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HOW TO MAKE MANUFACTURER SPIFFS WORK FOR YOU: DEPARTMENT OF LABOR PROVIDES NEW GUIDANCE

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Last month, the U.S. Department of Labor (DOL) gave car dealers welcome news. In an opinion letter interpreting the federal Fair Labor Standards Act (FLSA), the DOL found that incentive payments paid directly by the manufacturer to dealership sales consultants – commonly referred to as “spiffs” – could be used to satisfy a dealership’s minimum wage obligations.

To be clear, this is not really “new” news. The DOL has issued opinion letters dating back to the 1960’s holding that “push” money paid to sales consultants in other retail establishments are properly considered “wages” under the FLSA. The agency has even publicized this position in its Field Operations Handbook. Still, the DOL’s most recent opinion letter gives dealers helpful clarification on how to best take credit for manufacturer spiffs and serves as a useful reminder for dealers to carefully look at your incentive plans for compliance with wage and hour laws.

BACKGROUND

The background here is well known to most car dealers. The DOL looked at several dealerships whose sales consultants were receiving direct payments from automobile manufacturers pursuant to incentive programs for selling certain vehicles or meeting certain sales goals. Although the incentive programs were established by the manufacturers, they were embraced by the dealers, who were familiar with and communicated the terms of the programs to their employees.

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As a result, even though the manufacturers set the terms of the program and made payments directly to the employees, the dealerships took credit for the manufacturer payments for purposes of satisfying the dealerships' minimum wage obligations under the FLSA.

ARE SPIFFS “WAGES”?

The DOL's analysis began with a well-established, although probably often overlooked, FLSA principle: wages may include third-party payments. Of course, as the DOL clarified, not *all* third-party payments are wages. Rather, whether a payment from a third party constitutes wages depends upon the terms of the parties' employment agreement.

Specifically, the DOL considered a recent federal appeals case which held that courts should consider the following three factors when determining whether third party payments may be considered wages: (1) whether the specific requirements for receiving payment are known by employees in advance; (2) whether the payment is for a reasonably specific amount; and (3) whether the employer's facilitation of the payment is more than a simple pass-through.

When looking to these factors, the DOL found that the dealerships at issue satisfied all three. Importantly, the dealerships embraced manufacturer spiffs and represented to employees that they would be considered part of the employee's overall compensation, which strongly suggested that they were “wages” under the FLSA. Additionally, the dealerships knew of and advertised the terms of the spiffs to sales consultants, even working with the manufacturer to determine whether and when payments should be made. Given this, the DOL found spiffs to be part of the employment agreement and properly included within the definition of “wages” for purposes of satisfying the FLSA's minimum wage requirements.

WHAT DOES OUR DEALERSHIP NEED TO DO NOW?

Importantly, the DOL clarified that spiffs do not need to be specifically mentioned in a written pay plan to be applied towards the dealership's minimum wage obligations. Rather, the payments may be “implicitly” part of the employment agreement depending upon the parties' past practices. Still,

your dealership may circumvent any argument about what the parties did or did not agree upon by simply amending existing sales pay plans to state that manufacturer incentive payments will be considered wages for purposes of ensuring that sales consultants are paid at least the minimum wage for all hours worked.

Moreover, while dealers should be pleased that spiffs may be credited towards sales consultants' minimum wage requirements, you should remember the implications elsewhere. Under the FLSA, salespersons are exempt from overtime payments, but that is not the case with all dealership employees. You should examine federal and state wage hour laws and consider whether any non-exempt employees who receive manufacturer incentives are also entitled to overtime premiums on these payments.

CONCLUSION

The DOL's recent opinion letter is welcome news to car dealers who are re-examining sales compensation in light of the current economy and COVID-19 pandemic. As you look to update your sales pay plans, consider how you can make manufacturer spiffs work to your advantage.

For more information, contact [the author](#).