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Court of Appeals Addresses Meaning of "Executives" and "Wages" Under NY Labor Law

A recent New York Court of Appeals decision clarifies two important aspects of New York Labor Law. In *Pachter* v. *Bernard Hodes Group, Inc.*[1], the appeals court held that executives are entitled to the protections granted to employees in article 6 of the Labor Law and that employers and employees are free to structure a compensation arrangement under which an employee's commissions are "earned" only after deductions are taken from the employee's gross pay.

Pachter involved an employee's challenge to her company's practice of reducing her gross commissions to reflect expenses like travel fees and the cost of an assistant. The employee argued that this pay formula subjected her to unlawful wage deductions in violation of Labor Law §193. The U.S. Court of Appeals for the Second Circuit certified two questions to the New York Court of Appeals: (1) whether an "executive" is considered an employee for purposes of the New York Labor Law, and (2) when commissions are "earned" and become "wages" for purposes of New York Labor Law §193 where there is no written agreement between the employer and employee.

Elaine Pachter was a vice-president for 11 years at the marketing firm Bernard Hodes Group, Inc. ("Hodes"), where her job was to arrange for media placements for clients.[2] Instead of receiving a fixed salary, Pachter chose an incentive arrangement where she was compensated on a commission basis.[3] When one of Pachter's clients agreed to purchase a media spot, Hodes would advance payment on behalf of the client and the client would reimburse Hodes and pay a fee for Pachter's services.[4] Pachter received a percentage of the amount billed to her clients minus business costs such as uncollectible client debts, Pachter's travel expenses, and half the cost of Pachter's assistant.[5]

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1 2008 NY Slip Op. 05300 (Jun. 10, 2008).

2 *Id.* at *2.

3 *Id.*

4 *Id.*

5 *Id.*

After leaving Hodes, Pachter sued the company in the U.S. District Court for the Southern District of New York, claiming that the subtraction of business expenses from her percentage of client income violated § 193 of New York's Labor Law, which prohibits employers from making all but a limited range of deductions from an employee's earned wages.[6] The business expenses deducted from Pachter's gross commissions clearly did not fall within the list of allowable deductions.

Hodes claimed that the deductions were proper because Pachter was an "executive" of the company, and not an "employee" for the purposes of § 193. Hodes also argued that the deductions were not taken from Pachter's earned commission but were used to calculate her earned commission. The district court granted summary judgment to Pachter, holding that that §193 does cover executives and that the deductions were illegal deductions from wages.

I. An "Executive" Is An "Employee" Under §193

On a certified question from the Second Circuit, the New York Court of Appeals agreed that §193 covers executives. It held that "[i]t is evident from the text and structure of article 6 of the Labor Law that executives are employees within the meaning of Labor Law § 190 (2)."[7] The court pointed out that § 190 (2) defines "employee" as "any person employed for hire by an employer in any employment" – a definition broad enough to encompass executives. It also noted that several provisions of article 6 specifically refer to the exclusion of executives, making it clear that executives are in the first instance considered employees.[8]

II. When a Commission Becomes a "Wage"

Because § 193 prohibits unauthorized deductions from employees' "wages", the Court of Appeals was also asked to determine when Pachter's commission was considered "earned" for the purposes of §193 – i.e., when did it become a "wage" subject to the statutory restriction.[9] The court concluded that although, under common law, a commission is generally earned once an employee produces a buyer ready and willing to enter into a contract under the employer's terms, in this case the parties' behavior over the course of Pachter's employment pointed to their agreement to a different arrangement.[10]

The court held: "[T]he evidence of the parties' extensive course of dealings for more than 11 years and the written monthly compensation statements issued by Hodes and accepted by Pachter [] provide ample support for the conclusion that there was an implied contract under which the final computation of the commissions earned by Pachter depended on first making adjustments for . . . miscellaneous work-related expenses."[11]

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6 *Id*. at *2-*3.

7 *Id*. at *3.

8 *Id*. at *4.

9 *Id*. at *5.

10 *Id.* at *6.

11 *Id*.

The court held that in the absence of a governing written contract, the question of when a commission is "earned" and becomes a "wage" for the purposes of article 6 is determined by the parties' express or implied agreement. If there is no express or implied agreement, the arrangement is subject to the common law rule that a commission is earned once the employee produces a ready, willing and able buyer.[12]

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at (212) 701-3403 or cgilman@cahill.com; Michael Macris at (212) 701-3409 or mmacris@cahill.com; Jon Mark at (212) 701-3100 or jmark@cahill.com; John Schuster at (212) 701-3323 or jschuster@cahill.com; Shira Forman at (212) 701-3044 or sforman@cahill.com.

[12] *Id*. at *6-*7.