

## WHEN IS A BONUS A "WAGE" UNDER INDIANA LAW?

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In *Highhouse v. Midwest Orthopedic Institute, PC*, 807 N.E.2d 737 (Ind. 2004), the Indiana Supreme Court held that a bonus calculated on the basis of both an employee's production and the expenses of the overall business is not a "wage" governed by Indiana's Wage Payment Statute.

Dr. Highhouse had a written employment agreement providing for an annual salary of \$250,000 and an annual bonus for each calendar year payable February 28 of the following year. The bonus, which actually was paid at the end of each calendar quarter, was based on the practice's collections for services rendered by Dr. Highhouse, less an allocation of expenses of the practice's overall operations. Therefore, the bonus was dependent on both Dr. Highhouse's productivity and expenses of the practice's operations over which Dr. Highhouse had no control.

On March 2, 1999, Dr. Highhouse gave notice of his resignation effective June 30, 1999. Following Dr. Highhouse's departure, the practice continued to receive collections for services that he provided prior to June 30. The practice refused to pay Dr. Highhouse a bonus based on post-June 30 collections, taking the position that Dr. Highhouse was entitled to no further compensation once he departed. Dr. Highhouse's employment agreement stated, in part:

**Termination without Cause.** Employer may terminate this Agreement at any time and without cause effective upon ninety (90) days advance written notice provided to Employee. In such event, Employee shall continue to render his services, and shall be paid his regular compensation up to the date of termination.

Dr. Highhouse sued, claiming he was entitled to bonus payments based on post-June 30 collections and that his bonus constituted a "wage" entitling him, in addition to the unpaid bonus, to twice the amount of the unpaid bonus plus attorneys' fees pursuant to Indiana's Wage Payment Statute.

Under Indiana case law, absent an agreement or policy to the contrary, when an employer makes an agreement to provide compensation for services, the employee's right to compensation vests when the employee renders the services. The Court determined that the "Termination without Cause" provision referenced above did not apply to Dr. Highhouse's resignation, and, therefore, his employment agreement did not unambiguously call for the termination of bonus payments as a result of his resignation. As a matter of contract law, he was entitled to a bonus on post-June 30 collections for his services.

Although the Court ruled that Dr. Highhouse was entitled to a bonus on post-June 30 collections, it held that his bonus did not constitute a "wage" for purposes of Indiana's Wage Payment Statute. Under that Statute, upon separation from employment, employees must be paid the amount of wages due them at their next and usual payday. Failure to pay wages when due subjects an employer to a penalty of up to double the amount of unpaid wages and attorney's fees. Under established Indiana case law, a "bonus" is a wage governed by the Indiana Wage Payment Statute if it is compensation for time worked and is not dependent on a contingency such as the financial success of the employer. In this case, the Court concluded

that Dr. Highhouse's bonus was dependent on expenses of the practice's operations, expenses over which Dr. Highhouse had no control. Consequently, his bonus did not constitute a wage, and he was not entitled to double damages or attorney's fees.

This case serves as a good reminder to Indiana employers to clearly document their intent with respect to an employee's eligibility for compensation following termination of employment, making sure to address all forms of compensation to which an employee may be eligible.

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