

# Mercer/CCH Guide for Employers

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## COMMISSION PAYMENTS: IS YOUR COMPANY PROTECTED?

— By *Patrizia Piccolo, Partner and Department Head, Labour and Employment, Keyser Mason Ball, LLP and Megan Burkett, Associate, Labour and Employment, Keyser Mason Ball, LLP.*

For many employees, commission payments form a considerable part of their total compensation. Yet not all companies have taken the time to clearly set out a written commission plan. There is a great deal of litigation on the topic of commission payments, particularly following a termination of employment. Including a few sentences in an employment agreement is generally not enough to protect a company.

To try and avoid or reduce this type of litigation, your company should consider incorporating some of the following items into a written commission plan:

1. How will the commission be calculated? For example, will the commission be calculated on the gross amount or the net amount of sales? Definitions should be included in the commission plan.
2. When will the commission become payable? For example, will it be once the invoice has been sent out? Or, once the customer has paid and the product has been delivered or the service has been completed?
3. Is there a minimum target amount of sales before the employee will earn commission? If so, is this a monthly, quarterly or yearly target and how often will these targets be set?
4. Will the plan incorporate increased percentages once a certain target amount of sales has been met?

The greater the detail in the commission plan addressing these types of issues, the less likely disputes will occur. The commission plan should also include language dealing with a situation where the customer does not pay for the services or if there is damage or problems with the product delivered or services performed. In these situations, a company may not pay commission or will only pay a reduced commission and if that is the case then the commission plan should say so.

Other issues to consider are how an employee's vacation pay will be calculated or what will happen to the commission payments upon termination.

## Vacation

To determine vacation pay under the [Ontario] *Employment Standards Act*, the definition of wages includes regular earnings, overtime pay, public holiday pay, vacation pay, commissions and non-discretionary bonuses. Yet many companies make the mistake of calculating an employee's vacation pay on base salary only. The two weeks of paid vacation time that an employee is entitled to under the *Employment Standards Act* must include all of the types of compensation that would be considered wages, including commissions.

If a company would like to provide additional paid vacation time beyond the minimum of two weeks, a decision must be made whether those additional weeks would include commissions as part of the vacation pay calculation. If it is the intention of the company to only pay the additional vacation pay on base salary, then the company's vacation policy should clearly indicate that.

## Termination

The terms of the commission plan should cover what will happen upon termination. The commission plan should not only define when commission is considered earned, but also that employees will only be entitled to commission earned up to and including the termination date.

The risk of not including any language to address the issue of termination is that the employee may continue to be eligible for commission payments during the common law notice period. The [Ontario] Court of Appeal's recent decision in *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130 [2011 CLLC ¶210-024] confirms that clear language is needed to resolve employee compensation issues upon termination. The Court of Appeal relied on the terms of the shareholders agreement between the parties in determining that the company had a right to buy back the shares as of the termination date and not the notice period. The outcome in this case was based upon the court's interpretation of what was agreed to between the parties. While this particular case dealt with shareholder rights, the principles from this case will likely be applied to termination cases involving commissions, bonuses, benefits or other types of employee compensation. Clear language is the best way for a company to protect itself.

As for the employee's termination package, it is to be calculated on total compensation which includes commission payments. Where an employee has signed an employment agreement that limits termination entitlements to the minimums under the [Ontario] *Employment Standards Act*, then the employee's earnings must be averaged over the 12 week period prior to the date of termination. Where a termination clause in an employment agreement provides more than the minimums under the *Employment Standards Act*, then there are a number of different options upon termination. Averaging commission over the prior year or over a 2 year or 3 year period are common ways to calculate total compensation and the commission plan or employment agreement should set out how to calculate total compensation for the termination package.

If the matter is left to be determined by the court, it will be within the discretion of the judge to determine when commission is considered as "earned" as well as how to calculate total compensation during the notice period. Often, judges will calculate commission and total compensation in a way that is most beneficial to the employee, which is why it is often in the best interest of the company to set out in a commission plan or an employment agreement what will occur upon termination.