Court Decision Illustrates Importance of Having a Clear Written Agreement or Policy on Bonuses and Commissions

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A recent decision from the North Carolina Court of Appeals shows why it is important to have a clear written agreement or policy on bonuses and commissions.

In *Kornegay vs. Aspen Asset Group, LLC,* a jury found the employer and employee had an enforceable verbal agreement that, in addition to his salary, the employee would be paid a bonus of "20% of the profits" from real estate investment projects he "originated and implemented." On appeal, the employer argued there was insufficient evidence to support the jury's verdict because the parties had negotiations for the employee's bonus but intended to reach an agreement on the bonus only if and when it was put in writing and signed by both parties, which never happened. The Court of Appeals upheld the lower court's award of bonus compensation based on the jury's verdict, finding there was sufficient evidence that the employer and employee reached an enforceable verbal agreement on "definite and certain" terms of how the bonus would be calculated and when it would be earned and payable to support the jury's decision.

The employee worked for the employer more than seven years and left its employment without ever receiving a bonus. On appeal, the employer argued that even if the parties had an agreement on a bonus for the employee, the bonus had been eliminated when the employer sent the employee a written statement during the fifth year of his employment telling him there would be "No Bonuses, No Commissions, No Nothing Until [the employer] sees fit & confident we are making money." Because the employee's bonus claim was brought under the North Carolina Wage and Hour Act, the Court of Appeals applied the Act's provisions governing loss or forfeiture of wages based on bonuses and commissions. As interpreted by North Carolina courts, those provisions dictate that a bonus or commission may not be lost or forfeited unless an employee has been given written notice of the employer's policy or practice resulting in such loss or forfeiture before the bonus or commission has been earned.

The Court of Appeals in *Kornegay* ruled that the aforementioned written statement by the employer did not give the employee sufficient notification to cause a loss or forfeiture of the bonus. The Court held that the employer's written statement did not state the bonus would be lost or forfeited upon the occurrence of specific events or otherwise specify the conditions for such loss or forfeiture. According to the Court, the employer was stating that the timing for payment of the bonus would be in its discretion based on when the employer thought it was making money, but did not state there would never be a bonus paid.

The employer in *Kornegay* argued on appeal that even if the employee's bonus was not eliminated, some of the

bonus was not earned and payable and could not be calculated at the time his employment terminated because some of the real estate projects he "originated and implemented" had not been sold or leased, and thus had not resulted in "profits," at the time of his termination. The Court of Appeals applied the Wage and Hour Act's provision governing payment of bonuses and commissions upon termination of employment, which provides that "Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs." The Court reasoned that provision would be meaningless under the employer's argument that the bonus must be calculable as of the date of termination. The Court rejected the employer's argument and held that "it is immaterial that a bonus is not 'calculable' as of the date of termination of employment if it is calculable at some later date."

The Court of Appeals then rejected the employer's challenge to the portion of the employee's bonus attributable to his real estate projects that had not been sold or leased at the time of his termination, and held that portion of the bonus was "calculable" at a later date because the projects increased in value and would have made the employer a profit after a reasonable time for resale or leasing.

A clear and effective written agreement or policy could have precluded many, if not all, of the employee's claims in *Kornegay*. Because the Wage and Hour Act's provisions at issue in *Kornegay* apply to commissions as well as bonuses, the *Kornegay* decision illustrates how important it is for employers who use these types of compensation to have a clear written agreement or policy that covers how bonuses and commissions are calculated, when they are earned and payable, when they are lost or forfeited, and whether and how they are paid upon an employee's termination.

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