

Employment Law by Hope Eastman

A no-win situation: You're fired! Here's your bonus.

Many businesses use commissions, incentives and stock options to motivate and reward. Employers need to be aware of pitfalls in adopting and implementing incentive plans.

When employees are let go for poor performance, companies tend to stop commissions and bonuses immediately.

However, commission and bonus plans that prohibit terminated employees from collecting have met judicial resistance.

In Maryland, in situations where there is no bona fide dispute about the wages owed, the employee can collect three times the amount owed, plus attorneys' fees. In the District, employees can collect costs and attorneys' fees as well as 10 percent of the wages due for each day they remain unpaid. In Virginia, the courts can order that wages be paid with 8 percent interest and impose other civil penalties on employers. Courts in all three have issued decisions giving employees rights under wage payment and collection laws.

Frequently, courts have looked at whether the bonuses and commissions were, in fact, "wages." They have ruled that in cases where wages were not promised in exchange for work, they were not to be considered wages. Where wages were promised, the employee was entitled to collect them after termination.

For example, bonuses promised after two years of employment and dependent upon the firm's profitability did not have to be paid when the employee resigned before the end of the second year. The bonus was not yet promised, due or payable because there was no evaluation of the profitability at the end of the two-year period.

However, where the bonus or incentive was directly related to the employee's efforts, incentive payments may well be viewed as wages and have to be paid.

In a Maryland case, where the employee did

everything he could to earn the bonus before he left, the court decided he was entitled to it, even though the employer's bonus plan required him to be employed both at the end of the incentive-plan period and at the time of actual payment. The employee left before the time of payment, but got the bonus anyway.

Maryland employers can no longer require that employees be employed until bonuses are actually paid out if those bonuses are fully earned before that employee's departure.

Stock options have come within this judicial reasoning. Employees are often offered stock options in their compensation package. A recent case applying Maryland law concluded that options were not "wages" and not promised in exchange for the work.

The court in that case drew a sharp distinction between compensation promised before an employee starts work and compensation added later. While this makes little sense if the compensation is promised for continued work, it does give employers some planning latitude. However, if specific grants of stock options come in the initial offer letter or agreement, it seems pretty clear that they would be considered wages.

Employers have considerable leeway in drafting bonus, commission and stock option plans. In situations where a sale requires considerable follow-up before revenue is realized or the employees who take over the account have to nurture the relationship, a carefully drafted plan can protect the employer against claims by employees who are fired or quit.

Employers should anticipate the situation where the plan requires the employee to be employed at the end of the year, but the parties agree to termination by mutual consent before the end of the year.

■ HOPE EASTMAN IS THE HEAD OF THE EMPLOYMENT LAW GROUP AT PALEY ROTHMAN. E-MAIL: HEASTMAN@PALEYROTHMAN.COM. PHONE: 301/951-9326