



New York State Department of Labor

David A. Paterson, *Governor*

M. Patricia Smith, *Commissioner*

June 20, 2008



Re: Request for Opinion
Supplement Payments (Labor Law §198-c)
File No. RO-08-0066

Dear [REDACTED]:

This letter is written in response to yours of April 30, 2008. Although the question posed in your letter was whether the payment plan described therein violated Labor Law §193, this Department's analysis of the facts provided has determined that Labor Law §193 is not relevant to those facts (except as described in footnote 3, below). It is the Department of Labor's opinion, however, that the described expense reimbursement payment plan constitutes a failure to pay agreed-upon benefits in violation of Labor Law §198-c.

You describe a payment plan in which an employee is paid a commission of 25% of the amount charged to the employee's customers. Presumably, this commission is intended to be the employee's wage (such commission shall hereinafter be referred to as the "wage commission"). The employee is also paid an additional commission of 25% of the amount charged to the employee's customers, ostensibly as and for expense reimbursements (such commission shall hereinafter be referred to as the "expense commission"). You then apparently state that if the employee's substantiated expenses are less than the amount of that 25%, the full 25% expense commission is still paid, with the difference between the expense commission and the substantiated expenses being reported as wages earned by the employee¹.

The first question to consider is what portion of these two commissions are wages as a matter of law. Labor Law §190(1) defines the term "wages" as including both commissions and benefits and wage supplements (the latter including reimbursement of expenses, *see* Labor Law §198-c(2)). Therefore, all commissions paid to the employees here, whether wage commissions or expense commissions, must be considered "wages" as that term is used in Article 6 of the Labor Law.

¹ You do not describe the action taken when the employee's substantiated expenses are greater than the expense commission.

Although you state that the above described reimbursement plan is an “accountable plan” as defined by IRS regulations, and that the expense commissions paid thereunder are not wages, an examination of information provided by the IRS does not substantiate this statement.

According to IRS Publication 15 (Circular E), Employer’s Tax Guide (2008), www.irs.gov/publications/p15/ar02.html (hereinafter referred to as “Tax Guide”):

Employee business expense reimbursements. A reimbursement or allowance arrangement is a system by which you pay the advances, reimbursements, and charges for your employees’ substantiated business expenses. How you report a reimbursement or allowance amount depends on whether you have an accountable or a nonaccountable plan.

The Tax Guide states that all three of the following factors must be met for a reimbursement plan to be considered an “accountable plan:”

1. They must have paid or incurred deductible expenses while performing services as your employees.
2. They must adequately account to you for these expenses within a reasonable period of time.
3. *They must return any amounts in excess of expenses within a reasonable period of time.* (Emphasis added).

By contrast, the Tax Guide states that payments are treated as paid under a nonaccountable plan if:

- Your employee is not required to or does not substantiate timely those expenses to you with receipts or other documentation,
- You advance an amount to your employee for business expenses *and your employee is not required to or does not return timely any amount he or she does not use for business expenses,* or
- *You advance or pay an amount to your employee without regard for anticipated or incurred business expenses.* (Emphasis added).

The Tax Guide clearly states that amounts paid under an accountable plan are not considered to be wages under IRS rules and that amounts paid under a nonaccountable plan are considered to be wages. Despite the implications in your letter, there does not appear to be any provision in the Tax Guide stating that a single payment to an employee may be divided into two

portions, one portion being deemed part of an accountable plan and the other portion being deemed part of a nonaccountable plan. Accordingly, as you have stated that employees are paid the entire 25% expense commission regardless of the amount of expenses actually incurred, and are permitted to keep the entire expense commission whether or not they have accounted for expenses in that amount, and are not required to return any portion of the payment in excess of expenses actually incurred, it appears, by application of the criteria set forth in the IRS's Tax Guide, that the described plan is a nonaccountable plan, and that, under IRS rules, both the wage commission and the expense commission are all wages paid to the employees.²

Having now determined that both the wage commission and the expense commission are "wages" as defined by the New York State Labor Law, we must now consider whether the employees in question receive an agreed-upon reimbursement for their business expenses. Although you correctly assert that "there is no law in New York that *requires* employers to pay or reimburse employees for business related expenses" (emphasis in original) you have failed to take note that it is the long-standing interpretation of Labor Law §198-c that such statute imposes on an employer the requirement to "abide by the terms of his agreement to provide benefits," (*Glenville Gage v. Industrial Board of Appeals*, 70 AD2d 283, 286 (3rd Dept. 1979), *aff'd* 52 NY2d 777 (1980)). In other words, while an employer is not required to provide benefits to employees, once it agrees to do so it must abide by the terms of that agreement. The Department of Labor interprets such statute and case law, in the present context, to mean that when an employer agrees to provide reimbursement to employees for business related expenses, the system created for that ostensible purpose must, in fact, provide such reimbursement. In the present case, however, the described plan does not do so.

Obviously, a bona fide plan for reimbursement of business expenses would mean that an employee would receive the full amount of his/her regular wages and also a separate payment for the amount of expense reimbursements. In such a plan, the wages would remain the same each pay period while the amount of reimbursed expenses would vary. Accordingly, the amount of total monies paid each pay period to an employee would vary depending on the amount of reimbursed expenses. Under the described plan, however, the total commission percentage paid to an employee remains the same, regardless of the amount of his expenses.

As you describe the plan, an employee receives two separate commission payments, each representing 25% of the amounts charged each week to the customers the employee services. If that was the complete plan, therefore, an employee's total wage would be a 50% commission. However, under this plan as described, one of the 25% payments is apparently considered to be the employee's wages while the other is considered both reimbursement for expenses and an

² Please note that as federal tax laws do not preempt state wage and hour laws, a state may consider a payment to be a wage for wage and hour purposes, even if the IRS does not consider it to be a wage for tax purposes. In this situation, however, it appears that both the IRS and this Department consider the described expense commission to be a wage.

additional wage. In the example given by you, if an employee's customers are charged \$2,000 in one week, the employee would be paid, for that week, \$500 as and for the 25% wage commission and \$500 as and for the 25% expense commission. However, if that employee is only able to substantiate \$450 in expenses, then the employee would still receive full payment of the \$500 expense commission, but such commission would be considered to be divided into a payment of \$450 in "substantiated expenses" and \$50 as "unsubstantiated expenses," the latter being treated as additional wages. Accordingly, in your example, the total payment to an employee would be \$550 in wages and \$450 as reimbursement of expenses, a total of \$1000.

Now let us go beyond your example and apply the same methodology to the next week, in which the same employee services the same customers who once again are charged \$2000. In this week, however, the employee is only able to substantiate expenses of \$100. According to the plan as described, the employee would once again receive the wage commission of \$500, and the expense commission of \$500. The only difference between the two weeks is that in the second week the expense commission would be divided into a \$100 payment of "substantiated expenses" and a \$400 payment of "unsubstantiated expenses." This employee, therefore, would receive, in the second week, \$900 in wages and \$100 as reimbursement of expenses for a total payment of \$1000, the same total payment as the previous week.

Accordingly, it is clear that under this plan an employee receives no actual reimbursement for expenses. As stated above, under a genuine reimbursement plan, an employee would receive his/her normal and regular wage plus reimbursement of the amount of expenses incurred. Using the above examples, if we consider only the wage commission as the employee's wages, then the employee should receive a total payment of \$950 (\$500 + \$450) in the first week, and \$600 (\$500 + \$100) in the second week. If, however, both the wage commission and expense commission are considered wages (as they are by this Department and, apparently, the IRS), then the employee should receive \$1,450 (\$1,000 + \$450) in the first week and \$1,100 (\$1,000 + \$100) in the second week. Under the described plan, however, the total and sole payment to the employee is a 50% commission whether the employee incurs \$450 in expenses, \$100 in expenses, or, apparently, no expenses at all. This raises the question – if, in every pay period, the total payment made to an employee is a 50% commission, regardless of the actual amount of expenses incurred, then where is the agreed-upon reimbursement for those expenses? Your letter fails to provide a satisfactory answer.³

According to the facts presented, the employer in question has agreed to pay benefits in the form of expense reimbursement but has not, in fact, paid such reimbursements. Therefore, this employer is in violation of Labor Law §198-c.

³ The final paragraph of your letter correctly states that making a deduction from an employee's 50% commission to pay the same employee a "reimbursement" would be a violation of Labor Law §193. Such a practice would be an interesting twist on the saying "robbing Peter to pay Paul." Such a practice would, instead, be robbing Peter to pay Peter.

This opinion is based on the information provided in your letter of April 30, 2008. A different opinion might result if any facts provided have been inaccurately stated, or if there are other relevant facts that have not been disclosed. If you have any further questions, please feel free to contact me.

Very truly yours,

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Associate Attorney

JGS:jc

cc: Carmine Ruberto