Document, Document, Document: A Maryland Dealer Learns The Importance Of Regularly Updating Employment Forms

Insights
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There are three documents that dealerships should regularly review and update for compliance: the employee handbook, commission pay plans, and arbitration agreements, if applicable. As a Maryland dealership recently learned, when any of these documents is incomplete, out of date, or missing, the legal exposure can be significant.

What Happened In The Case?

In *Coady v. Nationwide Motor Sales Corp.*, three former sales managers filed suit on behalf of themselves and 150 other current and former employees for unpaid commissions resulting in alleged state and federal minimum wage and wage payment violations in excess of $5 million. The employees claim that the dealership assessed undisclosed "packing costs," "wholesale costs," "promotional" costs, and "service reductions" to vehicle sales in order to artificially deflate profits and reduce employee commissions. They additionally contend that their pay plans did not adequately explain that base wages would be treated as an advance or draw against future commissions, that unspecified chargebacks were assessed against commissions, and that the dealership made improper deductions from their final pay.

After the lawsuit was filed, Nationwide asked the court to require the employees to arbitrate their claims. Like many dealers, Nationwide utilizes arbitration as a method for resolving legal disputes with its employees, which would ordinarily require private arbitration of the employees' claims on an individual (as opposed to class or collective action) basis. Unfortunately, however, Nationwide did not have stand-alone arbitration agreements with employees bringing the suit. Rather, the arbitration policy at issue was contained in Nationwide's employee manual (last updated in 2004) which the employees claim they were not permitted to review.

Moreover, the handbook acknowledgment that employees did receive and sign stated that the dealership "has the right, from time to time, to make and enforce new policies and procedures and to enforce, change, abolish, or modify existing policies, procedures or benefits applicable to employees as it may deem necessary, with or without notice." Because the handbook acknowledgment provided Nationwide the unilateral right to change or modify its policies, including the arbitration policy, at any time, the court held that the parties did not have an enforceable arbitration agreement and that arbitration was not required.

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The dealership is seeking appeal of the court's order denying arbitration, and may ultimately prevail given the overwhelming trend in favor of arbitration in recent years. Indeed, some courts have held that the ability to modify employment policies in an employee handbook does not apply to arbitration policies and have therefore enforced arbitration even in the absence of a stand-alone arbitration agreement.

What Are The Lessons To Be Learned?

Even if arbitration ultimately is required in this case, getting that outcome could have been easier – and far cheaper – for Nationwide if it had taken care of some due diligence ahead of time. Regardless of the outcome of the case, this lawsuit is a reminder of that taking simple steps now may help you avoid more complex, disruptive, and expense problems later.

1. **Handbook Updates.** The dealership at issue last updated its employee handbook in 2004. Suffice to say, there have been a number of employment law updates since then. By regularly reviewing and updating the handbook, the dealership could have identified policies that required legal updates, including the arbitration policy, and put itself in a better position to compel arbitration in this case.
2. **Pay Plan Review**. The risks associated with using commission pay plans that do not accurately and clearly explain how commissions are calculated cannot be overstated. While chargebacks, packs, and other costs are routine in the dealership industry, the failure to disclose these assigned costs and commission calculation process provides employees with the opportunity to make the dubious claim that they were unaware of them. A thorough pay plan disclosing exactly how commissions are calculated greatly reduces the risk employees will raise these claims in the first place.
3. **Arbitration Agreements**. Arbitration agreements are helpful in defending some employment claims, as they may require employees to litigate claims in a private forum on an individual basis rather than in court as a class or collective action. However, if your dealership wants to require binding arbitration, it should make sure that employees sign stand-alone arbitration agreements that conform with recent Supreme Court guidance. Plaintiffs generally look to avoid arbitration whenever possible and will seek to exploit any weaknesses in your agreements.

At the outset, we said that there are three documents that dealers should regularly review and update for compliance: the employee handbook, commission pay plans, and arbitration agreements. If your dealership hasn't updated these documents in the last year, you should consider consulting with legal counsel to make sure your documents are compliant and enforceable.

Related People

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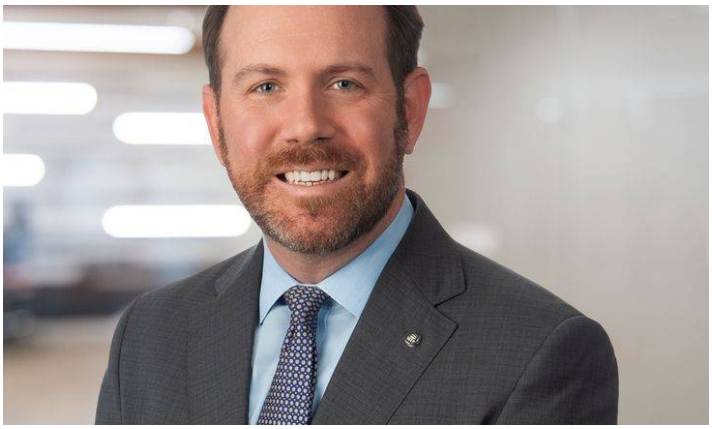

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