PLUNKETT COONEY

Agreements Sealed with Hand Shakes are Enforceable

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Over the years, most human resources professionals have believed that there was “no agreement” because it was never reduced to writing. However, oral understandings may be enforceable as one employer recently discovered.

In *Gibbons v Agricultural Consultants,* Kent County Circuit Court, Sept. 11, 2013, the plaintiff, who was hired as a salesman, sued for unpaid commissions based on a “hand shake agreement.” He alleged claims for breach of contract, sales commissions under the Michigan Sales Representatives’ Commissions Act (MSRCA) and quantum meruit (an equitable claim to prevent unjust enrichment by implying a contract when one did not exist, which was later dismissed). The plaintiff claimed his efforts in selling fertilizer enriched the defendant while it claimed the allegations were simply “urea hype.”

The defendant, seeking dismissal, argued that the Statute of Frauds, which prevents the enforcement of oral agreements in certain circumstances, barred the plaintiff’s claims. However, the court denied the request to dismiss, recognizing that an oral agreement can support a breach of contract claim and also a claim under the MSRCA where, as here, there was partial performance by the plaintiff. “Although the terms of that initial agreement are not clear, Gibbons plainly agreed to sell fertilizer and industrial-grade urea, and [the defendant] clearly agreed to pay Gibbons a combination of a monthly draw and a form of commissions that depended upon sales volume.”

While this opinion is not binding on other courts, it serves as an important reminder. Employers should never assume that verbal promises are unenforceable. That is why employment handbooks and applications require any modification of the at-will employment relationship to be in writing to prevent the employee from relying on verbal agreements to the contrary.

MSRCA is a very dangerous statute for defendant companies that have sales representatives paid in commissions for selling their products. Unless the company fails to pay commissions due at termination as a result of a mathematical error, twice the amount owed in liquidated damages is almost guaranteed to the former sales representative (plus attorney’s fees).

Companies should consider instituting a bonus program instead of a commission plan. Bonuses are employee benefits that only need to be paid at termination, if the company promised in writing to do so. The difference between commissions and bonuses is the structure of the compensation plan and not necessarily the amount to be paid.

If a company decides to pay commissions, it is important to have the agreement carefully drafted, focusing not only on what percentage to pay, but when it is "earned" (for example, when the product is ordered, delivered or payment is received), when it is to be paid (for example, 60 days after payment has been received from the customer) and when the obligation will end (to prevent a claim under the "procuring cause" doctrine, which may result in an obligation to pay commissions for so long as the customer places orders).

Poorly drafted policies and plans can cost companies far more than anticipated. It is always wise to seek assistance from an experienced employment attorney.

If you need assistance in reviewing and updating your employment policies, please contact the author or your Plunkett Cooney employment attorney.