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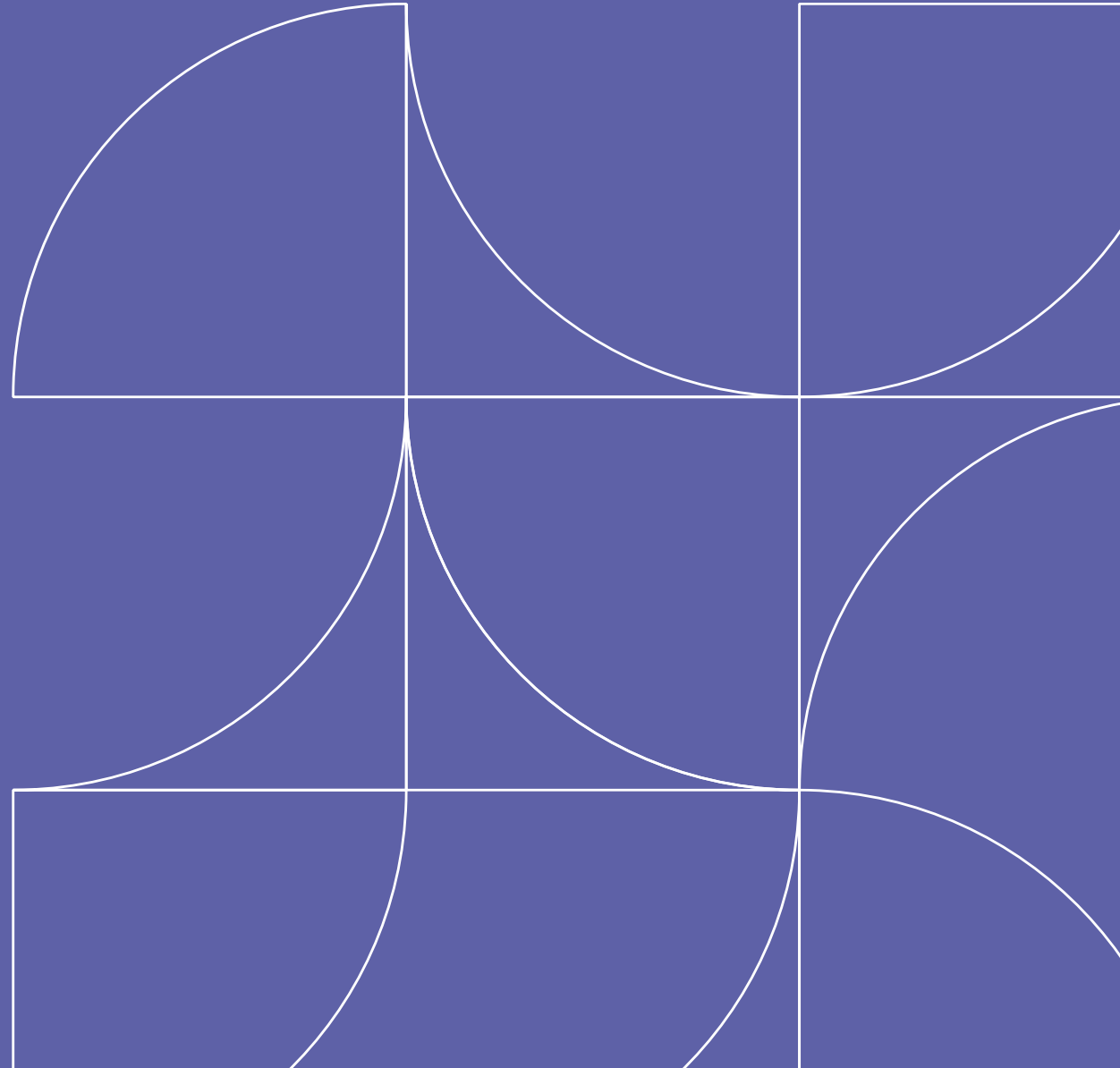


Commission and Incentive Plans After *Reuter*, Batten Down the Hatches

May 9, 2022

Seyfarth Shaw LLP

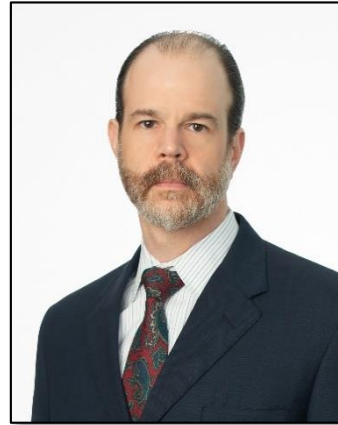
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Agenda

- 1 | ***Reuter* and Incentive Compensation**
- 2 | **Types of Compensation Subject to the Wage Act**
- 3 | **Provisions to Consider in all Incentive Plans**
- 4 | **Provisions to Consider in Commission Plans**

Reuter v. City of Methuen

- The City of Methuen terminated Beth Reuter on March 7, 2013 because she was convicted of larceny
- Reuter had accrued approximately \$9,000 in unused vacation at the time of her termination
- Methuen failed to pay that accrued vacation at the time of her termination, and instead paid 3 weeks later – a Wage Act violation
- The parties disputed the proper measure of damages:

Interest that accrued as a result of the late payment (<\$200)

OR

Treble the late wages + attorney's fees (>\$18,000)



The issue is not whether the city violated the Wage Act in failing to pay the plaintiff for her vacation time on the day she was fired -- it clearly did. Rather, the parties dispute the proper measure of damages . . . Given the strict time-defined payment policies underlying the Wage Act, and the liquidated damages provision providing for treble damages for "lost wages and other benefits," we conclude that an employer is responsible for treble the amount of the late wages, not trebled interest.

Reuter v. City of Methuen





Potential Impact of *Reuter* on Incentive Compensation

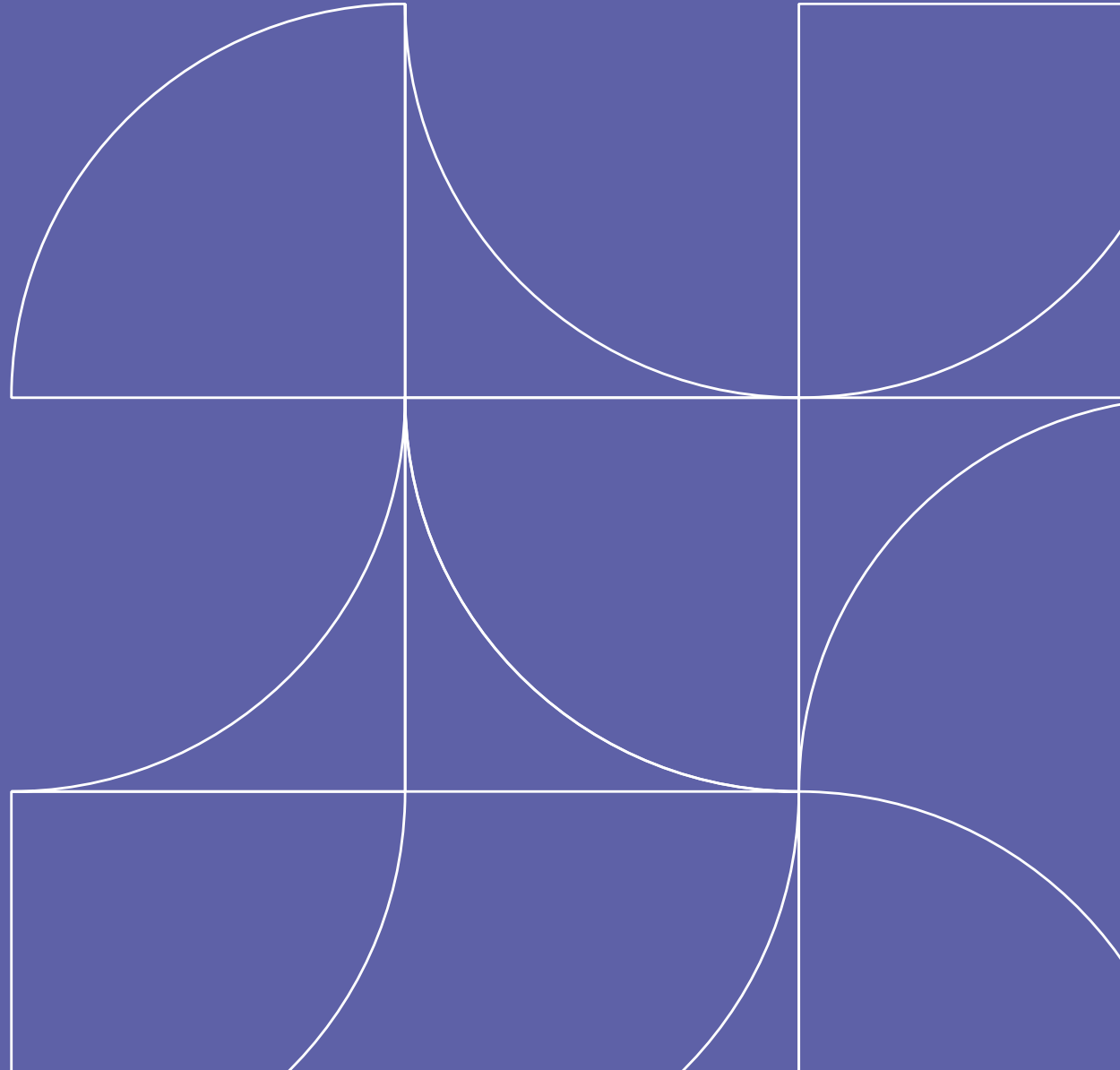
- Potential impact on incentive compensation:
 - Commissions
 - Non-discretionary bonuses
- Should remove all ambiguity from incentive plans moving forward
- Very clearly define:
 - What employees are owed
 - When it is going to be paid



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What Counts As “Wages”? (The Easy Part)

- “Wages” is not defined in the Wage Act
- What’s included?
 - hourly pay
 - salary
 - service credit for tipped employees
 - holiday pay
 - vacation pay
- What’s excluded?
 - Severance pay (probably)
 - Deductions from pay for purchase of stock (if authorized by employee)
 - Contributions to deferred compensation plans
 - Health insurance premiums

How Does the Wage Act Treat Commissions?

- Commissions are treated as wages
 - the Wage Act applies “so far as apt, to the payment of commissions **when the amount of such commissions . . . has been definitely determined and has become due and payable**”
- When is commission earned under the Wage Act?
 - Has the employee done everything needed to close the transaction?
 - Is it certain or near certain that the transaction will occur?
 - Unclear whether employer can impose other contingencies
- When is earned commission “definitely determined” and “due and payable”?
 - Is the amount known with reasonable certainty?
 - Can employer define “due and payable”?

Does the Wage Act Apply to Bonuses or Other Variable Compensation?

- Is the bonus really a commission?
- Is the bonus non-discretionary?
 - Will all employees in the same position get one?
 - Can the employee calculate the bonus amount in advance?
- May an employer impose additional contingencies?
 - continued employment through bonus payout date?
 - is the purpose to retain employees?
- Employer can define due date?



General Incentive Plan Considerations

- Should obtain written acknowledgement of incentive plan from all participants
- Consider choice of law and choice of venue provision
- Consider providing arbitration or internal resolution process for disputes arising under the plan
- Consider defining what efforts or results are being compensated to clarify when compensation is earned
- Consider shorter performance period (e.g., quarterly bonuses versus annual bonuses)
- Reconsider provisions requiring participants to be employed on the date of payment



Commission Plan Considerations

- Commission plan must be clear and easy for a layman/outsider to understand
- Plan should be communicated in writing and acknowledged before each performance period
- Administer plan strictly according to its terms
- Provisions to consider adding / vetting in commission plans
 - Specify timing for calculation and payout of commissions
 - Windfall provisions
 - Provisions delegating interpretive authority of the plan
 - Caps on commission earnings
 - Clear mechanism for crediting of sales to workers
 - Chargebacks

Thank you

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