IN THE COURT OF APPEALS FOR THE STATE OF NEW YORK

USCOA 2 No. 180

ELAINE PACHTER,

Respondent,

v.

BERNARD HODES GROUP, INC.,

Appellant.

ON REVIEW OF CERTIFIED QUESTIONS FROM UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, NO. 06-3344-CV

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION *AMICUS CURIAE* BRIEF ON SECOND CERTIFIED QUESTION

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, the Securities Industry and Financial Markets Association, states that it is a non-profit organization that has no parents or subsidiaries, but it has the following three non-profit affiliates: Foundation for Investor Education (FIE), Inc.; The Bond Market Educational Foundation; and the Securities Industry Association, New York District, Economic Education Foundation, Inc.

PRELIMINARY STATEMENT

The Securities Industry and Financial Markets Association ("SIFMA") is the product of the November 1, 2006 merger of the Securities Industry Association and the Bond Market Association. SIFMA brings together the shared interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to present its members' interests locally and globally. It has offices in New York, as well as Washington D.C., and London, and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

SIFMA does not address the first certified question in this brief. Instead, this brief addresses only the second certified question – when commissions vest so as to be considered earned wages under Sections 191 and 193 of Article 6 of the New York Labor Law. As a leading advocate in the financial services industry, and as an organization that represents a wide range of financial service industry employers in New York, SIFMA has a broad perspective that extends beyond the specific interests of the parties in this matter. Moreover, this Court's decision could have a significant impact on SIFMA's members, their hundreds of thousands of employees in New York, and the agreements and plans that presently govern their compensation.

As demonstrated below, the statutory language, legislative history, and judicial interpretations of Sections 191 and 193 (as well as similar provisions in other states) all prove that the <u>parties' agreement</u> governs how and when commissions vest so as to be considered earned wages. This is true even if the agreement is not in writing. Indeed, in amending Section 191 after the District Court issued its decision in <u>Pachter</u>, the Legislature made clear that the agreement of the parties governs how commissions are to be calculated and earned, that the calculation of commissions can include offsets and adjustments before they vest, and that the agreement can be a non-written one.

In the instant case, Bernard Hodes Group, Inc. ("Bernard Hodes") contends that the commission statements provided to Pachter reflect the parties' agreement concerning how and when commissions would be calculated and earned. Pachter disagrees. SIFMA takes no position on this part of the dispute because what the parties agreed to, and whether there was any agreement at all, are factual issues that should be resolved in the federal action. Rather, SIFMA's position is that <u>if</u> the fact-finder concludes that the parties agreed: (1) that commissions would be calculated by taking gross revenue from sales, applying a percentage to that revenue, and then making certain adjustments, and (2) that no commissions would be due or payable until all such calculations were completed, then the agreement would be enforceable without violating Sections 191 or 193 because the commissions did not vest so as to be considered earned wages until the computation was done.

In any event, regardless of how this Court answers the narrow, legal question of when commissions become vested and hence earned wages for purposes of Sections 191 and 193, SIFMA respectfully urges this Court to make it clear that it is not disturbing existing precedent governing incentive compensation. Incentive compensation is compensation that vests only upon agreed terms and conditions for employees who are already being compensated for their labor by a salary or other fixed compensation. Preserving the current law on incentive compensation is important because employers should be permitted to use incentive compensation plans that encourage employees to control costs and that reward employees for generating business that is profitable, not just any business. The current law on incentive compensation also should not be disturbed because incentive compensation arrangements serve significant public policies such as encouraging retention of employees and increased productivity – both of which increase the stability of New York businesses, particularly within the financial services industry. Further, preserving the current law on incentive compensation is important because overturning current precedent – such as the First Department's decision in Dean Witter Reynolds, Inc. v. Ross, 429 N.Y.S.2d 653 (1st Dep't 1980), that was correctly decided and that has been relied on by employers for nearly 30 years – would risk creating a flood of litigation. Overturning such precedent also would cause significant disruption by upsetting compensation arrangements that cover hundreds of thousands of New York-based employees and, in particular, would undermine long and well-functioning compensation systems for a significant, New York-based enterprise – the securities and financial services industry.

CERTIFIED QUESTION

Question: 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?

Proposed Answer: Under Sections 191 and 193, commissions vest and are earned according to the terms of the parties' agreement, regardless of whether that agreement is in writing. Therefore, parties can agree to a calculation formula that incorporates various offsets and adjustments, and the commissions are earned and vested after application of that formula.

STATEMENT OF FACTS

Although this Court obviously must resolve the certified questions with due regard for the facts presented in Pachter, the certified questions ask this Court to opine on general statements of law that could have far-reaching implications for employees and employers throughout New York. Accordingly, SIFMA provides some background about how compensation plans are structured in the financial services industry for Registered Representatives.

The actual job titles of "Registered Representatives" vary from firm to firm within the securities/financial services industry and include titles such as account executives, broker-representatives, financial executives, financial consultants, financial advisors, investment professionals, investment consultants, and stockbrokers. Although the functions performed by Registered Representatives may vary at different firms and in different segments of the industry, generally speaking, Registered Representatives: (1) collect and analyze clients' financial information (including assets, income, debts, cash flow, and tax status); (2) develop investment strategies for clients based upon the clients' financial status, risk tolerance, tax exposure, and objectives; (3) study and assess securities market conditions and trends to identify potential investments and to determine optimum times to implement investment strategies; (4) advise clients on the advantages and disadvantages of particular investments, and effect the purchase or sale of such investments; (5) structure and implement transactions in a manner that ensures conformity with applicable laws, regulations, and requirements; and (6) engage in business development activities.

Registered Representatives, in effect, run their own businesses and profit centers within their firms. They are responsible for deciding what licenses and professional designations (beyond the required federal Series 7 license) to acquire,[1] what states to do business in, what types of investment advice to provide or specialize in, how to promote themselves (e.g., by holding seminars, making presentations to law firms or other businesses, participating in charity events, etc.), what fee discounts to give to which customers, what fees normally assessed on client accounts to waive, how much money to spend on business development (such as advertising, direct mailings to potential customers, and the like) and how much time to devote to the business. Often, Registered Representatives decide to enter into partnerships with one or more other Registered Representatives to build business, service clients, and to share revenue, expenses, and incentive compensation as a team. Registered Representatives also have the option of obtaining additional help by hiring more assistants, some of whom are registered and, by regulation, can share in the revenue generated by the team and some of whom are not registered. Registered Representatives may elect to hire additional assistants to support their business (a) because they believe the additional help will

[1] For example, Registered Representatives can acquire a Series 6 license for mutual funds, Series 31 license for commodities and futures, Series 9 and 10 licenses, permitting them to serve as managers, and/or health and life insurances licenses, permitting them to promote insurance products. They can also obtain professional designations such as Certified Financial Planner and Certified Investment Management Analyst.

help them expand the number of clients they are able to service and thus be rewarded with more incentive compensation, (b) because the additional help will permit them to spend more time with their families or engage in other non-work activities, or (c) because they just prefer to avoid the administrative activities that an additional assistant can perform for them. To protect the investing public, which is investing its savings for such things as retirement, college education, and future nursing home or other health care costs, Registered Representatives must avoid trading errors that could result in a loss to investors. Each of the decisions Registered Representatives make about how to run the business from day to day directly affects the profitability of their employers.

Turning to how Registered Representatives are compensated, their compensation plans, which are virtually always set forth in writing, vary among financial institutions, but they generally share certain key features. First, they generally include a salary (sometimes in the form of a guaranteed draw) that is paid on a weekly, monthly, or semi-monthly basis. The salary is pre-determined and guaranteed, meaning that both parties know and agree on what the fixed amount is going to be before it is paid and the employee receives that guaranteed salary, without any deduction or offset, regardless of the quality or quantity of work. The salary is typically at or above the salary necessary to meet federal and state overtime exemption standards.

In addition to a guaranteed salary, compensation plans for Registered Representatives generally afford covered employees the opportunity to be awarded substantial incentive compensation over and above their guaranteed salary. Registered Representatives are typically eligible for an incentive compensation award on a monthly basis after the close of the month period. The incentive compensation is calculated based on complex formulas and rules. Generally speaking, incentive compensation is calculated by taking credits allocated under the rules of the written compensation plan and subtracting debits under the rules of the plan. Credits are allocated based on fees expected to be received by the financial institution when the Registered Representative executes a particular transaction (e.g., a stock or mutual fund trade) or performs a particular service (e.g., managing a customer's investment portfolio). The amount of the credit is usually determined based on the percentage of fees charged for the particular transaction or service performed or based on the dollar amount of assets the client has invested with the firm. For example, the credit for a mutual fund trade may equal X percent of the fees generated, whereas the credit for managing a customer's portfolio may be Y percent of the assets the client has under management with the firm for some specified measurement period.

Debits used in the formula for calculating incentive compensation can include such items as reversals for cancelled trades, trade errors, marketing expenses, and compensation paid to additional assistants on the Registered Representative's team. For example, where a credit has been allocated in a prior month for a particular transaction, but that transaction did not close for some reason (e.g., the customer cancelled the trade and never paid a fee to the firm on the transaction, or the trade was an error), the amount of the credit will be subject to an offsetting debit in the calculation of incentive compensation.

Once all of the credits and debits are added up for the month, incentive compensation is calculated by taking credits and subtracting debits. The incentive compensation plans make clear, and Registered Representatives acknowledge, that no incentive compensation is due or owing unless and until all calculations under the plan are made. Plans in the industry are designed to operate, in effect, as profit-sharing plans. Because, as explained above, Registered Representatives essentially run their own businesses with their own profit centers, the terms of their written incentive compensation plans are designed to maximize revenue while encouraging efficient business operations. Throughout the financial services industry, it is very common for Registered Representatives to earn hundreds of thousands of dollars and even millions of dollars each year in incentive compensation over and above base salary.

ARGUMENT

I. COMMISSIONS VEST AND ARE CONSIDERED EARNED WAGES ACCORDING TO THE TERMS OF THE PARTIES' AGREEMENT, REGARDLESS OF WHETHER THE AGREEMENT IS IN WRITING.

As explained below, the statutory language of Article 6 of the New York Labor Law and cases interpreting Article 6 make clear that it is the agreement between the parties that governs when commissions become vested and thus earned wages. As such, adjustments made prior to contractual vesting do not fall within the rubric of unlawful deductions from "wages." As also explained below, the parties' agreement governs the vesting and hence earning of wages regardless of whether the agreement is in writing or not.

A. The Text Of Article 6 Makes Clear That Commissions Vest And Are Considered Earned Wages According To The Terms Of The Parties' Agreement.

Article 6 of the New York Labor Law is entitled "Payment of Wages." Contained within Article 6 is Section 193(1), which limits the ability of an employer to "make any deduction from the wages of an employee . . ." (emphasis added). Also contained in Article 6 is Section 191, which governs the frequency with which "wages" must be paid to certain categories of employees. Neither Section 193 nor Section 191 defines the term "wages." Instead, to find the statutory definition of "wages," one must turn to Section 190, which contains a definition of "wages" that applies throughout Article 6, including Sections 191 and 193. See, e.g., N.Y. Stat. § 236 (McKinney 2007) ("[i]n the absence of anything in the statute indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout . . .").[2] Section 190(1) defines "wages" as the "earnings of an employee for labor or services rendered . . ." (emphasis added). Thus, the pertinent question in determining whether an adjustment violates Section 193(1) is whether that adjustment is made to "earned wages."

Article 6 does not specify the amount of wages that must be paid for an employee's labor or services. See, e.g., N.Y. Lab. Law § 191(c) (stating that commissions should be paid "in accordance with the agreed terms of employment . . . ."); Levy v. Verizon Info. Servs., Inc., 498 F. Supp. 2d 586, 600-01 (E.D.N.Y. 2007) ("[o]n its face, § 193 does not restrict how an employer determines entitlement to commissions or incentive compensation. Rather, it simply imposes restrictions on the types of deductions that an employer can make from wages or commissions already earned.") (internal citation omitted). An employer can offer to pay, and an employee can decide to accept, $15 per hour, $500 per day, or a salary of $50,000 per year, subject of course to satisfying the New York Minimum Wage Act, N.Y. Lab. Law § 650 et seq. Likewise, there is nothing in Article 6 that governs how commissions must be calculated. An employer can offer to pay, and

[2] The certified question presented specifically asks about the point at which commissions vest and are earned under Sections 191 and 193, which reflects the Second Circuit's understanding that the answer must necessarily be the same for both.

an employee can decide to accept, 10 percent of orders written, 5 percent of orders sold, $7 for every pizza delivered, 30 percent of profits, 15 percent of sales if sales exceed $10,000, 10 percent of expenses saved, or 40 percent of fees generated less the costs incurred to generate those fees. What services an employee performs and how much the employee is paid for performing those services are matters of contract.

As confirmation for the principle that wages, including commissions, are earned according to the contract between employer and employee, one need only look to the New York Legislature's recent amendment of Section 191. Effective October 16, 2007, Section 191 was amended to add the following language:

> The agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson, kept on file by the employer for a period not less than three years and made available to the commissioner upon request. Such writing shall include a description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated. Where the writing provides for a recoverable draw, the frequency of reconciliation shall be included. Such writing shall also provide details pertinent to payment of wages, salary, drawing account, commissions and all other monies earned and payable in the case of termination of employment by either party.

N.Y. Labor Law § 191(c) (emphasis added). In promulgating this new language, and the requirement that employers and commissioned salespersons reduce their compensation agreement to writing, the Legislature could not have been clearer that it is the agreement between the parties that governs "how wages, . . .

commissions and all other monies earned and payable shall be calculated." Id. Accordingly, where the parties agree that commissions are earned and payable only after the application of a formula that includes various adjustments and offsets, their agreement governs how commissions are calculated, and the adjustments made in calculating the amount of commissions earned and payable are not unlawful deductions from earned wages in violation of Section 193. Indeed, Senator Maziarz, who was the Chairman of the Senate Labor Committee and who sponsored the legislation, made this very point in explaining the desirability of written agreements: "wage payment claims for commission salespersons are very difficult to investigate when there is no written agreement detailing . . . when and how commissions are earned, [and] what offsets . . . are to be computed . . . ." New York State Senate Introducer's Memorandum in Support of Senate Bill S3674 at 2 (emphasis added).[3]

Moreover, the statutory requirement that the agreement specify the frequency with which a "recoverable draw" will be reconciled demonstrates the Legislature's understanding that adjustments made as part of the calculation of commissions before they are earned are entirely acceptable. In fact, a recoverable draw is a payment made to an employee that is debited against potential

[3] Earned commissions need not be calculated in only one manner – a fixed percentage multiplied by gross sales. To the contrary, according to the New York State Legislature and the plain terms of recently amended Section 191, "commissions and all other monies earned and payable shall be calculated" according to the "agreed terms of employment."

commissions in determining the compensation owed. See Black's Law Dictionary, at 343 (1991) (defining draw as "to periodically advance money . . . against future sales commissions.").[4] Where the agreement so provides, there is nothing unlawful about making such an adjustment as part of the calculation of earned wages.

Thus, according to the plain text of Article 6, how and when commissions are calculated and earned is controlled by agreement between employer and employee.

B. New York Courts Also Recognize That Commissions Vest So As To Become Wages According To The Terms Of The Parties' Agreement.

In addition to the statutory language, judicial interpretations of Article 6 further reflect that when and how commissions are earned are governed by the parties' agreement. The starting point of any Article 6 claim must be the parties' compensation agreement since a "plaintiff cannot assert a statutory claim for wages under the Labor Law if he has no enforceable contractual right to those wages."

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[4] For example, if a salesperson is provided with a guaranteed recoverable draw in the amount of $10,000 per month and sells goods generating a potential commission of $5,000 in January and $20,000 in February, then he or she will be paid a $10,000 guaranteed draw with 0 earned commissions in January and a $10,000 guaranteed draw with $5,000 earned commissions in February. The deficit between the salesperson's recoverable draw of $10,000 and the $5,000 in commission for January ($5,000) is deducted or reconciled against February's $20,000 potential commission, along with that month's $10,000 draw, to produce commissions earned or payable in the amount of $5,000.

Tierney v. Capricorn Investors, L.P., 592 N.Y.S.2d 700, 703 (1st Dep't 1993).[5]

This is certainly true with respect to commissioned salespersons:

> Pursuant to N.Y. Lab. Law § 191(c), commission salesmen are to be paid in accordance with the agreed terms of employment. Thus, a claim under Article 6 rises and falls with plaintiff's claim for breach of contract. Failure to establish a contractual right to wages necessarily precludes a statutory claim under New York's labor law.

Simas v. Merrill Corp., No. 02-CIV-4400, 2004 U.S. Dist. LEXIS 1415, at *8 (S.D.N.Y. Feb. 4, 2004) (citations omitted); see also Dwyer v. Burlington Broadcasters Inc., 744 N.Y.S.2d 55, 56 (3d Dep't 2002); Dean Witter Reynolds, Inc. v. Ross, 429 N.Y.S.2d 653 (1st Dep't 1980); Jacobs v. Macy's East, Inc., No. 017283/96, 1998 WL 35250506, at 3 (N.Y. Sup. Ct. Jan. 6, 1998) (granting motion to dismiss all Section 193 claims because "the parties were generally free to agree on the method by which commissions would be calculated" and "relevant authority indicates that an employee has no claim to wages or other compensation where his right to such has not, as in the case at bar, vested" pursuant to the terms of the relevant contracts), rev'd on other grounds, 693 N.Y.S.2d 164, 166 (2d Dep't 1999).

[5] See also Kaplan v. Capital Co., 747 N.Y.S.2d 504, 506 (1st Dep't 2002) (where there was no contractual right to compensation at issue, plaintiff's claim under Labor Law § 193 was not viable); Miller v. Hekimian Labs., Inc., 257 F. Supp. 2d 506, 518-19 (N.D.N.Y. 2003) (where plaintiff had no contractual claim to the commissions he sought, his claims under Section 193 must be dismissed).

That a compensation agreement determines the vesting of commissions is reflected in cases in which an employee has sued a former employer for commissions that allegedly became due after the termination of employment. The outcomes in these cases vary because they are entirely dependent on the terms of the compensation agreement as to when the commissions were earned and vested.

For example, in Simas, where the plaintiff sought post-resignation commissions on long term customer accounts, the court explained that this "turns on when, under his contract, commissions are first earned." 2004 U.S. Dist. LEXIS 1415, at *9, *13. The Simas compensation plan "states that commissions are to be calculated and paid quarterly on 'collected revenue' only," and the plan gives management the right to review and reject commissions for accounts that perform below an 18.9% profit margin for the given quarter. Id. at *11-12 (emphasis added). On this basis, the court concluded that under the plan, commissions were earned quarterly after the revenue was collected and profit margin calculated, and not at the time of sale, and granted summary judgment to the defendant employer on the basis that the commissions sought by the plaintiff were not earned and vested. Id. at *12-13.[6]

[6] See also Dwyer, 744 N.Y.S.2d at 56 (dismissing plaintiff's Section 191 claim because, under the compensation policy, the employee was not entitled to commissions on ads she sold that were broadcast after her termination of employment); Graff v. Enodis Corp., No. 02-CIV-4922, 2003 WL 1702026, at *2 (S.D.N.Y. Mar. 28, 2003) (granting summary judgment to employer on Article 6 claims for post-termination commissions because the plan provided that commissions

In contrast, in Tuttle v. Geo. McQuesten Co., 642 N.Y.S.2d 356, 358 (3d Dep't 1996), the contract between the parties stated that plaintiff's commissions in excess of $75,000 would be payable in three equal installments, one third of which was payable at the end of the year in which it was earned. 642 N.Y.S.2d at 357. The court concluded that this language implied that the compensation was earned at the time of sale, it became wages at that point, and the employer could not refuse to pay such wages merely because he was not employed at the time the payments were due. Id. at 358. Although the result in Tuttle was different, it turned, like Simas, on the terms of the compensation plan. In Tuttle, the plan provided for the vesting of commissions prior to the plaintiff's termination, whereas in Simas the plan contained no such provision.

In the context of Section 193, courts have held that, where an agreement provides that adjustments be made as part of the calculation of commissions and prior to vesting, such adjustments are not prohibited "deductions" from wages. In the seminal case on this issue, Dean Witter, the compensation agreement provided that certain adjustments – for things such as any credit extensions in customers' cash accounts, expenses for long-distance calls to clients, and trading errors –

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would be determined by the "net sales value for equipment actually shipped and invoiced," which meant that they were earned when shipped and invoiced and not at the time of sale).

would be made as part of the formula to arrive at earned compensation. Dean Witter, 429 N.Y.S.2d at 655-56. The court held:

> amounts due [the employee] under the plan could not be established until the deductions were made. It was not until that time that the amounts due were determined. In simple terms, it was the net figure to which he was entitled. We hold, therefore, on the record before us, that respondents applied the definition of the term "wages" prematurely in construing the control factors in the incentive compensation plan.

Id. at 658 (emphasis added). Therefore, the court concluded that the adjustments and offsets made as part of the contractual calculation of compensation did not amount to unlawful deductions in violation of Section 193 because the commissions were not earned until those adjustments were applied.[7] This conclusion has been reaffirmed most recently in Levy v. Verizon Info. Servs., Inc., 498 F. Supp. 2d 586, 601 (E.D.N.Y. 2007), which held that recoveries of amounts paid for sales that were later cancelled were not unlawful under New York Labor Law Section 193 because under the parties' compensation plan, the compensation was "not earned until the end of the production period – when appropriate adjustments can be made to calculate the 'net figures' to which employees are

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[7] See also Kletter v. Flemming, 820 N.Y.S.2d 348, 350 (3d Dep't 2006) (where the defendant was a dentist whose contract stated he would be paid compensation in the amount of "33% of all net fees collected" and defendant alleged he did not receive the full amount of the compensation owed to him because his employer "withheld some of [his] pay to compensate other dentists for the correction of his work," no violation occurred because the alleged deductions were merely part of the calculations to arrive at vested compensation, which was a net number pursuant to the agreement).

entitled."[8] In sum, the New York courts, both state and federal, have recognized that commissions vest pursuant to the terms of the parties' agreement, and if that agreement specifies that commissions vest only after certain adjustments are made, those adjustments are not deductions from "wages" prohibited by the New York Labor Law.[9]

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[8] Cases finding violations of Section 193 are distinguishable from those above because they involve deductions from commissions already earned and vested pursuant to the terms of the applicable agreement. For example, in Gennes v. Yellow Book of N.Y., Inc., 776 N.Y.S.2d 758 (N.Y. Sup. Ct. 2004), aff'd, 806 N.Y.2d 646 (2d Dep't 2005), the court held that the penalty clause in the employment contract, which provided for a deduction from the plaintiffs' earned commission for every account in which they failed to obtain an ad renewal, violated Section 193 because "the defendant cannot charge its employees against monies already earned for the failure to renew accounts." 776 N.Y.S.2d at 760 (emphasis added). The Second Department affirmed, noting that "whether a commission is earned is dependent upon the terms of the agreement providing for such commission," and that the evidence in that case established that the commissions were already earned and vested before the deduction. 806 N.Y.2d at 647. Thus, the court was rejecting not the ability of parties to agree on a formula by which commissions become vested and are earned, but a contract that imposed a charge-back penalty on wages already earned under the terms of the contract.

[9] In addition, outside of New York, in states with similar statutes limiting deductions from wages, the law also is that commissions vest pursuant to the agreement of the parties and agreed-upon formulas that incorporate adjustments to gross revenue generated by an employee prior to vesting are not unlawful deductions from wages. See, e.g., Mytych v. May Dep't Stores Co., No. X-03-CV-98485223S, 2001 WL 290485, at *4-5 (Conn. Super. Ct. Mar. 2, 2001) (where the department store employer and shoe salesperson agreed to a "pre-approved formula" for the calculation of earned commissions pursuant to which an adjustment was made for pro-rated share of unidentified returns in determining her commission payments, the employer was not "attempt[ing] to deduct any sums from their wages" in violation of Connecticut's wage and hour laws); Koehl v. Verio, Inc., 142 Cal. App. 4th 1313, 1322, 1330-34 (Cal. App. 1st Dist. 2006) (where commission plans provided that employer would recover previously paid sales commissions when sales credited failed to actually generate revenue, those adjustments did not violate California law prohibiting chargebacks from wages because "[t]he right of a salesperson or any other person to a commission depends on the terms of the contract for compensation"); Kephart v. Data Sys. Int'l Inc., 243 F. Supp. 2d 1205, 1225-27, 1231 (D. Kan. 2003) (no violation of statute for failure to pay commissions for certain plaintiffs where plan provided that commissions were not earned until the employer received the customer payment, and not at the time of sale); Oja v. Dayton Hudson Corp., 458 N.W.2d 169, 170-71 (Minn. Ct. App. 1990) (holding that system whereby employee receives weekly draw against commissions and parties

C. <u>Even Where The Parties' Agreement Is Not In Writing, It Still Controls The Calculation And Vesting Of Commissions.</u>

Not only does the plain text of Article 6 and the case law interpreting the statute indicate that the parties' agreement determines when and how commissions are calculated and earned, the Second Circuit, in its opinion certifying questions to this Court, acknowledged that: "[w]hen a commission becomes 'earned' so that an employee has a 'vested right' to these moneys usually depends on the terms of an agreement providing for the commission." Pachter v. Bernard Hodes Group, Inc., 505 F.3d 129, 134 (2d Cir. 2007). Indeed, the Second Circuit's second question posed to this Court is: "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?" (emphasis added). In framing this question, the Second Circuit assumed, consistent with all of the case law cited above, that the governing agreement between the parties determines when commissions are earned, at least where the agreement is written.[10]

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agree that commissions vest monthly only after incorporating adjustments for any carryover deficit, returns, and unidentified returns does not violate Minnesota statute prohibiting deductions from wages because commissions are not due and earned until the relevant adjustments are made); Shannon v. Keystone Info. Sys., Inc., 827 F. Supp. 341, 342, 344 (E.D. Pa. 1993) (applying New Jersey law to uphold a commission plan that specified that a commission was not actually "earned" by the salesperson until the employer received a sales order and full payment from the customer).

[10] Apart from Section 193(1) discussed supra, Section 193(2) of the New York Labor Law also states that "No employer shall make a charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from

One issue under the Second Circuit's second question, however, is whether the same rule applies when the parties' agreement is not written. It does. Indeed, following the district court's summary judgment decision in Pachter, the question has been answered squarely by the New York State Legislature in enacting its recent amendments to Section 191 of Article 6.

As explained above, effective on October 16, 2007, the New York State Legislature amended Section 191(c) of Article 6 to encourage employers and commissioned salespersons to put their compensation agreements in writing, including specifying how commissions and all other monies earned and payable shall be calculated. This was done for obvious reasons. As Senator Maziarz stated in introducing the Bill, "wage payment claims for commission salespersons are very difficult to investigate when there is no written agreement detailing . . . when and how commissions are earned, [and] what offsets . . . are to be computed . . . ." New York State Senate Introducer's Memorandum in Support of Senate Bill S3674

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wages under the provisions of subdivision one of this section." This subsection does not mean that the parties cannot agree as to how commissions are earned and vested so as to become wages. Rather, this subsection was added in order to ensure that employers did not force employees to pay back some of their agreed upon wages as a condition of employment. See L. 1974 Ch. 160, N.Y. State Senate Introducer's Memo in Support of Senate Bill 8706 at 2 (discussing fact that an employee should not be forced to "agree" after receiving his full wage that he will then reimburse the employer for any cash register shortages). For example, if an employer promises that an employee will be paid $8 an hour, then that employer cannot try to get the employee to agree to pay for a loss – such as the $50 in goods the employee broke, or the $30 dollars the cash register was short – from that already earned and vested $8 per hour. See, e.g., Guepet v. Int'l TAO Sys., Inc., 443 N.Y.S.2d 321, 322-23 (N.Y. Sup. Ct. 1981) (holding that where the parties agreed on a weekly fixed salary for employee, the employer could not make deductions from those wages because the employee "failed to perform properly").

at 2. Although the amended Section 191(c) states that the parties "shall" create a written agreement, id., the penalty for having only an oral agreement covering commissioned salespeople is not that the oral agreement is to be disregarded. Rather, the Legislature was clear that where the agreement affecting commissioned salespeople is not in writing, the Commissioner of Labor may apply a presumption to deal with evidentiary difficulties. Specifically, "[t]he failure of an employer to produce [] written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms of employment." N.Y. Lab. Law § 191(c) (L. 2007 ch. 304.) Thus, if a commissioned salesperson admitted that she had an oral agreement under which she was to earn 10 percent of sales upon the employer's receipt of the income, less the variable costs incurred in generating the sales, and less her guaranteed draw, then that agreement would govern, even though that agreement had not been reduced to writing.

The statute thus makes crystal clear that a non-written agreement can control the calculation and earning of commissions after October 16, 2007. The same rule applied before October 16, 2007 (but there was no statutory presumption in favor of the commissioned salesperson's version of the agreement in the Commissioner of Labor's investigations). There would have been no reason to promulgate an amended Section 191(c) had non-written agreements for the calculation and earning of commissions not been enforceable. As noted above, the amendments were passed because of the difficulty in determining what those non-written agreements were, not because they did not control. Also, before the effective date of the amendments, nothing in Article 6 distinguished between written and non-written agreements. There simply would be no basis for this Court to read such a distinction into the statute before October 16, 2007. The Legislature has now acted expressly to create such a distinction and a preference for written agreements, but that implies that oral and other non-written agreements and written agreements previously stood on an equal footing, not that non-written agreements could not be enforced at all. See, e.g., N.Y. Stat. § 94 (McKinney 2008) ("The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" and stating in comments that "new language cannot be imported into a statute to give it a meaning not otherwise found therein."); Palmer v. Spaulding, 299 N.Y. 368, 368, 87 N.E.2d 301, 303 (1949) ("It is a strong thing [] to read into a statute words which are not there and, in the absence of a clear necessity, it is a wrong thing to do").

Finally, the historic "default rule" referenced by the Second Circuit that commissions vest at the time of sale is a common law rule that applies in the absence of an agreement altogether. In discussing the "default rule," the Second Circuit cited a series of cases and questioned whether this rule might always apply in the absence of a written agreement. Pachter, 505 F.3d at 134. In fact, the cases cited actually support the conclusion that the parties' agreement must govern, whether written or not, and that this default rule is applied as a gap filler where the parties only agreement is that the broker will be paid a flat fee or a flat percentage of the proposed sale price.[11] For example, in Lane – The Real Estate Dep't Store Inc. v. Lawlet Corp., 28 N.Y.2d 36, 42, 319 N.Y.S.2d 836, 840 (1971), this Court explained that "in the absence of an agreement to the contrary, a real estate broker will be deemed to have earned his commission when he produces a buyer who is ready, willing and able to purchase at the terms set by the seller." (emphasis added). The Court recognized, however, that there was an oral agreement that governed the commissions to be earned by the plaintiff-appellant broker and a new

[11] As a practical matter, three different issues typically arise in an examination of compensation: (1) what amounts of money are due for the performance of what services; (2) when do those amounts vest so that the employee is entitled to them as wages; and (3) when do those wages, once vested, need to be paid. The Second Circuit, in its citation to the "default rule," raises only the second of these three questions for the Court's consideration. Even if the commissions vested immediately upon the sale, however, the agreement of the parties still must govern what amounts are owed and this agreed amount could be calculated by a formula that includes both credits and debits (e.g., 10 percent of net sales, which is calculated by multiplying the sales price by 10 percent and then offsetting that amount by the variable costs incurred in generating the sale).

trial was needed to resolve the factual dispute over whether the parties had agreed to additional requirements for vesting. 28 N.Y.2d at 44.[12]

Thus, the "default rule" respecting when commissions are earned only applies in the absence of an agreement on vesting – whether written or not. Where there is an agreement, the agreement controls. Specifically, in response to the Second Circuit's question, both written and non-written agreements control when commissions are "earned" and therefore are considered "wages" under Sections 191 and 193.[13]

II. IN ANSWERING THE CERTIFIED QUESTIONS POSED, THIS COURT SHOULD DO SO IN A WAY THAT DOES NOT UPSET EXISTING PRECEDENT ON INCENTIVE COMPENSATION.

For the benefit of employers and employees throughout New York State, this Court should make clear that, consistent with the text of Article 6, the parties'

[12] See also Srour v. Dwelling Quest Corp., 5 N.Y.3d 874, 875, 808 N.Y.S.2d 128, 128 (2005) ("[a]lthough the common law rule is that 'a broker who produces a person ready and willing to enter into a contract upon his employer's terms . . . has earned his commissions,' the 'parties to a brokerage agreement are free to add whatever conditions they may wish to their agreement.'").

[13] The rule that the parties' agreement governs makes sense because the purpose behind Section 193 is to protect the parties' expectations and agreements – that is, that the employee is being paid what has been promised for the particular services. To the extent that there is an agreement as to what the earned and vested wages will be, this expectation is protected. SIFMA takes no position as to whether Pachter and Bernard Hodes reached an agreement regarding the calculation and vesting of commissions and, if so, what that agreement was. See Pachter v. Bernard Hodes Group, Inc., No. 03-Civ-10239, 2005 WL 2063838, at *4 (S.D.N.Y. Aug. 25, 2005) ("[t]he parties do not dispute that the Plaintiff consented – either orally or through her course of conduct – to the compensation formula by which the Defendant calculated her pay and that the Defendant complied with this formula in all respects"); Pachter, 505 F.3d at 131 n. 2 (stating that Pachter "knew of, and essentially acquiesced in, these deductions while employed at Hodes"). Those questions are not before this Court.

agreement determines how commissions are to be calculated and when those commissions constitute earned wages. Regardless of how the certified questions are answered, however, SIFMA respectfully urges this Court to be mindful of, and not to disturb, precedent that has existed for decades regarding incentive compensation. Set forth below is an explanation as to what constitutes incentive compensation under existing precedent and why this precedent should not be disturbed.

A. What Is Incentive Compensation Under Existing Precedent?

Under this Court's decision in Truelove v. N.E. Capital & Advisory, Inc., 95 N.Y.2d 220, 224, 715 N.Y.S.2d 366 (2000), incentive compensation is not considered earned wages. Thus, where compensation constitutes incentive compensation, there can be no dispute that it can be calculated in any manner whatsoever, that it does not have to vest at all, that it may vest only upon certain conditions (e.g., maintaining employment through a specified date), and that it can be forfeited if certain events occur (e.g., resigning employment or going to work for a competitor). Carlson v. Katonah Capital, L.L.C., 814 N.Y.S.2d 889, 2006 WL 273548, at *3 (N.Y. Sup. Ct. Jan. 27, 2006) (Table). Incentive compensation constitutes "wages" under Article 6 "only once [it becomes] vested." Levy, 498 F. Supp. 2d at 601 (citing Pachter, 2005 WL 2063838 at *5 n.8; Truelove, 95 N.Y.2d at 224-25); see also Carlson, 2006 WL 273548, at *2 ("[a]n employee's incentive compensation may become earned when the employee acquires a vested interest in the incentive compensation and its payment is not conditioned on some occurrence or left to the discretion of the employer").

Under existing precedent, incentive compensation is compensation over and above a guaranteed or fixed salary. As one New York court aptly put it: "Receipt of a fixed wage generally negates any inference that a separate incentive payment . . . constitutes wages." Cantor Fitzgerald Assocs., L.P. v. Mines, 781 N.Y.S.2d 622, 2003 WL 23109714, at *3 (N.Y. Sup. Ct. Oct. 12, 2003) (Table) (noting that the compensation in dispute was incentive compensation because the employee was also earning a separate fixed salary); IBM v. Martson, 37 F. Supp. 2d 613, 618 (S.D.N.Y. 1999) (holding that the stock award plan in question was an incentive compensation plan since the plaintiff also "received fixed compensation for his services"); DeLeonardis v. Credit Agricole Indosuez, No. 00-Civ-0138, 2000 WL 1718543, at *11 (S.D.N.Y. Nov. 15, 2000) (same). The guaranteed salary constitutes the wages for services performed, and the employee is eligible for incentive compensation over and above the salary based on certain terms and conditions. See, e.g., Dean Witter, 429 N.Y.S.2d at 658 (holding that compensation above guaranteed fixed salary, which included deductions as part of the calculation, was incentive compensation and not wages until vested); Ladau v. Hillier Group, No. 02-Civ.-4703, 2004 WL 691520, at *1, *5 (S.D.N.Y. Mar. 31,

2004) (holding that where there was an agreement that the employee would be paid salary plus "incentive comp" commissions based on a percentage of net profit or net fees brought in by the plaintiff, incentive commissions became vested wages only as required by the terms of the contract); Levy, 498 F. Supp. 2d at 590, 600-02 (holding that where the plaintiff received both a salary and commissions, commissions were incentive compensation that only became wages after relevant adjustments per the terms of the agreed compensation plan). The terms and conditions for the award of incentive compensation are typically designed to encourage or discourage certain employee behaviors and outcomes – hence the term incentive compensation.[14]

The fact that incentive compensation, compensation over and above a guaranteed salary, is not wages and falls outside the protections of Article 6 – at least until such compensation becomes vested per the terms of the compensation plan or agreement – is entirely consistent with the legislative history underlying Article 6 and the text of the statute itself. For example, in 1955, when the requirement that earned commissions be paid at least once a month was first passed, industry groups complained that this new statute was interfering with compensation plans that provided salespersons with salaries and additional "incentive commissions" on a quarterly, semi-annual, or annual basis. See 1956

[14] Incentive is defined as a "payment or concession to stimulate greater output by workers." The Oxford American Desk Dictionary, at 297 (Frank Abate ed., 1998).

N.Y. Legs. Ann., at 283 (L. 1956 ch. 511.) Because the Legislature wanted to continue to preserve the agreement of the parties, in 1956, it amended Section 196-a by adding a section that allowed payment of incentive commissions per the terms of the parties' agreement where salary or other compensation was paid regularly. Id. In connection with this amendment, the New York Department of Labor explained: "It was not the intent of the sponsors of the law to require monthly payments of 'incentive' commissions, which customarily are paid quarterly, semi-annually or annually. The attached bill would effectuate the basic intent of Chapter 620 and at the same time meet the objections of industry by not upsetting existing incentive wage plans." Id. (emphasis added). Thus, the Legislature made it clear that with respect to incentive commissions – where a fixed wage was already provided –the parties' agreement controlled all aspects of that compensation, including whether, when, and how the commissions vested, and once vested, how frequently they were paid. This distinction is still reflected in the language of Section 191(c) today, which states that: "commissions shall be paid no less frequently than once each month and not later than the last day of the month following the month in which they are earned" except "if monthly or more frequent payment of wages, salary, drawing accounts or commissions are substantial, then additional compensation earned . . . may be paid less frequently than once in each month, but in no event later than the time provided in the employment agreement or compensation plan." N.Y. Lab. Law § 191(c) (2008).

The fact that compensation over and above a guaranteed salary is incentive compensation and not wages, at least until such compensation becomes vested according to the parties' agreement, is also consistent with the district court's decision in Pachter. Although the district court found that the offsets at issue were unlawful deductions from wages, the court expressly distinguished the facts from those at issue in Dean Witter. Pachter v. Bernard Hodes Group, Inc., No. 03-Civ-10239, 2005 WL 2063838, at *5 (S.D.N.Y. Aug. 25, 2005). Specifically, the court emphasized that Pachter "received no guaranteed base salary and the subtractions were made from her commissions, which were her sole form of compensation, not from bonus payments or incentive compensation." Id. at *5. Accordingly, the court felt constrained to conclude that the commissions were wages and that the offsets were impermissible deductions. Id. at *5, *7. SIFMA believes this decision, that the parties' agreement on vesting only governs where the commissions in question are a form of incentive compensation, was erroneous. While commissions need to be paid more frequently when there is no other form of compensation, they still must vest so as to become wages pursuant to the terms of the parties' agreement, as discussed above. Nonetheless, the district court correctly acknowledged that where compensation is incentive compensation, it can be calculated by taking into account various adjustments, such as those at issue for the salaried Registered Representative in Dean Witter.

Where the compensation is "more in the nature of a profit-sharing arrangement" or is based, at least in part, on factors falling outside the employee's control, this too is a form of incentive compensation. Truelove, 95 N.Y.2d at 223-25 (holding that compensation that was dependent "at least in part" on the financial success of the business, even though the employer stated that the bonus would be paid, remained incentive compensation and not vested wages); Miller v. Hekimian Labs., Inc., 257 F. Supp. 2d 506, 518-19 (N.D.N.Y. 2003). One example of the application of this principle is the First Department's decision in Dean Witter.

In Dean Witter, plaintiff was a registered representative and securities broker who claimed that his securities brokerage firm employer, Dean Witter Reynolds ("DWR"), made unlawful deductions from his wages in violation of Section 193. 429 N.Y.S.2d at 656. Under DWR's compensation program, plaintiff received a guaranteed monthly salary "that was unaffected by his rate of productivity and the quality of his performance" and was also eligible to receive "'incentive compensation'" which "depended on his productivity and the profitability to DWR of the business which he generated." 429 N.Y.S.2d at 655, 658.

> The incentive compensation program is designed to encourage an account executive's productivity and, thereby, his profitability to DWR. Any extraordinary expenses or costs relative to any transaction would, of course, reduce the profitability of that transaction.

Id. at 655. Accordingly, under the compensation program, incentive compensation was calculated at the end of the production month and was based on revenue generated as well as "quality control" adjustments for extraordinary expenses. Id. at 655, 658. For example, although the plaintiff could have limited the business he conducted to clients near his branch, to the extent he did not and chose to deal with long-distance customers, this reduced the profitability of the business to DWR and thus plaintiff's incentive compensation. Id. Similarly, when a client failed to pay for his stock purchase in a cash account within seven days as required by federal regulations, DWR had to incur expenses obtaining an extension from the Federal Reserve Board, and was also required to advance its customer the monies – essentially giving the customer a no-interest loan. Id. at 655. Because these external costs reduced the profitability of the transaction, this was reflected in the share of profits that DWR passed along to plaintiff through incentive compensation. Id. at 658.

Recognizing that the term "wages" did not encompass this sort of incentive compensation plan, the Appellate Division held that no deduction from wages had occurred. Id. at 658-59. The Court explained that the compensation was in the nature of incentive pay that was not earned and vested until all adjustments were made at the end of the production period because it was analogous to the example in the Report of Attorney General, 1950 N.Y. Op. Atty. Gen. No. 168, in which the incentive compensation was conditioned on employees "'exceeding the normal rate of output of the required quality for the entire month'" and where "'[i]t is quite possible that the increased production attained in the first weeks of the period might be offset by the decreased production occurring in the last week of such period and thus no incentive pay would be earned therein.'" Id.

The Court's decision in Dean Witter – endorsing the legality of agreed incentive compensation plans that incorporate various adjustments to arrive at earned and vested compensation – reflects sound public policy. Employers and employees should be permitted to enter into agreements that encourage employees to increase revenue, manage expenses, and overall be more efficient and profitable, as long as they do so in a way that does not reduce what the parties have agreed will be received as earned wages. Thus, where an employee is paid a guaranteed salary that does not depend on the quality or quantity of work, the employer should be able to provide an additional incentive compensation plan that encourages desired behavior. As long as the parties agree as to how incentive compensation will be calculated, it should be lawful for the compensation plan or agreement to calculate incentive compensation by reference to revenue (e.g., 10 percent of sales), by reference to expenses (e.g., 20 percent of expenses saved), or by reference to a combination of the two (e.g., five percent of profits, 30 percent of revenue less the costs incurred to generate such revenue, etc.).

B. This Court Should Not Upset Long-Established Precedent.

Since Dean Witter was decided more than 26 years ago, it has been cited or relied upon by other courts more than 35 times. For all of those 26 years, firms within the financial services industry, including those that make their home within the largest financial center in the world – New York City – have relied on this precedent in structuring their compensation plans and agreements. Other industries have relied on this precedent as well.

Because Dean Witter has been firmly entrenched in our jurisprudence for so long and has been relied on so much, this Court should reinforce the precedent set forth in that decision. Even if this Court were not inclined to expressly reinforce Dean Witter in answering the questions posed by the Second Circuit, however, SIFMA respectfully urges the Court not to say anything that would undermine Dean Witter's precedential value. Doing so could cause a flood of new litigation throughout the State seeking to invalidate commonly used compensation arrangements. Doing so also potentially could require huge windfall payments to be made to employees well beyond the compensation for which they agreed to work. And upsetting Dean Witter could require the restructuring of hundreds of thousands of compensation plans and agreements throughout the financial services industry and beyond, agreements that work well and have worked well for employers and employees alike for decades.

In the case of the financial services industry, if an individual is able to bring in a great deal of business and keep his or her trade errors and marketing expenses low, this will potentially result in higher incentive compensation under the formula laid out in the compensation plan. If this Court were to take away the ability of financial services companies to make any adjustments as part of a formula to calculate incentive compensation, they would no longer be able to offer financial incentives for Registered Representatives to control their costs and minimize their errors.[15] For example, Registered Representatives can have different kinds of customers. One customer may always make timely payment of any amount that is owed, and another may routinely pay late or may ask for discounts or complete fee waivers. It would be illogical to prohibit financial services companies and Registered Representatives from agreeing that such factors can be taken into consideration in the calculation of incentive compensation. Employers should be able to incent their employees to consider whether they should continue to serve customers who are not profitable. What is key here is that the incentives in question are only those that have been agreed to in advance by the parties, and the adjustments are not taken from earned and vested wages.

[15] This Court has recognized that Registered Representatives are sophisticated employees who are capable of deciding for themselves which financial arrangements are in their best interest and which are not. Marsh v. Prudential Secs., Inc., 1 N.Y.3d 146, 154 n. 5, 155, 770 N.Y.S.2d 271, 275 n.5, 276 (2003).

Finally, as Bernard Hodes recognized in its brief, should this Court restrict the parties' freedom to contract for appropriate incentives through adjustments as part of an incentive compensation formula, employers in the financial services industry and elsewhere would be forced to lower the percentages applied to gross revenue. The only beneficiaries of such a change would be inefficient employees who do not maximize profitability, while efficient employees stood to make much more money under a system in which they could receive greater amounts in incentive compensation by keeping their marketing expenses and other costs low.

CONCLUSION

In response to the Second Circuit's second certified question, this Court should hold that agreements, whether written or not, control when commissions are "earned" and therefore are considered "wages" under Sections 191 and 193. In any case, in responding to the Second Circuit's questions, this Court should not disturb existing precedent governing incentive compensation, including the First Department's 1980 decision in Dean Witter.

Respectfully submitted,

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<u>ADDENDUM</u>

L. 2007, Ch. 304, N.Y. State Senate Introducer's Memorandum in Support of Senate Bill S. 3674

L. 1974 Ch. 160, N.Y. State Senate Introducer's Memorandum in Support of Senate Bill 8706

1956 N.Y. Legs. Ann., at 283 (L. 1956 ch. 511.)

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S3674

SPONSOR: MAZIARZ

TITLE OF BILL:

An act to amend the labor law, in relation to payment of wages and penalties for violations of certain sections of such law

PURPOSE OF BILL:

This is an omnibus bill that would amend several sections of the Labor Law to allow for more effective enforcement and regulation by the Department of Labor (the Department).

SUMMARY OF PROVISIONS:

Section one of the bill amends Labor Law § 190(7) to provide that the weekly wage threshold that exempts certain executive, administrative and professional employees from the definition of "clerical and other worker" shall be increased to $900.

Section two of the bill amends Labor Law § 192(2) to provide that the weekly wage threshold, triggering the executive, administrative and professional exemption from the prohibition against an employer's direct deposit of an employee's wages without written consent, shall be increased to $900.

Section three of the bill amends Labor Law § 198-c(3) to provide that the weekly wage threshold, triggering the executive, administrative and professional exemption from the provision rendering an employer's failure to pay agreed upon benefits or wage supplements to employees within 30 days a misdemeanor, shall be increased to $900.

Section four of this bill amends Labor Law § 191(1)(c) to provide that the terms of the employment agreement between an employer and a commission salesperson shall be in writing, and shall describe how and when a commission is earned. It creates a presumption, in the absence of a written agreement, that the terms presented by the employee are correct.

Section five of the bill amends the opening paragraph of Labor Law § 218(1) to add sections 161 and 162 to the list of sections of the Labor Law for which a violation of said sections would subject the employer to civil penalties.

Section six of the bill provides the effective date.

EXISTING LAW:

Currently, with respect to the executive, administrative, or professional exemption, Labor Law §§ 190(7), 192(2) and 198-c(3) exempts an individual who earns $600 or more from coverage under the Article.

Currently, with respect to written employment contracts for commissioned salespersons, Labor Law § 191 provides that a commission salesperson shall be paid in accordance with the agreed terms of employment. There is no provision that those terms be in writing.

Currently, with respect to meal period and day of rest violations, the only penalty for violations of Sections 161 (failure to provide day of rest) and 162 (failure to provide meal periods) falls under Labor Law § 213, which is a catch-all provision imposing criminal penalties.

LEGISLATIVE HISTORY:

This is a new proposal.

STATEMENT IN SUPPORT:

EXECUTIVE, ADMINISTRATIVE OR PROFESSIONAL EXEMPTION:

Currently, if an employee who makes more than $600 per week files a wage claim complaint, the Department cannot take the complaint because such an employee is exempt from Article 6, which covers payment of wages. As a result, the Department cannot bring enforcement actions against their employers for failing to provide benefits or wage supplements.

Since the last increase in the weekly wage threshold, to $600 in 1992, the average weekly wage in New York State has increased considerably. This proposal would increase the weekly wage threshold to $900, which more accurately reflects the current average weekly wage in the State. It will also expand the Department's jurisdiction, enabling the Department to investigate and recover wages for more individuals.

WRITTEN EMPLOYMENT CONTRACTS FOR COMMISSION SALESPERSONS:

Currently, the Labor Law does not require that employment contracts for commission salespersons be written. Wage payment claims for commission salespersons are very difficult to investigate when there is no written agreement detailing the terms of employment, when and how commissions are earned, what offsets against wages are to be computed, and when commission payments cease after termination of employment.

By requiring written agreements, and by creating a presumption in the employee's favor in the absence of such an agreement, the Department of Labor will be able to more effectively and efficiently investigate commission salespersons' wage complaints.

DAY OF REST AND MEAL PERIOD PENALTY:

Currently, the only enforcement tool available to the Department for violations of Labor Law §§ 161 and 162 is criminal prosecution under Section 213, which renders a violation of any provision of the Labor Law a misdemeanor. Section 213 has proven to be a weak deterrent, because the penalties are low and it is difficult to get any prosecutorial entity to pursue this type of case. Allowing the Department to issue civil penalties for violations of these sections would enable more efficient, consistent and effective enforcement of Sections 161 and 162.

BUDGET IMPLICATIONS:

With respect to the executive, administrative and professional exemption, the Department would expect increased complaint volume and investigatory activities.

With respect to written employment contracts for commissioned salesperson there is no fiscal impact.

With respect to meal period and day of rest penalties, there may be potential revenue from civil penalties collected for violations.

EFFECTIVE DATE:

Immediately.

LDM #12-74

February 13, 1974

Senate No. 8706

Assembly No. ______

MEMORANDUM

AN ACT to amend the labor law, in relation to deductions from wages

Purpose of Bill:

To prohibit wage deductions by indirect means where direct deductions would violate the statute.

Summary of provisions of bill:

The bill amends Section 193 of the Labor Law to make unlawful the deduction of wages by indirect means where such deductions would not be permitted under the provisions of Section 193, subd. 1.

Statements in support of Bill:

The Labor Department has encountered many instances where a prospective or current employee has been required, as a condition of obtaining or continuing in employment, to agree to reimburse the employer for monetary loss which the employer may deem attributable to him. For example, an employee whose duties involve the regular handling of cash may "agree" that after receiving his full pay he will reimburse the employer for any shortages found in his account. Likewise in relation to breakage, spoilage or damage of the employer's equipment. A direct deduction from wages to satisfy this type of arrangement would violate Section 193 since it is neither specifically authorized nor encompassed under the catch-all clause in the section "similar payments for the benefit of the employee." (Emphasis supplied) Since, in most instances, agreements to reimburse the employer by separate transaction are in no sense voluntary, the Labor Department has been administratively ruling such arrangements to be unlawful, i.e., an attempt to do indirectly what cannot be done directly. A 1970 decision of the New Jersey Superior Court, Appellate Division, directly supports this interpretation. (Male v. Acme Markets, Inc., 62 Labor Cases, Par. 52, 292; 1970.) This bill, by codifying the Department's position and giving it statutory force and effect, would eliminate unnecessary litigation.

Budgetary Implications:

The Labor Department's Division of Labor Standards is prepared to absorb the additional costs involved until sufficient experience is gained to make an assessment of the increased workload.

LABOR AND WORKMEN'S COMPENSATION

State Labor Department Memoranda

Wages, outdoor salesmen S. I. 2997, Pr. 3266, Greenberg Ch. 511

Labor Law, § *196-a.* This bill is designed to correct the imperfections and ambiguities of Chapter 620 of the laws of 1955 relating to the payment of commissions and other remuneration to salesmen.

The underlying purpose of Chapter 620 was to extend the wage payment provisions of the labor law to salesmen, so that salesmen would be assured of receiving payments at least once in every month. It was not the intent of the sponsors of the law to require monthly payments of "incentive" commissions, which customarily are paid quarterly, semi-annually or annually.

The attached bill would effectuate the basic intent of Chapter 620, and at the same time meet the objections of industry by not upsetting existing incentive wage plans. It provides that wages, salaries, drawing accounts, or commissions shall be paid at least once a month, but if a salesman receives monthly payments that are substantial, he may be paid additional compensation, including incentive and bonus payments, at such time as provided in the employment agreement.

Wages, white collar workers A. I. 2551, Pr. 4479, Ostrander Ch. 539

Labor Law, § *196-c, new.* The term "employee" is defined in Section 2, subdivision 5 of the Labor Law to mean ". . . a mechanic, workingman or laborer working for another for hire." The term "employer" is defined in Section 2, subdivision 6 to mean ". . . the person employing any such mechanic, workingman or laborer . . .".

The effect of these restrictive definitions is that office workers, such as typists, stenographers, and clerks, and other non-manual employees do not have the protection of the Labor Law provisions for the prompt payment of wages and the assistance of the Department of Labor in the collection of unpaid wages.

At the 1955 legislative session wage payment protection was afforded to salesmen by Chapter 620.

The attached bill would permit the Department of Labor to assist typists, stenographers, clerks, and other office workers in the collection of their unpaid wages in the same manner that the Department assists manual workers in their wage claims. The bill does not contain any specific time requirement for the payment of wages; it merely requires that wages and salaries shall be paid in accordance with the agreed terms of employment.

This bill will in no way upset existing wage plans under which office workers are paid on a semi-monthly or monthly basis.