EMPLOYMENT STANDARDS FACT SHEET

COMMISSION PAY PLANS

Who does this Fact Sheet apply to?

This Fact Sheet applies primarily to employees who are paid in whole or part by commission. However, there may be situations where it applies to employees compensated by other types of incentive-based pay plans. For a more detailed discussion on incentive-based pay, refer to Fact Sheet #8, *Incentive-Based Pay and Minimum Compensation Entitlement.*

What is the purpose of this Fact Sheet?

The purpose is to define common terminology, explain processes unique to the payment of commission and outline policy used by Employment Standards to determine if minimum standards under the *Employment Standards Code (Code)* have been met.

Common Terminology

Commission: Commission is a type of incentive-based wage that is calculated on the amount of business done. Examples include percentage of sales, percentage of gross or net profits and lump sum payments per transaction.

Draw: A draw is payment made to an employee in anticipation of earning future commission. Unless there is evidence to support a different meaning, the word "draw" is interpreted to mean that the parties intend that the funds be repaid at some point in time during the employment relationship.

Guarantee: A guarantee is a fixed amount paid to an employee on a regularly scheduled basis even if the amount of commission earned is less than the amount of the guarantee. Unless there is evidence to support a different meaning, the word "guarantee" is interpreted to mean that the parties do not intend that the difference between commission earned and the guarantee be repaid by the employee.

Earning Commission

An employee typically has to satisfy a variety of conditions before commission is earned. These conditions may be in the form of a written employment contract, verbally agreed to or established by past practice or industry standard.

All or most of the following steps are common to transactions where employees earn commission:

- employee soliciting clients to purchase products or services,
- employee or other authorizing individual entering into an agreement (written or verbal) with clients to purchase products or services,
- employee or other individual(s) delivering products or providing services,
- clients making payment for products or services in full or by instalments, and
- employer allowing a period of time to pass to ensure the client does not return the products or dispute services that were provided before crediting the salesperson with the commission.

Employees earn their commission either upon completion of the entire process or at certain points during the process. The employment contract will determine when a commission is earned and will outline the exact nature of the employee's responsibilities in this process.

Paying Commission

Commission must be paid within 10 consecutive days after the pay period in which it was earned. Upon termination of employment, earned commission must be paid by an employer within the time limits described in sections 9 and 10 of the *Code.* Additional information is available in Fact Sheet #4, *Termination of Employment and Temporary Layoff.*

Often when employment terminates, the activities that are required to be completed before an employee earns certain commissions, have not yet occurred. These activities may be completed subsequent to the date of termination. Whether or not the employee will be entitled to all or a portion of these commissions will depend on a variety of factors. These include whether the employment contract states how the employee will be paid upon termination, the circumstances of the termination, past practice of the employer and industry standards.

Commission and the Minimum Wage

Many employees who are paid commission are exempt under section 2 of the *Employment Standards Regulation (Regulation)* from recording daily hours of work and are entitled to a weekly minimum wage (currently $280 per week). For those employees not exempted from recording daily hours of work, the prevailing hourly minimum wage applies (currently $7.00 per hour). Only a small number of employees are exempt from the minimum wage. They include real estate brokers, security salespersons and insurance salespersons paid entirely by commission.

In determining whether the minimum wage has been paid to an employee who is paid entirely or partly by commission, the amount of commission earned is compared to what the employee would have received had the minimum wage been paid. If the commission totals less than the minimum wage, the employee must be paid at least the minimum wage. If the commission is greater than the minimum wage, then the commission must be paid.

Where employees are subject to the hourly minimum wage, this determination must also take in to account an employee's entitlement to overtime and general holiday pay. For more information on this process, please refer to Fact Sheet #8, *Incentive-Based Pay*.

Recovery of a Draw

Where an employee is paid a draw and the commission earned in that pay period is less than the draw, the difference may be recovered from the employee's future commissions. Providing that the employer and employee clearly agree to a negative balance being carried forward, this practice is acceptable to Employment Standards. Recovery of a draw cannot result in the employee receiving less than the minimum wage in any pay period.

Example:
An employer has a bi-weekly pay period and the employee is entitled to a draw equal to the weekly minimum wage. The draw for the employee is $560 (2 x $280) in each two-week pay period. The employee must receive at least $560 every pay period. Employment terminates at the end of the fourth pay period.

Pay Period	Commission Earned	Draw or Commission Paid	Balance* <negative>
1	$0	$560	<$560>
2	$1,400	$840	$0
3	$0	$560	<$560>
4	$500	$560	<$620>

* Balance is a carry-over that can only be zero or negative because section 8 of the *Code* requires that earnings be paid within 10 days of the end of the pay period in which they were earned.

In this example, a negative balance of $620 exists in the last pay period. The employer cannot recover this negative balance, as the employee is entitled to receive minimum wage each pay period, including the last pay period.

Suppose the employee terminates employment after the fifth pay period during which she earns $1600 in commissions.

Pay Period	Commission Earned	Draw or Commission Paid	Balance* <negative>
4	$500	$560	<$620>
5	$1600	$980	$0

Here the employer can recover the negative balance of $620, as the employee will still receive more than the minimum wage in the last pay period.

Recovering Commission on Returned Goods or Cancelled Contracts

An employer may be able to recover commission paid to an employee if the goods are subsequently returned or a contract is cancelled. Recovery of commission by the employer will be allowed if it is authorized in the employment contract. Where there is no employment contract or it does not address the issue, Employment Standards will consider the past practice of the employer to determine if recovery is permitted.

Where Employment Standards determines that the recovery of commissions was expressly agreed to or has been standard practice, recovery will be allowed. Therefore written authorization from the employee is not required. However, recovery of commission cannot result in the employee receiving less than the minimum wage for that pay period.

Override Commissions and Annual Vacation Pay

Where an employee is paid an override (a percentage of sales generated by other employees), it is not unusual for the override to continue to be credited to the employee for sales made while they were away on vacation. This may result in the employee receiving more or less vacation pay than if they had been paid using the *Code's* minimum standards for calculating vacation pay.

In all cases the "set" wage (monthly salary, hourly or otherwise) component of the employee's compensation plan must meet the requirements for vacation pay in sections 39 and 40 of the *Code*. Also refer to Fact Sheet #6, *Vacations and Vacation Pay*.

The following two methods of calculating vacation pay entitlements on the override portion of the compensation plan are acceptable to Employment Standards:

1. Pay the employee their override as if they had been at work during their vacation, or
2. Pay the appropriate percentage of the total override earned in the year for which the vacation pay is being calculated. If this option is used, the employer does not have to pay an override to the employee on sales generated during their absence on vacation.

This document is for general information. For the purposes of interpretation and application of the law, the *Employment Standards Code* and the *Employment Standards Regulation* should be consulted.