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What's Inside

Mark's In Box

President names Kenneth
Feinberg "pay czar" — how
far is his reach? 3

Misconduct

Court says tape recording
was enough to justify abusive
deputy's discharge 4

Arbitration

Agreement prevents
employee from taking wage
claim to court 7

Discharge

Court rules officer's retirement
was voluntary, not forced by
employer 10

Crisis Preparedness

With flu season around the
corner, get ready for swine
flu round 2 11

On HRhero.com

Wages

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employees in one of two ways:
either an hourly wage or a fixed
salary. Do you know whether
you're paying your workers
by the right method? At www.
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COMMISSIONS

Agreement prevents employee from recovering postemployment commissions

by Michael Futterman

In the following case, the employee earned a salary and commissions. Before his termination, he had initiated negotiations with a customer for a lucrative deal for his employer. After his termination, the deal closed, but he didn't receive any commissions. The trial court ruled that he wasn't entitled to commissions because he didn't have a broker's license and his employment agreement stated that he would be eligible for commissions only while he remained an employee.

The California Court of Appeal ruled that the trial court should have allowed a jury to determine whether a broker's license was needed. But it agreed with the trial court that the employee wasn't entitled to commissions anyway because the written employment agreement made clear that only current employees, not ex-employees, were eligible.

Employer fails to pay commissions

Randy Nein worked for HostPro and Interland, first as a sales representative and then as a channel manager. In 2000, he approached an agent for AT&T at a networking event. That contact led to HostPro acquiring all of AT&T's smaller Web-hosting clients. The parties were still negotiating the

transaction when Nein's employment was terminated in late 2001. In early 2002, HostPro agreed to purchase from AT&T certain Web-hosting customer accounts and equipment used to service them. Nein sued HostPro, charging that it didn't pay him any commissions on the transaction.

Under the terms of Nein's written employment agreement, HostPro paid him a salary plus commissions on Web-hosting sales. The agreement said he "will be eligible for commission pay as set forth in this [document], so long as [he] remains employed with the Company as a Sales Representative." The agreement also contained a clause stating that any amendment needed to be in the form of a written agreement signed by the parties. After Nein was promoted to channel manager, under a new oral agreement, he received a significant salary boost and an increase in his commission rate.

Nein sued HostPro, arguing that he was owed commissions on the AT&T transaction. The trial court dismissed the suit without a trial, finding that he (1) couldn't recover commissions because he wasn't a licensed broker at the time of the transaction and (2) wasn't entitled to commissions after his employment terminated. Nein appealed.

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Court overturns part of ruling

California Business & Professions Code Sections 10131 and 10136 bar an individual from filing suit to recover compensation on a transaction for a "business opportunity" unless he has the proper broker's license. Under Section 10030 of the code, a business opportunity includes "the sale or lease of the business and goodwill of an existing business enterprise or opportunity." It doesn't matter whether the business opportunity involves real estate. It was undisputed that Nein didn't have a broker's license at the relevant time. It was also undisputed that the AT&T transaction, in its final form, constituted a "business opportunity" because HostPro purchased its customer accounts and equipment rather than simply selling Web-hosting services.

Commission plans provide fertile ground for ambiguity and lawsuits.

Interestingly, the court of appeal didn't focus on the ultimate form of the transaction. Instead, it focused on the nature of Nein's actions. If he "solicited" or "negotiated" a transaction for the sale of his employer's services rather than negotiating the purchase of certain AT&T assets, even if the ultimate agreement was for the purchase of assets, he didn't need a broker's license. Because the trial court's analysis didn't make that distinction, it was improper to dismiss the case on those grounds.

Unfortunately for Nein, however, the ruling didn't end there.

Agreement barred recovery of posttermination commissions

Nein's employment agreement clearly stated that he would be eligible for commission pay "so long as [he] remains employed with the Company as a Sales Representative." According to the court of appeal, there is only one logical interpretation of that language: Once he ceased to be a HostPro employee, he was no longer eligible for commission pay.

Nein argued that the later oral employment agreement didn't contain the same termination clause. The court rejected his argument because it fell outside the scope of his pleadings. While he had pleaded a claim for breach of a *written* contract, he didn't plead a claim for breach of an *oral* contract and failed to ask the court to amend his pleading to add that claim. His ineligibility for posttermination commissions was dispositive of *all* his claims, and the court dismissed the appeal. *Nein v. HostPro, Inc.* (California Court of Appeal, Second Appellate District, 6/3/09).

Bottom line

Commission plans provide fertile ground for ambiguity and lawsuits. It's critical to define in writing provisions such as what activities can earn a commission, the rate of pay, and whether an employee is entitled to commissions for postemployment transactions or revenues. This case demonstrates that a clearly written employment agreement — that arises at the inception of the employment relationship — is a critical tool in defining the rights of employees and employers.

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