

# CLIENT ALERTS

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## Important Amendments Reshape Key NY Labor and Employment Laws

Several important amendments to the New York State labor and employment laws warrant notice from employers. These amendments include: (1) a requirement of a written agreement with certain employees whose earnings are based on commissions; (2) a change in the wage threshold for coverage of employees under certain provisions of the Labor Law; (3) an increase of monetary fines for meal and rest period violations; (4) a grant of leave of absence for blood donors; and (5) a narrowed criminal conviction inquiry.

This Alert also discusses the Second Circuit's decision in *Pachter v. Bernard Hodes Group Inc.*, No. 06-3344 (Oct. 12, 2007) to certify the following questions to the New York State Court of Appeals: (1) whether an "executive" is considered an "employee" for purposes of New York Labor Law Article 6, Section 193, and thereby subject to the protections of that provision; and (2) in the absence of a governing written agreement, when are commissions "earned" and therefore considered "wages" under sections 191 and 193, thereby rendering most subsequent deductions unlawful.

### Agreements with Commission Employees Must Now Be in Writing

Effective October 16, 2007, the Labor Law provision pertaining to commission salespersons has been amended. The provision applies to all salespersons whose earnings are based, in whole or in part, on commissions from merchandise, real estate, insurance, securities, and other products or services. The new amendment to Labor Law Section 191(c) requires the following:

- The employer and the commission salesperson must enter into a written document describing the terms of employment.
- The document must be signed by both the employer and the employee.
- The written document must describe how the wages, salary, commissions, draw-against commissions, if any, and all other monies earned and payable are calculated.

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- The frequency of reconciliation should also be included, if the agreement provides for a recoverable draw.
- The document must also describe how commissions are paid upon termination of employment.
- The document must also be kept on file by the employer for at least three years.

If an employer does not provide a written document with the terms of commission to the New York State Department of Labor upon its request, the Department will assume that the terms of employment asserted by the commission salesperson are the agreed terms of compensation.

## **Changes to the Definition of Executive, Administrative or Professional Employee**

Currently, executive, administrative and professional employees earning more than \$600 per week are exempt from certain wage-payment provisions of Article 6. As of January 14, 2008, to be considered an executive, administrative or professional employee for certain provisions of the Labor Law, the employee must earn \$900 per week. As a result of this amendment, employees earning less than \$900 per week will have to be paid at least semi-monthly<sup>1</sup> and will need to provide written consent for their wages to be subject to direct deposit.

Please note, however, that this new amendment does not affect the requirements that a bona fide executive, administrative and professional employee must be paid a minimum of \$536.10 per week to possibly be exempt from New York State overtime requirements. Still, to comply with the new requirements, for employees earning less than \$900 per week, employers should review the frequency of payment of wages to these employees and whether those employees have consented to direct deposit.

## **Rest and Meal Period Fines**

The New York Labor Law currently requires that most employers allow every employee at least 24 consecutive hours of rest in any calendar week (*i.e.*, one rest day in seven) and, among other meal breaks, a 30-minute unpaid lunch period for most employees between 11:00 a.m. and 2:00 p.m. While employers will continue to be subject to possible criminal sanctions for violations for these provisions, effective immediately, employers will now be subject to civil fines for up to \$1,000 for the first violation, \$2,000 for the second violation and \$3,000 for the third violation. To avoid these fines, we recommend that employers review their weekly scheduling and meal-break policies to ensure compliance with the Labor Law.

## **Leave For Blood Donors**

Effective December 13, 2007, employers are required to grant three hours of leave of absence in any 12-month period to an employee who seeks to donate blood. The leave may not exceed three hours, unless otherwise agreed to by the employer. The law applies to employers with 20 or more employees. To be eligible

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<sup>1</sup> Section 190 of the Labor Law will now define “clerical and other workers” as all employees except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of \$900 per week. Section 191(d) of the Labor Law states, “a clerical and other worker shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer.”



for the leave, employees must work an average of 20 or more hours per week. The statute also prohibits retaliation against an employee for requesting or obtaining a leave of absence to donate blood.

Employers should inform all managers and supervisors of the new leave requirements and should remind them that they may not take any adverse employment action against any employee seeking time off from work to donate blood.

## **Criminal Conviction Inquiry and Use of Criminal Conviction Information Is Narrowed**

Effective November 1, 2007, New York State employers may no longer make an inquiry on an employment application or make an adverse employment decision based on convictions that have been sealed pursuant to Section 160.55 of the Criminal Procedure Law or information pertaining to youthful offender adjudications under Section 720.35 of the Criminal Procedure Law. Thus, it would be advisable for employers to review their employment applications to determine whether the applicant must provide information pertaining to convictions that have been sealed or classified as youthful offender adjudications.

## **Deductions From Wages: Executive Exemption and Commissions**

In *Pachter v. Bernard Hodes Group Inc.*, the Second Circuit certified the following undecided questions for resolution by the New York State Court of Appeals, the state's highest court: (1) Whether an "executive" is considered an "employee" for purposes of New York Labor Law Article 6, Section 193, and thereby subject to the protections of that provision; and (2) in the absence of a governing written agreement, when are commissions "earned" and therefore considered "wages" under Sections 191 and 193, thereby rendering most subsequent deductions unlawful?

Section 193 of the Labor Law states that employers may not make any deductions from employees' wages except for deductions in accordance with federal or state law or employee authorized deductions 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.

Although the Second Circuit was inclined to conclude that all employees, including executives, are covered by Section 193, the Court was reluctant to do so in light of the sharp disagreement in the New York federal and state courts over this issue. As the Court noted, the resolution of this issue is fundamental to the Labor Law since its resolution potentially affects large numbers of employees and employers throughout New York State.

The second question certified by the Court, the determination of when a commission becomes "earned," usually depends on the terms of an agreement providing for the commission. Once "earned," deductions, other than those set forth in Section 193, are improper. In *Pachter*, there was no agreement memorializing when the employee's commission became earned, thus the Court was forced to decide. To avoid litigating this issue, we would recommend that employers include the formula for determining when a commission is "earned" in the writing memorializing the written terms of employment for commissioned employees, as required by the recent amendment to the Labor Law and discussed in this Client Alert.

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If you have any questions regarding these new developments or any other New York labor or employment law, please contact Kenneth W. DiGia at (212) 351-4610 or [kdigia@ebglaw.com](mailto:kdigia@ebglaw.com), Jeffrey M. Landes at (212) 351-4601 or [jlandes@ebglaw.com](mailto:jlandes@ebglaw.com), or Anna A. Cohen at (212) 351-4922 or [acohen@ebglaw.com](mailto:acohen@ebglaw.com).

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