



# Labor and Employment Law Information Memo

July 2008

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## NYS COURT OF APPEALS HOLDS THAT LABOR LAW ARTICLE 6 PROVISIONS ON PAYMENT OF WAGES APPLY TO EXECUTIVES AND THAT EMPLOYERS HAVE THE RIGHT TO DETERMINE WHEN COMMISSIONS ARE “EARNED”

In a recent case, New York’s highest state court found that although executives are generally covered by the payment of wages provisions of the New York Labor Law unless specifically excluded, employers have the right to determine when commissions are earned. *Pachter v. Bernard Hodes Group, Inc.*, 2008 NY Slip Op. 05300 (June 10, 2008). In *Pachter*, the plaintiff, a former Vice-President of Bernard Hodes Group, was responsible for selling advertisements and was paid on a commission basis. When her employment ended, she sued her employer, claiming that certain charges made against her commissions violated Section 193 of the Labor Law, which prohibits most deductions from wages. This information memo discusses both the legal background with respect to these issues and the practical implications for employers.

### Executives Under the New York Labor Law

Article 6 of New York Labor Law consists of Sections 190 through 199-A. Section 190 provides the definitions of terms used in Article 6. Section 190(2) defines an employee as “any person employed for hire by an employer in any employment.” The New York Court of Appeals (the “Court”) noted that federal and state courts have disagreed about whether sections in Article 6 protect executives when those provisions do not specifically exclude executives from coverage. Certain provisions of the Labor Law expressly exclude executives

from coverage, such as Section 198-c which imposes penalties for failing to pay “benefits” or “wage supplements” within thirty days after such payments are required to be made. However, other provisions, such as Section 193 which limits the circumstances under which employers can make deductions from their employees’ wages, do not specifically exclude executives from coverage. Section 193 provides that employers cannot make any deduction from an employee’s wages unless permitted by law or expressly authorized by the employee, in writing, for “insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.”

The Court looked to Section 190(2) to determine whether executives are generally entitled to Article 6 protections. The Court found that the definition of “employee” in Section 190(2) “plainly embraces” executives. Furthermore, the Court noted that specifically excluding executives from certain sections of the Labor Law would be “wholly superfluous” if executives were not generally covered by Article 6. Accordingly, the Court held that executives are “employees” for the purposes of Article 6, except where Article 6 expressly excludes them.

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## When are Commissions “Earned” Under the New York Labor Law?

Once the Court found that executives are covered by Section 193 of the Labor Law, it then needed to determine whether certain charges made against commissions violated that provision. The Court first sought to determine when a commission becomes “earned” and thus subject to Section 193’s prohibition against wage deductions. In making this determination, the Court looked to the common law, which provides that a “broker who produces a person ready and willing to enter into a contract upon his employer’s terms. . .has earned his commission.” However, an employer and employee are free to depart from the common law, and make a different arrangement for calculating commissions. Thus, the Court held that unless the parties expressly or impliedly contract otherwise, the common law rule applies that an employee “earns” his commission when he produces a person who is ready and willing to purchase the employer’s goods or services. However, if the parties expressly or impliedly agree to depart from the common law rule, the agreement will control when a person “earns” his commission for the purposes of Article 6.

Applying the common law doctrine, the Court determined that Pachter “earned” her commission when she obtained a client’s commitment to buy advertising. However, the Court found that the written monthly commission statements and Pachter’s acceptance of those statements for eleven years showed that the parties had an implied contract regarding the calculation of Pachter’s commission. The implied contract provided that Pachter “earned” her commission after Hodes deducted certain “business expenses” such as finance charges for late payments, losses attributable to errors in placing advertisements, uncollectible debts, and travel and entertainment expenses. At the time the employer deducted the business expenses, Pachter had not yet “earned” her commissions. Thus, Section 193’s wage deduction prohibitions did not apply and the deductions were deemed to be lawful.

### What Does *Pachter* Mean to Employers?

Employers should review their current wage practices and procedures to ensure that executives are afforded the protections of Article 6 of the Labor Law unless specifically excluded. This includes making sure that deductions are not being made from the wages of executives, unless authorized by Section 193.

The case also serves as a good reminder that due to a recent amendment to the Labor Law, employers must have signed written commission agreements for all commission salespersons. Even if an individual does not meet the definition of commission salesperson under the Labor Law, it is still a good idea to have a written commission agreement for all employees paid on a commission basis, in whole or in part. The *Pachter* litigation most likely could have been avoided in the first instance if there was a written commission plan describing when commissions were earned. Employers may also wish to review current commission plans to ensure that they are clear on when commissions become “earned” and what types of charges may be made before commissions become earned. It may also be helpful to have a complaint mechanism in the plans to address complaints of miscalculation.

If you have any questions regarding this information memo or need any assistance in drafting or reviewing commission plans or agreements, please contact:

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**Effective July 24, 2008, the federal minimum wage increased from \$5.85 per hour to \$6.55 per hour.**

**Private sector employers in New York State, however, must continue to comply with the state minimum wage of \$7.15 per hour.**