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New Jersey Supreme Court Rules All Commissions Are Wages Under the New Jersey Wage Payment Law, Exposing Employers to Criminal and Civil Penalties for Non-Payment

On March 17, the New Jersey Supreme Court ruled in *Musker v. Suuchi, Inc.* that commissions earned by employees "always constitute a wage" under the New Jersey Wage Payment Law (WPL). The Court's decision overturned a prior decision from the New Jersey Appellate Division which held that, in certain circumstances, money earned by an employee for making sales can be a "supplementary incentive" which is not recoverable under the WPL. The Supreme Court's decision greatly expands the scope of the WPL and will likely lead to greater liability for New Jersey employers.

New Jersey's Wage Payment Law

The WPL sets forth the requirements for the time, manner and mode of payment of both exempt and non-exempt employees' wages. The law defines "wages" as "the direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto." While the WPL does not define "supplementary incentive," New Jersey courts have found that the term includes additional perks that motivate employees to go "above and beyond" the normal labor or services they provide to their employers. Examples of supplementary incentives include payment for sharing office space with another employee, achieving attendance goals or referring a friend to apply for an open position.

While employees can bring suit under the WPL to seek unpaid wages, they cannot do so for unpaid supplementary incentives and bonuses since such payments are not recoverable under that law. Rather, employees seeking to recoup unpaid bonuses or supplementary incentives, which included certain commissions under the Appellate Division's prior decision in *Musker*, are limited to contract claims, and the damages are limited to the amount of money, if any, the employee can prove the employer offered or promised. This is in stark contrast to the damages available under the WPL. Indeed, under the WPL, employees who successfully bring suit can recover, in addition to unpaid wages, liquidated damages of up to 200% of the employees' unpaid wages over a period of the previous six years, as well as attorneys' fees and costs of suit. Given the significantly greater potential liability for employers under the WPL, the distinction between wages and supplementary incentives and bonuses is an important one.

Case Background

The plaintiff in *Musker* worked for the defendant, selling software subscriptions to apparel manufacturers. In addition to her base salary, the plaintiff was eligible to earn commissions under the defendant's commission plan. During the COVID-19 pandemic, the defendant decided to additionally sell personal protective equipment (PPE), for which salespersons were also eligible to receive commissions. Despite the plaintiff generating approximately $35 million in gross revenue by selling PPE, the defendant refused to pay her commissions on those PPE sales. The plaintiff sued, alleging the defendant withheld her wages in violation of the WPL. The defendant argued that because the PPE was a new product and not part of its primary business (i.e., software subscription sales), the commissions were more akin to "supplementary incentives and bonuses" and thus were not recoverable by the plaintiff under the WPL. A trial court agreed that the PPE commissions were not wages under the WPL and dismissed the plaintiff's claim. The Appellate Division affirmed, holding that because the plaintiff's sale of

PPE went "above and beyond her sales performance, and the [PPE] commissions are calculated independently of her regular wage," those commissions did not constitute wages that were recoverable under the WPL.

The New Jersey Supreme Court Weighs In

The New Jersey Supreme Court took a different view. It reversed the Appellate Division's decision, emphasizing that the WPL's definition of wages explicitly includes all "direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a ... commission basis." Using that definition, the Court further held that a "'commission' earned 'for labor or services rendered by an employee' can never be a 'supplementary incentive'" under the WPL. In fact, the Court found that because the definition of wages explicitly includes commissions, it "would be illogical and contrary to applicable canons of statutory interpretation" to conclude that any commission could be considered a supplementary incentive not covered by the WPL. The Court further found that "just because a product is new and potentially sold only temporarily does not mean that sales of that product somehow fall outside the regular 'labor and services' an employee provides." Because selling PPE became a part of the plaintiff's job, even if only temporarily, her compensation for performing that task became a wage under the WPL.

Bottom Line

While the New Jersey Supreme Court's decision in *Musker* expands the types of compensation that employees can seek to recover under the WPL, it also provides employers with greater clarity on how commissions earned by employees should be treated under the law — whether those commissions are earned as part of an employee's regular day-to-day duties or as part of one-off or temporary assignments. Given the significant potential liability under the WPL for unpaid wages (including commissions), such as liquidated damages, attorneys' fees, and criminal and monetary penalties, and given the WPL's six-year lookback period, New Jersey employers should consult with employment counsel to ensure that they comply with the requirements of the WPL.

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