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Chargebacks of Advanced Commissions Remain Valid in California, Despite Novel Legal Argument

In *Deleon v. Verizon Wireless, LLC*, the California Court of Appeal confirmed that an employee cannot maintain Labor Code claims for commission chargebacks when the commission plan at issue is carefully drafted to define when and how a commission is earned.

The Facts

Saul Deleon, a former retail sales representative, sued Verizon Wireless on behalf of himself and other aggrieved employees to challenge Verizon Wireless' commission plans permitting chargebacks. Under the commission plans, sales representatives earned hourly wages (base pay) and received advanced commissions based on their individual sales. The plans dictated that commissions were not earned until the end of the relevant chargeback period – which ranged from 120 days to one year depending on the service being sold. If a customer discontinued service within that period, Verizon Wireless adjusted the employee's next commission advance to account for the cancellation.

Deleon asserted various claims, including a representative action under the Private Attorneys General Act, which all derived from his claim that the commission plans violated Labor Code section 223. Section 223 prohibits employers from secretly paying a lower wage than the wage provided for by statute or contract. The trial court granted Verizon Wireless' motion for summary judgment on the ground that the commission advances were not wages, such that Verizon Wireless could charge back unearned advances if the conditions necessary to earn a commission did not occur.

The Appellate Court Opinion

The Court of Appeal recognized that a commission is not a wage until the employee becomes entitled to it. In other words, the commission is earned only when all conditions in the contract are fulfilled. This is a well-settled proposition, primarily set forth in cases holding that the practice of charging back commissions does not violate Labor Code section 221's prohibition against recovering wages already paid. It makes sense, then, that Deleon instead alleged a Section 223 claim in a creative attempt to circumvent this clear line of authority. The Court of Appeal did not take the bait, however.

In addition to upholding summary judgment on the ground that the advanced commissions were not wages, the Court of Appeal also concluded that summary judgment was appropriate because the chargebacks were not secret, but were explained to the sales representatives in their compensation plans and in training sessions. The court also found that the chargebacks did not result in a lower wage than was promised in the compensation plans.

What *Deleon* Means For Employers

Although the Court of Appeal endorsed the commission plan in this case, the court made certain comments highlighting the need to review existing commission plans. For example, there could be an issue of fact sufficient to defeat summary judgment if an employee is not expressly advised that a payment relating to a commission is in fact an advance. Therefore, it is a best practice for employers to (1) include an explicit statement in the commission plan that the payment is an advance, potentially subject to chargebacks at a later date, (2) explain the chargeback process to employees through formal training or other documented means, and (3) reflect payments on wage statements as "advance commissions" or "commission advances," instead of simply labeling them as "commissions."

Further, an employer may not be entitled to summary judgment if the employee did not agree to the chargeback policy. While continued employment after notice of the policy can be evidence of consent, the best practice would be to have a signed written agreement. That practice will be statutorily required as of January 1, 2013. AB 1396, amending Labor Code section 2751, will then require that any agreement to pay commissions to an employee be in writing, be signed by the employer, and be copied for the employee.

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