It's COMP-licated: Tricky Compensation Issues for Employers

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Overview

- Risks and Rewards When Utilizing Incentive Compensation
- Michigan’s Equal Pay Statutes
- Avoiding Claims Under the Michigan Sales Representative Commission Act

What is Incentive Compensation?

- Compensation paid to an employee in addition to his or her regular salary for attaining certain levels of performance.
- Can be short-term or long-term.

Types of Incentive Compensation

- Profit Sharing
- Cash Bonuses
- Equity Awards
- Phantom Equity
- Discretionary Bonuses
- Project Bonuses

Rewards

- Motivation
- Loyalty
- Job Satisfaction
- Investment in Employer’s Success
- Increased Sales or Productivity

Risks

- Promotion of Risky Behaviors
- Fairness
- Lack of Clear Objectives
- Failure to Communicate Expectations and Monitor Progress

Incentive Compensation: Keys to Success

- Setting realistic performance goals and measures.
- Consistent implementation of plan.
- Adapting to unforeseen circumstances.
- Clear communication of program and employee progress.
- Monitoring employee behavior.

Michigan's Equal Pay Statutes

- **Elliott-Larsen Civil Rights Act**
  - MCL § 37.2202
- **Workforce Opportunity Wage Act**
  - MCL § 408.423
- **The Michigan Penal Code**
  - MCL § 750.556

Avoiding Claims Under the Michigan Sales Representative Commission Act

Michigan Sales Representative Commission Act – MCL § 600.2961

- Who does it cover?
  - Principal
  - Sales Representative
- What does it cover? – Products vs. Services
  - Commissions arising from the sale of "products"
  - "Products" have been interpreted to encompass things that are normally thought of as "services" like lawn treatment

Commissions: When Must They Be Paid?

- Contract terms will dictate when commissions will be paid.
- If there is no contract, past practice between the parties will control.
- If there is no past practice between the parties, the custom or usage of similar businesses will control.

Post-Termination Commissions

- All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination.
- Commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due.

Penalties for Violating SRCA

- A Principal who is found to have violated the SRCA is liable for the following:
  - Sales representative's actual damages;
  - If the principal is found to have "intentionally" failed to pay the commission, double damages up to $100,000; and
  - Attorneys' fees.

How to Avoid SRCA Claims

- Critical considerations:
  - Sales representative's duties?
  - When are commissions earned? When are commissions paid?
    - Submitted order?
    - Completed sales?
    - Customer procurement?
  - At will or for "cause"?

What to Avoid?

- "Procuring cause" or "life of the part or contract" clauses. Consider inclusion of a provision specifically excluding such concepts from the contract.
- Clauses attempting to make the SRCA inapplicable to the contract.
- Oral agreements.

Sales Bonuses: An Alternatives to Sales Commissions

- "Sales commission" is compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders or sales or as a percentage of the dollar amount of profits."
- A "sales bonus" is compensation based on attaining certain goals or quotas.
- Sales bonuses, if structured properly, are not subject to SRCA provisions.

Example: Commission vs. Bonus

- Commission
  - Rep makes $500,000 in sales. His commission rate of 10% of completed sales results in a commission to Rep in the amount of $50,000.
- Bonus
  - Rep makes $500,000 in sales. His bonus structure is set up as follows: 6% of sales up to $100,000, 10% of sales up to $300,000, and 12% of sales up to $500,000.


THANK YOU