Dealership Update

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Did The Local DUI Lawyer Draft Your Pay Plans?

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Of course not. We just wanted to get your attention. The real question is when was the last time you reviewed your pay plans to make sure that they accurately reflected your current pay practices and policies, and adequately protected the dealership? How do you know if your pay plans may need an overhaul? Well, if the local DUI lawyer actually drafted them or any of the following are true, it may be time:

- you have no written plans;
- your only written plans are on cocktail napkins;
- your plans look like ransom notes;
- your plans are the poster children for “short and sweet”;
- swamp water is clearer than the plan’s language; or
- your plans make more promises than a campaigning politician.

Seriously, if it has been a awhile since you reviewed and possibly revised them, you may be overdue. No offense intended, but pay plans have legal implications that may not be appreciated by those using them. Inadequately-drafted plans can create risks and legal liability for dealerships that the drafter never even considered.

How To Get It Wrong

Many plans have the same risk-creating features. For example, a written pay plan that does not accurately reflect the dealership’s actual pay practices may give rise to a breach of contract claim. The inconsistency between what the document says and what the dealership actually does may simply result from a failure to update the plans as practices change. The problem may also be the product of a new manager implementing pay plans brought over from another dealership without making necessary changes…the one-size-fits-all approach. But for whatever the reason, pay practices that do not match the pay plans may give rise to claims that the dealership was not living up to its agreement.

To be sure, dealerships generally have the right to change pay plans as often as they want because most dealership employees are employed “at will.” Many well-drafted pay plans even include language reserving the dealership’s right to make these changes. To minimize possible controversy, good plans note that all such changes must be in writing to be effective. This language provides protection against claims that a manager changed the plan verbally.

But the “right to make changes” is the right to make changes on a prospective or going-forward basis. A dealership that make changes retroactively may be stirring up a hornets’ nest.

Saying Too Little…Or Too Much

Another potential problem results from the absence of words (usually explanations and definitions). For various reasons, including the “I don’t want to make the plan too complicated because my employees will not understand it” rationale, many managers deliberately draft plans to be as short and cryptic as possible. And why shouldn’t they be? After all, everybody involved knows exactly what the pay plan means, right?

When a plan says that a salesperson will get 25% commission on the “gross profit” for new car sales, what possible controversy could there be? Since everyone knows what you’re talking about, what’s the need to explain what constitutes a sale, when a commission is “earned” and payable, what number or numbers are used when calculating the 25% commission, or what “gross profit” means in the context of the plan?

Unfortunately, “short and sweet” may create avoidable risks for the dealership because the person or persons (e.g. judge, juror, arbitrator) who may ultimately decide what the plan means or was intended to mean may have no idea what you meant. Most pay plans are written to be read and understood by people in the retail automotive industry who know the industry’s terms and jargon, but the ultimate interpreter of the pay plan’s language will be a person or persons who may have never heard of an “up” or a “spiff.”

The risk of an unintended interpretation of the plan is increased by the chance that an arbitrator or judge may not let you explain what you meant. Instead, you may be left with the words on the paper. Each unanswered question provides an opportunity for a challenge and an unintended interpretation.

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Let's face it, terms like "pack" and "spiff" are seldom used or heard outside the industry. Moreover, when terms like "sale", "gross profit" and "chargebacks" are used without explanation or definition, the possibility exists for someone outside the industry to apply a commonly understood (outside the industry) definition of these terms. Remember, "outsiders" will ultimately define the terms and if your plan doesn't provide guidance, that definition of "gross profit" may not be the one you intended. When there is uncertainty or ambiguity as to the intent of the plan, the general rule of law is that the document will be construed or interpreted against the party who drafted it (i.e., the dealership).

Similarly, plans that offer bonuses, spiffs, guarantees and other incentives should explain what an employee must do to be eligible for this additional or guaranteed pay. If the plan includes a guarantee, the plan should be clear as to the duration of the guarantee and that it is not a guarantee of employment. The plan also should define the circumstances when the guarantee will be paid or not paid in whole or in full, for example, when an employee misses work during the guarantee period.

Additionally, well-drafted pay plans often include language addressing minimum wage and overtime issues where applicable and any policy for recovering make-up pay. These plans also include language addressing the employees timekeeping responsibilities, the process for questioning concerns about the calculation of their pay and a restatement of the at-will relationship.

The Cost Of Doing It Wrong

At this point you may saying to yourself, "Is this really necessary? I've been drafting pay plans for years with no problems!" To that, we can say that dealerships have recently faced lawsuits, including class actions, based on pay plans that allege breach of contract, fraud, and violation of state wage-payment laws. A typical claim is that the dealership breached its contract with the employee or committed fraud by failing to pay commissions on the gross profit, as promised in the pay plan.

Generally these claims go on to allege that the dealership deducted packs or other undisclosed charges from the total gross profit before calculating commissions or that the dealership failed to include all payments from the manufacturer, lender or other vendor, and docked fees when calculating the actual "profit" on a deal. Courts have reasoned that if the dealership wanted to calculate "gross profit" in some particular manner or if it wanted to make certain deductions from the total gross profit, it could have made that clear in the pay plan. In the absence of evidence of such intent, the document speaks for itself, and when documents start talking, you want them to support your side.

Of course, we're not saying your plans are bad. Find out for yourself. One good test is to hand one to someone with no knowledge of the business and ask them to tell you what it means without any explanations from you. If that person has any difficulty understanding it, it's a safe bet a judge, jury or arbitrator will, too.

The good news is that it's never too late to make the changes and to update your pay plans. You may want to consider including a pay plan review for all positions (not just sales) on your to-do list. By the way, if you decide to do it and need help, your local DUI lawyer may not be your best choice (no offense to DUI lawyers).

For more information contact the author at TCoffey@laborlawyers.com or 404.231.1400.

Ask Fisher & Phillips

Our Dealership Practice Group represents thousands of dealerships all across the country, from large consolidators, to regional groups, to single dealerships. Because of working so closely with so many dealerships for so many years, we've acquired an in-depth understanding of dealership operations as well as a wealth of practical experience in dealing with dealers' unique labor and employment issues.

In "Ask Fisher & Phillips," we will be taking some of the more common dealership questions and providing our response and advice. This section is based on our clients' real-life questions. But don't worry . . . all names have been removed to protect the innocent!

Question:
We have an employee who was off for five days taking care of his sick wife. He has been with the dealership for more than a year and worked more than 1,250 hours last year. I sent him the FMLA paperwork. He called me and said that he did not want to use his time off for FMLA, and instead was just going to use unpaid time off. What do I do now?

Answer:
An employee does not have a choice whether or not to take FMLA. If the employee and the reason for the absence satisfy the requirements of FMLA, then you are legally obligated to grant it and he or she is obligated to take it. Otherwise their absence is simply unexcused. So tell the employee that you are taking him at his word that he needed time off to care for his wife (a FMLA-qualifying event) and that based on that representation, you have granted him five days of FMLA.

The *Dealership Update* is a periodic publication of Fisher & Phillips LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

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