New York's Highest Court Rules on Two Important Issues Regarding Commissions and Wage Law Coverage

On June 10, 2008, the New York Court of Appeals ruled on two important issues affecting employers in New York State in the case of *Pachter v. Bernard Hodes Group, Inc*. The Court's rulings were the result of two certified questions from the federal appeals court in New York. Morgan, Brown & Joy, LLP filed an *amicus curiae* brief on behalf of the National Retail Federation and in support of the employer, Appellant Bernard Hodes Group, Inc.

In October 2007, the United States Court of Appeals for the Second Circuit took the unusual step of asking the New York Court of Appeals to answer the following two questions pertaining to New York law: (1) whether executives are exempt from Article 6 of the New York Labor Law, and (2) in the absence of a written agreement, when are commissions "earned" and therefore considered wages under New York Labor Law § 193, which forbids any deduction from the wages of an employee unless they are permitted by law or authorized by the employee and for the benefit of the employee?

The Court of Appeals answered the certified questions on June 10, 2008, by first holding that executives are protected by New York Labor Law § 193, as well as the other provisions of Labor Law Article 6 that do not expressly exclude them from coverage. (Note: Executives in New York are still exempt from the state's overtime provisions.) In doing so, the Court of Appeals resolved a split of authority that had developed in the state and federal courts over whether executives come within the purview of the Labor Law § 193's prohibition on unlawful deductions from wages, as well as other portions of Article 6.

The Court of Appeals then turned to the second question, regarding when commissions are earned for purposes of Labor Law § 193. Labor Law § 193 forbids any deduction from the wages of an employee unless they are permitted by law, or are authorized by the employee and for the benefit of the employee, *e.g.* union dues, insurance premiums, pension or health and welfare benefits, and contributions to charitable organizations. At issue in *Pachter* was the employer's deduction as part of its commission formula of certain business costs and expenses, *e.g.*, half of the employee's assistant's salary.

The Court reiterated the common law presumption that commissions are earned

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when the commissioned salesperson's efforts result in a customer's commitment to purchase, but agreed with Bernard Hodes Group, Inc. and the National Retail Federation in observing that employers and employees are free to agree to whatever commission formula they want, and that a commission formula may include deductions for items such as uncollected bills to clients and overhead without running afoul of the prohibition on unlawful deduction from wages contained in Labor Law § 193. In particular, the Court held, an employer and employee are "free to add whatever conditions they may wish to their agreement [including] that the computation of a commission will include certain downward adjustments from gross sales, billings, or receivables." The Court concluded that, in the event that the employer and employee agree to such conditions, the commission is not deemed "earned" or vested until computation of the agreed-upon formula.

After holding that the parties can so agree, the Court of Appeals considered whether a written commission agreement is required. The Court held that the agreement need not be in writing, but can be an implied contract based on the parties' course of dealings. (Importantly, however, an October 2007 amendment to New York Labor Law § 191(c) now requires that compensation agreements with commissioned salespersons be in writing.) After articulating these two principles, the Court of Appeals answered the second certified question by stating that, in the absence of a written agreement, when a commission is "earned," and becomes a "wage" for purposes of Labor Law Article 6, is regulated by the parties' express or implied agreement, or, if no agreement exists, by the default common law rule that commissions are earned when the commissioned salesperson's efforts result in a customer's commitment to purchase.

While the Court of Appeals' finding that executives are protected by the New York Labor Law is bad news for employers, the Court's holding that employers and employees can fashion their own commission formulas without running afoul of New York law is good news for employers. With the Court of Appeals' decision in *Pachter*, New York employers who fashion commission agreements with their employees that provide for the deduction of items such as returns, unpaid bills, overhead expenses, and miscellaneous expenses as part of the formula for calculating commission wages, can rest assured that such deductions will not be viewed as unlawful deductions from wages in violation of New York Labor Law § 193. With this ruling in *Pachter* and the recent amendment requiring that agreements with commission salespersons be in writing, New York employers should review their commission plans, as well as their practices regarding executive employees.

Diane Saunders and Laura M. Raisty were on the *amicus curiae* brief of the

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National Retail Federation. Both Ms. Saunders and Ms. Raisty are admitted to practice in New York.

Diane Saunders and Laura Raisty are attorneys with Morgan, Brown & Joy, LLP and may be reached at (617) 523-6666 or at dsaunders@morganbrown.com and lraisty@morganbrown.com. *Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.*

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