

New York Appellate Division Revisits Post-Termination Payment Of Commissions

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The New York Appellate Division, First Judicial Department's recent decision in *Arbeeny v. Kennedy Executive Search, Inc.*, --- N.Y.S.2d ----, 2010 WL 114948 (1st Dept. Jan. 14, 2010), serves as a valuable lesson to employers with commissioned employees. When drafting written commission agreements, as required by N.Y. Labor Law § 191(c), employers must ensure that they clearly define when a commission is considered "earned." In *Arbeeny*, the Appellate Division reinforced the long-standing policy that once a commission is earned, it cannot be forfeited, even if the employee who earned the commission is no longer employed when the commission is payable and the commission agreement provides that commissions are only paid if the employee is still employed when the commissions are due to be paid.

In *Arbeeny*, the plaintiff was employed by Kennedy Executive Search ("KES"), an executive recruitment firm, as a Senior Executive Search Consultant. Plaintiff's commission agreement provided that he was eligible "to earn commission compensation in respect of placements **arranged** by Employee on behalf of KES." (Emphasis added.) According to the wording of arrangement, the commission was earned at the time it was arranged. Payment of the commissions was to be made in the calendar month following the month in which KES received payment from the client, provided KES recovered certain costs. The commission agreement also provided, "[n]o commission shall be due" in the event plaintiff "is not in the employ of KES at the date the commission payment would otherwise be made."

KES terminated plaintiff's employment in March 28, 2007. KES received payment from a client in March for a placement that plaintiff had arranged; however, pursuant to plaintiff's commission agreement, plaintiff's commission would have been payable in April, after plaintiff's termination date. As plaintiff was no longer employed by KES when the commission was due, KES attempted to avoid a dispute with plaintiff by paying him a portion of the commission, but did not pay plaintiff the entire amount due. The court noted that after plaintiff's termination, KES received other fees from placements also arranged by plaintiff; however, KES did not pay any further commissions to plaintiff.

Although the lower court dismissed plaintiff's complaint with respect to his claim for unpaid commissions, noting that "the employment agreement expressly deprives plaintiff of post-

termination commissions,” and there was “no allegation that [KES] failed to pay to [plaintiff] commissions for placements he finalized and for which fees were received prior to his termination,” the Appellate Division reversed this decision and found that plaintiff “has sufficiently stated a breach of contract claim for unpaid earned commissions that he ‘arranged’ prior to his termination.”

While *Arbeeny* does not prohibit employers from foreclosing the possibility of an employee earning a post-termination commission, to do so, employers should explicitly state that commissions only become **earned** by the employee if (i) the entire transaction is completed during the employee’s employment, and (ii) the employee remains employed by the company on the date the commissions are due to be paid. To ensure that existing commission agreements are enforceable in the manner intended by the employer, we recommend that employers consult with their Employment Law attorneys to review all commission agreements.

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