Proskauer

newsletter

February 2010
in this issue

A monthly "best practices" alert for multinationals confronting the challenges of the global workplace.

This Month's Challenge

Commission plan's are a staple of American business, but there are important issues to consider before rolling out a commission plan internationally.

Best Practices Tip of the Month

To avoid an unpleasant legal surprise, American employers must carefully consider local law before unveiling a new commission pay plan.

Tip of the Month

Common Pitfalls to Avoid When Drafting Global Compensation Plans

Paying employees on a commission basis is commonly accepted as a good way to increase sales of a product or service – in the United States. Outside the U.S., commission plans are far more problematic. What is perfectly legal in the U.S. simply won't pass muster under the invasive labor laws of many other countries. A company that decides to simply roll out a compensation plan across borders in other countries without first ensuring that it complies with local labor laws may find out too late that key aspects of the plan are void or unenforceable.

One Plan or Many?

It is often tempting for a multinational company to try to harmonize the laws of several different jurisdictions and arrive at a uniform company-wide commission plan that can be utilized across the globe. However, while clearly an admirable goal, the idea rarely works in practice. Too often, the changes required to make a key provision acceptable under one country's laws make it unlawful in another country, or imposing those changes in other countries is simply too burdensome.

Mandatory Home Country Provisions

Despite a U.S. multinational's preference to have the law that it is most comfortable with apply (for instance, the State where it is headquartered) and despite the fact that U.S. law, with its relatively *laissez faire* approach, is generally more employer-friendly than most other countries' labor and employment laws, a U.S. choice of law clause will generally be considered void. Under the Rome Convention of 1980, which governs the choice of law of a European employment relationship, the choice of law will generally be deemed to be the country in which the employee habitually performs his or her work—irrespective of the choice of law specified in the commission plan. The same result will obtain in almost all countries outside Europe.

Many U.S. employers also use compensation plans as an opportunity to insert a provision whereby employees agree to submit any claim to binding arbitration. However, arbitration is a totally foreign concept in many jurisdictions, especially in the labor context. In all but a handful of jurisdictions, a multinational organization will find that an arbitration agreement to govern employment disputes will be unenforceable. In Italy, for example, where 99% of employees are subject to one of several industry-wide collective bargaining

agreements, an arbitration agreement will only be permissible if it is provided for in the applicable collective bargaining agreement.

Problems often arise not only in the substantive provisions of a commission plan, but in the way it is distributed to employees. Often, a company will assume that because all company business is conducted in English and all employees understand English, the documents governing their compensation are also permitted to be in English. Not so. Several countries require compensation plans to be in the local language in order to be enforceable, such as France, Russia, and Turkey, to name a few. In other countries, such as Spain, while not mandatory it is often recommended to give employees a local language translation of the document when distributing it to the local workforce, in the event an authoritative local translation is needed when a dispute arises.

Pitfalls in Global Compensation Plans

Wary of offering anything to employees that could be construed as a binding contract, U.S. commission plans often contain language expressly denying that any language in the plan is intended to create a contract of employment. However, in many countries, such as the United Kingdom, due to the very nature of its subject matter, a commission plan will likely be deemed part of the contract of employment with the employee. In France, a compensation plan is likely to be regarded by a French court as an addendum to the employment contract because (i) it is linked to the performance of the employee's job; and (ii) it deals with remuneration, which is a matter that French courts generally consider to be contractual by nature.

The designation of a plan as an addendum to an employment contract has serious consequences: the company would likely not be able to change the amount of variable compensation—or even the method of calculating it on a discretionary basis—in the absence of the employee's explicit consent. Indeed, if the company retains the discretion to amend the plan, and amends it unfavorably (or terminates the plan unilaterally), a plan participant could claim that doing so constitutes a unilateral termination of contract and could seek not only payment of commissions allegedly generated under the Plan, but payment of damages for unfair termination as well. In those countries where a commission plan would not automatically be deemed to constitute an employment contract, it is still important that the plan not state that the company anticipates that its employees will achieve all of their performance objectives under the plan each year, lest such language creates a vested or acquired right to receive a commission payment at the full performance level.

Introducing commission plans in Japan has its own set of hurdles to overcome. For instance, companies sometimes desire to implement provisions that provide that under certain circumstances, advanced compensation will be reconciled and offset against a participant's future compensation or base salary. However, Japan's Labor Standards law prohibits offsetting against salary unless there is an agreement between the employer and a labor union to which the majority of its employees belong or, if such labor union does not exist, an employee representative who represents the majority of the employees. Further, any provision that requires the employee to object to the calculation of the commission within a certain period of time will likely run afoul of Japanese labor laws which provide that promised compensation must always be paid in full.

Brazil is another country that presents its own special set of challenges to the implementation of a commission plan. As a preliminary manner, even if sales are calculated in dollars, payment of commissions must be in the local currency, in order to avoid a claim by an employee that he was subject to a reduction in compensation due to fluctuations in the exchange rate. In addition, companies wishing to offer a "ramp up" period in their commission plan, whereby employees receive a fixed salary for several months before transitioning to fully commissioned salespersons, is fraught with peril, as a Brazilian court could find that even the initial payment of a fixed regular sum could result in a continuing obligation to pay a salary (notwithstanding the terms of the plan) until the employee's separation of employment. Further, by operation of Brazilian law, a commission is deemed earned when the company accepts the sale; therefore, any limitations to the definition of when a commission is earned (such as a limitation providing that the commission is not earned until a particular trial or revocation period has expired) will be problematic.

Commission plans are challenging enough to implement in the U.S., but companies with a multinational presence must tread carefully before rolling out a new commission plan.

Proskauer Rose LLP's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

For more information about this practice, click here or contact:

Bettina B. Plevan
212.969.3065 – bplevan@proskauer.com

Aaron J. Schindel
212.969.3090 – aschindel@proskauer.com

Howard Z. Robbins
212.969.3912 – hrobbins@proskauer.com

Yasmine Tarasewicz
33.1.53.05.60.18 – ytarasewicz@proskauer.com

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Jeremy M. Mittman
310.284.5634 – jmittman@proskauer.com

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Daniel Ornstein
44.20.7539.0604 – dornstein@proskauer.com

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

Boca Raton | Boston | Chicago | Hong Kong | London | Los Angeles | New Orleans | New York | Newark | Paris | São Paulo | Washington, D.C.

www.proskauer.com

© 2010 PROSKAUER ROSE LLP. All Rights Reserved. Attorney Advertising.