A Victory for Illinois Employers Who Use Commission Sales' Draws

The Seventh Circuit Court of Appeals recently held that Illinois employers can reconcile commissioned sales "draws" without fear of class action litigation under the Illinois' Wage Payment and Collection Act ("IWPCA"). This September 23rd decision is a common sense ruling that is good for both employers and employees. It allows Illinois employers the flexibility to advance sales draws and reconcile them later.

The Facts Of the Case

The Tile Shop, LLC, is a specialty retailer of ceramic and stone tile. Like many Illinois employers, it provides level payments to its commissioned sales staff. The Tile Shop paid its sales employees a $1,000 "draw" twice a month even when the employee earned less than a $1,000 in sales commissions. The Tile Shop recovered any shortfall between actual earned commissions and the $1,000 draw in later pay periods, provided its sales employees earned in excess of $1,000 in later pay periods.

Adriel Osoro sold tile for The Tile Shop in both Illinois and New Mexico. Sometimes he earned more than $1,000 in commissions and sometimes he earned less. When he earned less, his draw was reduced the following month to reconcile the commissions he actually earned the month before. Mr. Osoro worked for The Tile Shop for 10 months and then quit. Later, he filed a class action lawsuit under the IWPCA. The crux of Mr. Osoro's allegation was that The Tile Shop's "recoverable draw" system violated the IWPCA because it functioned as a de facto cash advance system. The IWPCA prohibits employers from deducting more than 15% of an employee's wages to recoup previous cash advances. Mr. Osoro argued that he, and others, had "deductions" of greater than 15% made to their wages.

The Court Says that Wage Reconciliations are Not "Deductions"

The definition of "wages" is broadly defined under the IWPCA. But neither the statute nor the Illinois Department of Labor's implementing regulations define the term "deductions." Because the term "deductions" has not been interpreted by prior courts, the Seventh Circuit used a definition that refers to, "an amount of money that is taken by an employer from an employee's pay, for income tax, insurance, etc."

The court said that the term "deduction" refers to withholdings from an employee's earnings, not the employer's method of *determining* an employee's earnings. The court held that in the case of The Tile Shop, its draw-reconciliation system is part of its formula for calculating a sales associate's commission earnings, not a deduction.

In support of this interpretation, the court noted that Mr. Osorio's paystub confirmed this understanding: the draw payments and reconciliations appear as line items under "Earnings," not under "Deductions."

Employer Takeaways

Employers who pay commissions should do the following if they want to follow the roadmap of *The Tile Shop* case and avoid liability under the IWPCA: 1) have a written commission agreement that both the employer and the employee sign; 2) record any commission reconciliations "above the line" and not as deductions "below the line"; 3) track the number of hours their sales' employees are working; 4) comply in all respects with Illinois' Minimum Wage Act; and 5) comply in all respects with the federal regulations that govern exemption from overtime requirements.

CLIENT ALERT: DOL Overtime Update

On September 24, 2019, the U.S. Department of Labor announced a final rule to make 1.3 million American workers newly eligible for overtime pay.

The final rule updates the earnings thresholds necessary to exempt executive, administrative and professional employees from the Fair Labor Standards Act's (FLSA) minimum wage and overtime pay requirements and allows employers to count a portion of certain bonuses/commissions towards meeting the salary level. The new thresholds account for growth in employee earnings since the thresholds were last updated in 2004.

In the final rule, the Department is:

- raising the "standard salary level" from the currently enforced level of $455 per week to $684 per week (equivalent to $35,568 per year for a full-year worker);

- raising the total annual compensation requirement for "highly compensated employees" from the currently enforced level of $100,000 per year to $107,432 per year;

- allowing employers to use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of the standard salary level, in recognition of evolving pay practices; and

- revising the special salary levels for workers in U.S. territories and the motion picture industry.

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