

OPINION  
FILE



New York State Department of Labor  
Eliot Spitzer, Governor  
M. Patricia Smith, Commissioner

April 10, 2007

[REDACTED]

Re: Request for Opinion  
Payment of Wages  
Our File No.: RO-07-0030

Dear [REDACTED]

I have been asked to respond to your letter of March 29, 2007 in which you state that a company has an "incentive compensation plan" under which it pays commissions to employees on a quarterly basis. The plan further provides that to receive such a commission, an employee must be employed at the time the commission is paid. You ask whether this plan is permissible under New York State Law and whether this analysis would change if the commission in question were a bonus.

You should first take note that Labor Law §190(1) defines "wages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, *commission*, or other basis," (emphasis added). Therefore, any "commissions" paid to employees under the described incentive compensation plan are "wages" (see *Monaco v. CIS Corp.*, 206 B.R. 680, 687-689 (Bankruptcy Court, S.D.N.Y. 1997)).

Please take further note that an employer cannot, as you state, deem an employee not to have "earned" wages until such wages are paid. It is the Department of Labor's interpretation of §190(1) that wages are "earned" immediately upon the rendering of labor or services. The time within which such earned wages must be paid is governed by Labor Law §191

Payment of commissions on a quarterly basis is a violation of Labor Law §191. Wages must be paid weekly to manual and railroad workers (§191(1)(a) and (b)), not less frequently than monthly to commission salesmen (§191(1)(c)), and not less frequently than semi-monthly to clerical and other workers (§191(1)(d)). Please take note that no employee shall be required as a condition of employment to accept wages at periods other than these (§191(2)).

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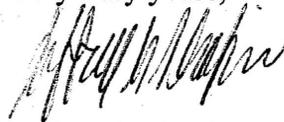
Furthermore, failure to pay wages by reason of termination of employment, whether by resignation or otherwise, is a violation of §191(3). Such section provides that upon termination, "the employer shall pay wages not later than the regular pay day for the pay period during which the termination occurred."

For these reasons, the quarterly payment of wages and the failure to pay wages upon termination of employment as set forth in the described incentive plan are violations of New York State Law. The employees covered under such plan must be paid their wages within the time periods set forth in Labor Law §191(1), and all employees whose wages have not been paid by reason of termination in violation of Labor Law §191(3) must be paid such unlawfully withheld wages forthwith, together with all applicable interest.

However, *bona fide* bonuses are not wages (*see Monaco v. CIS Corp.*, supra), therefore the payment of such bonuses is not governed by Labor Law §191, but by Labor Law §198-c, which applies to "benefits and wage supplements." According to that statute, an employer who is party to an agreement to provide benefits must provide benefits pursuant to the terms of the agreement. Such an agreement may condition payment of benefits upon continued employment and may provide for non-payment upon termination (*see Modugu v. Continuum Health Partners, Inc.*, 3 A.D.3d 422 (1st Dept. 2004)).

This opinion is based upon the information provided in your letter of March 29, 2007. A different opinion might result if any facts provided have been inaccurately stated, or if there are other relevant facts which have not been disclosed. If you have any further questions, please feel free to contact me.

Very truly yours,



Jeffrey G. Shapiro  
Senior Attorney

JGS:dmm  
cc: Carmine Ruberto

bcc: Opinion File  
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CO Dayfile (RO-07-0030)