When Must Commissions Be Paid?

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Many wage laws and jurisdictions give deference to employment agreements or even past employer practices when determining when commissions are "earned" by an employee and must be "paid" by an employer. As a recent decision illustrates, even in these states employers should not assume that complete deference will be given to the parties' terms without some consideration as to the work performed by the employee and its relationship to the employer's definition of commissions "earned".

The Seventh Circuit Rejects Office Depot's Commission Plan

In *Daryl Sutula-Johnson v. Office Depot, Inc.*, the U.S. Court of Appeals for the Seventh Circuit flatly rejected an employer's definition of when commissions are "earned" under an agreed commission plan. The plaintiff sold office furniture for her employer, Office Depot. In its written compensation plan, Office Depot set a quarterly sales target for each employee and issued an "incentive payment" of 13.5% or 10% of all employee quarterly sales, depending on whether the employee exceed the quarterly sales target. The policy further stated that employees "accrued" the incentive payments upon invoicing but did not "earn" them until the day Office Depot actually paid them to the employee. According to the plaintiff, Office Depot usually paid the quarterly incentive payments 45 days after the end of each quarter.

The Illinois Wage Act requires employers "at least semi-monthly, to pay every employee all wages earned during the semi-monthly pay period." The Act also states "[c]omissions may be paid once a month." The Act therefore provides an exception to the semi-monthly requirement, by allowing commissions to be paid monthly.

The critical question that follows the Act's language is when are commissions "earned" that would trigger the obligatory monthly payment? The court rejected the notion that an employer can satisfy the monthly requirement by simply declaring wages are not earned until they are paid. Specifically, that "[a]n employer can set the requirements for earning a wage or commission, but it cannot undermine the monthly payment requirement by imposing an arbitrary date on which wages are earned, completely unrelated to the employee's duties." The critical factor in regard to Office Depot's policy, in the court's opinion, was that an employee may not "earn" a commission on a sale until over three months after the employee completed all work on the sale. The court held such delay was a violation of the Illinois Wage Act.

Sutula-Johnson is significant in that the effect of the court's holding is to define "commissions earned" as the date in which the employee completes his or her duties on the project that "earns" the commission. Such definition entitles the employee to the commission regardless of whether any other independent events, such as receipt of the customer's payment, have occurred. Further, that once the commission is "earned," the employee must be paid within the monthly pay period.

In this opinion, the Seventh Circuit gave no deference to the agreed to commission plan, including its definition of "commissions earned." Furthermore, the court offered no mention of the Illinois Department of Labor regulations that state that "to be entitled to receive compensation for a commission under the Act, the commission *must be earned under the terms of the agreement or contract*" (emphasis added). In *Sutula-Johnson*, the court held the commission was not earned despite the terms of the employee's agreement with her employer. Without regard for the plain language of the agency regulations and the agreed commission plan, the court essentially created its own definition of commissions earned.

Defining "commissions earned" as the court did in *Sutula-Johnson* is obviously problematic for employers. Under the court's definition, the employee could be entitled to full commission payment for a sale before the sale is even invoiced, let alone paid. Employers often rely on the receipt of at least a portion of the sale proceeds before paying the employee commission. Requiring commission payments to be made to employees before receiving any proceeds on the sale could cause significant budgeting, accounting, and cash flow headaches for employers.

The holding in *Sutula-Johnson* overlooked both Illinois law and the decision's practical impact. The state regulations as written allow employment agreements to define when commissions are "earned." Fortunately for Illinois employers, while federal court opinions are persuasive authority, such opinions are not binding on Illinois law. However, the decision does set precedent in federal district courts in the Seventh Circuit, and any cases with issues similar to those in *Sutula-Johnson* will look to the case for guidance.

The Bottom Line

In light of the *Sutula-Johnson* decision, employers should take steps to pay sales employees as soon as practicable, or at least analyze the "why" and whether there is an alternative "how" for reaching those goals. The decision leaves room for employers to craft a different incentive pay structure, but it would be beneficial (in any state) for an employer to consider the timing between the work completed and eligibility to receive the commission payment. For one, the frequency of Office Depot's payment was quarterly such that an employee would complete the work, in many cases, several weeks beforehand. Moreover, the extensive amount of time Office Depot waited to make the payment (45 days after each quarter) likely influenced the court's decision to completely disregard the underlying agreed commission plan.