurate.

As both the Court and you have stated, the Labor Law does not define the term "earned." In the absence of such a definition, the *Pachter* Court first looked to the common law to determine when commission salespersons have earned their wages. As the Labor Law does not define "earned" in any context, the common law will always have to be consulted for such a determination no matter what the occupation of the employee. Therefore, your claim that the *Pachter* holding turns on the fact that the employee in question was a commission salesperson is not correct.

Furthermore, despite your characterization, the *Pachter* Court did not find any uncertainty in such common law. Rather, it cited the long-standing rule that "a broker who produces a person ready and willing to enter into a contract upon his employer's terms … has earned his commissions."

The Court then held that such common law principles may be superseded by an agreement between an employer and employee - "it is well settled that parties to a transaction are free to depart from the common law by entering into a different arrangement," (10 NY3d at 617).

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Accordingly, even if there was some common law principle defining when a dentist's wages are earned (while you claim as a settled principle of law that your client "earned his compensation as soon as he had rendered professional services to a patient," you cite no statute or case law in support of that statement) such principle could be superseded by an employment agreement. As you have stated that a written employment agreement existed between your client and his employer, this Department can render no opinion as to when your client's wages were "earned" unless and until a copy of the complete agreement is provided. Furthermore, as you have stated that "an investigator from the Buffalo office previously provided an informal opinion that the arrangement described above violates Section 193," please be advised that any further requests for opinions on this matter must also provide the investigator's name and the name of the employer being investigated.

This opinion is based on the information provided in your e-mail of July 3, 2008. A different opinion might result if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By: Jeffrey G. Shapiro
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JGS:jc
cc: Camine Ruberto