

Employees' Entitlement to Bonuses and Commissions Following Termination of Employment

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For many employees, bonuses and commissions represent a significant portion of the compensation they expect to receive in exchange for their hard work and efforts in growing and cultivating their employers' businesses and, in many instances, generating revenue. Typically, incentive pay is tied to performance—whether individual or company-wide—and is earned as of a certain date (which may be at the end of each year, each quarter, each month, or any other regular, set intervals), upon successful completion of certain tasks (such as the closing of a sale), or upon achieving certain measurable performance metrics or benchmarks. Often times commissions are paid on a monthly basis and bonuses are paid annually, either at the end of the year or beginning of the following year. But it does not have to be that way, and employers generally enjoy broad discretion in how they wish to construct and implement their incentive compensation plans and policies—and whether to even have one at all.

Regardless of how this compensation is calculated and structured, most employees reasonably expect that as long as they remain employed with their company and continue to work hard, they will continue to be paid any bonuses and commissions they earn when the designated criteria and conditions are met. As with one's base salary or regular wages, if an employer fails or refuses to pay an employee his or her agreed upon bonus or commission after the employee has earned it by satisfying whatever preconditions and requirements have been set, that employee likely has recourse and may pursue legal action against his or her employer for that earned but unpaid compensation.

One recurring issue that often arises with respect to incentive pay and is not always easy to answer, however, is what, if anything, is an employee entitled to receive *after* his or her employment is terminated? That is, if a bonus or commission for a certain period becomes due and is supposed to be paid on a certain date, but the employee is let go or discharged prior and no longer works for the company when the payment date comes, is he or she still entitled to be paid out that bonus or commission or any portion thereof? Many employers and employees assume or believe the answer is always "no." Many also assume that if the employee is no longer employed as of the date the bonus or commission is scheduled to be paid, the employer does not have to pay it. While that may be true in some situations, it certainly is not always the case. As it turns out, the answer depends on a number of factors, some or all of which may come into play and must be taken into consideration in any given case.

Whether an employer is required to pay out, and an employee is entitled to receive, bonuses or commissions that become payable after the termination of that employee's employment may turn on any many different factors, including but not limited to what state the employee is (or was) employed and worked in. Different states have different laws and rules regarding the post-termination payment of incentive compensation such as bonuses and commissions. For example, in some states such as Pennsylvania, an employee who is terminated through no fault of his or her own is entitled to his or her pro rata share of a bonus earned prior to termination. Even if the employer's compensation plan or policy states that the employee must remain in the employ of the company as of a particular date—whether it be the last day of the year, the first day of the following year, the date payment is scheduled to be made, or otherwise—courts in many jurisdictions have held that an employer cannot avoid paying an employee his or her bonus by simply terminating the employee's employment prior to the applicable cutoff date. In those cases, these courts have refused to allow employers to deprive employees of the bonus they otherwise would have received but for the unilateral action of the employer, and they have ordered the employer to pay the terminated employee his or her proportionate share of the bonus based on the amount of time served in the employer's employ during the period in question.

Conversely, in other states, where the employee's employment agreement or the employer's bonus or commission plan clearly indicates that the employee's entitlement to such compensation is predicated and conditioned upon the employee remaining employed as of a particular date (or that such compensation will not be paid if the employee is not employed as of that date), such language will be enforced as written, treated more or less the same as any other contract.

Regardless of where the employer is located and where the employee works, other factors and variables must be taken into consideration in order to determine whether there is any post-termination entitlement to payment. Some of these factors include, but are not limited to:

- Whether the incentive pay at issue is a bonus, on the one hand, or a commission on the other, which itself turns on a number of different factors such as how the compensation is calculated and quantified and whose performance and what metrics and measurements it is tied to;
- Whether payment of the bonus or commission is governed by a written employment agreement or compensation plan and, if so, the specific terms, conditions, and phrasing and language of that document, including but not limited to how it defines the term "bonus" or "commission," when it states such compensation is earned and when it becomes payable, and whether it requires employment as of a particular date as a required condition of payment;
- Whether payment of the incentive compensation at issue is completely discretionary on the part of the employer, or a non-discretionary, guaranteed component of the employee's compensation earned and accrued upon completion of certain tasks, particular measurable criteria, or periods of time of employment; and
- The facts and circumstances surrounding the termination of the employee's employment, such as whose decision it was to end the employment relationship (did the employee decide to resign or did the employer fire or let him or her go) and the reason for that decision (e.g., whether the employee was terminated with or without cause).

These are just a handful of the many different factors that must be taken into consideration when determining whether an employee is owed and entitled to receive bonus or commission payments after his or her employment is terminated. Depending on where the parties are located and the specific facts and circumstances of a particular matter, which can and do vary greatly from one case to the next, a former employee may be able to pursue his or her former employer in court for payment of some or all of the bonuses and/or commissions the employee believes were earned prior to being let go. In situations where the employee is in fact legally entitled to payment, an employer's failure or refusal to remit such payment may give rise to various causes of action, including but not limited to for breach of contract and potentially violation of applicable state wage payment laws, and may expose the employer to substantial liability—sometimes even far greater than the underlying amount allegedly in dispute.

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