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Today's financial and management professionals are compensated in a variety of complex schemes, designed by everyone from lawyers to specialized compensation consultants. While these compensation "packages" have traditionally been available to the top officers of established companies, more and more they have been used to compensate other employees throughout a firm's hierarchy.[1] The complexity of compensation packages, which often separate what have traditionally been considered "wages" from other forms of payment, allows employers to take advantage of the system. As a result, employers may defer wages through vehicles such as contingent stock options that subject the employee to forfeiture of what otherwise would be considered earned compensation.

In *Guiry v. Goldman, Sachs & Co.*,[2] the court held that the plaintiff-appellant's unvested deferred equity-based compensation was not "wages" as defined in New York Labor Law Article 6, Section 190[3] and thus was properly withheld by the company when the plaintiff was terminated.[4] Consequently, the court held that Guiry was not entitled to the protections of New York Labor Law Article 6, Section 193,[5] which provides that an employer may not make any deductions from an employee's wages unless that deduction falls within a set of specified statutorily-allowed deductions.[6] Under New York Labor Law Article 6

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1. *See* Craig Gunsauley, *A Lot of Hot Air?*, EMPLOYEE BENEFIT NEWS, May 1, 2000, *available at* 2000 WLNR 220225.

2. 814 N.Y.S.2d 617 (1st Dep't 2006), *appeal withdrawn*, 7 N.Y.3d 809 (2006).

3. N.Y. LAB. LAW § 190 (Consol. 2006). New York Labor Law Article 6, Section 190 provides:

   > Definitions. As used in this article:
   >
   > 1. "Wages" means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. The term "wages" also includes benefits or wage supplements as defined in section one hundred ninety-eight-c of this article, except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article.
   >
   > 2. "Employee" means any person employed for hire by an employer in any employment.
   >
   > 3. "Employer" includes any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service. The term "employer" shall not include a governmental agency.
   >
   > . . .
   >
   > 6. "Commission salesman" means any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions. The term "commission salesman" does not include an employee whose principal activity is of a supervisory, managerial, executive or administrative nature.

   Id.

4. *Guiry*, 814 N.Y.S.2d at 617–18.

5. *Id.* at 617.

6. N.Y. LAB. LAW § 193 (Consol. 2006). New York Labor Law Article 6, Section 193 provides:

   > Deductions from wages.
   >
   > 1. No employer shall make any deduction from the wages of an employee, except deductions which:
   >
   > a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or

("Labor Law Article 6"),[7] "wages" are defined as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis."[8] This case comment contends that the *Guiry* court was incorrect; the plaintiff's compensation met the broad definition of "wages" under Labor Law Article 6.[9]

Martin Guiry, an employee of Goldman, Sachs & Co. ("Goldman") from May 1993 through June 2002, was terminated without cause.[10] Guiry was an account executive in the Private Client Services Group ("PCS"), an arm of Goldman consisting of advisors to Goldman's highly affluent clients in the management of their financial assets.[11] Beginning in 1996, Guiry was paid on a purely cash-commission basis. However, in December 1999, Goldman replaced the cash-commission compensation system that had previously been in effect with a new compensation system consisting of three components: cash-commission, subjective commission, and equity-based commission.[12]

Prior to the implementation of the trifurcated compensation system, Guiry's cash commission was roughly equal to one-third of the commission and fee revenue that he generated for Goldman.[13] In May 1999, Goldman engaged in an initial public offering in which it raised $3.6 billion—one of the largest offerings in history.[14] In December 1999, following the success of Goldman's public offering, the company distributed an internal memorandum titled the "Overview of

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> b. are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises. Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.
>
> 2. No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section.

Id.

7. *Guiry*, 814 N.Y.S.2d at 617. *See infra* note 12 and accompanying text (explaining what constitutes the deferred equity-based compensation at issue).

8. N.Y. LAB. LAW § 190(1).

9. *See supra* note 3 (defining "wages" under N.Y. LAB. LAW § 190(1)).

10. *Guiry*, 814 N.Y.S.2d at 618.

11. *Id.*

12. *Id.* Guiry's approximate compensation in 1996 was $400,000; in 1997, $654,000; in 1998, $877,000; in 1999, $952,000. After the three-part division in Guiry's compensation, his approximate cash-commission compensation in 2000 was $1,174,000; in 2001, $787,000; in the six months of 2002 before being terminated, $325,000. *Id.*

13. Brief for Plaintiff-Appellant at 3, Guiry v. Goldman, Sachs & Co., 814 N.Y.S.2d 617 (1st Dep't 2006), *appeal withdrawn*, 7 N.Y.3d 809 (2006) (No. 04/101929).

14. Leah Nathans Spiro, *How Public is this IPO?*, BUSINESS WEEK, May 17, 1999, at 120.

Changes to the Compensation Program of PCS Professionals."[15] The memo informed PCS employees, including Guiry, of the trifurcated compensation system.[16] Additionally, the memo described the method of determining the amount of compensation allotted to the non-cash components.[17] It described each part of the compensation system associated with the employee's production of revenue for Goldman, an amount dubbed the "Target Total Compensation."[18] The equity-based component was to be calculated as a percentage of the employee's total compensation, according to a pre-set firm-wide equity-award table developed by Goldman on a yearly basis.[19] Additional variables, such as the price of Goldman's stock at the time of disbursement, also determined the number of equity-based units to be given to each PCS employee.[20]

The equity-based compensation was disbursed in the form of stock options and in the form of Restricted Stock Units ("RSUs").[21] RSUs were essentially promises by Goldman to deliver one share of common stock per unit in the future, while stock options gave the employee a right to purchase Goldman's common stock at a specified future time and price.[22] Each equity-based component was subject to certain specified conditions laid out in "The Goldman Sachs 1999 Incentive Plan and Award Agreements."[23] The equity-based component, pursuant to the specified conditions, consisted of both vested and unvested compensation, the amount of which was determined at the end of each fiscal year based on the employee's revenue generation for Goldman.[24] The unvested portion of the employee's equity-based compensation was conditional on his or her continued employment with Goldman as of the scheduled vesting date.[25]

On June 28, 2002, Goldman terminated Guiry without cause.[26] Following his termination, Goldman denied Guiry the unvested RSUs and stock options he earned from his work in 2000, 2001, and the first six months of 2002.[27] In

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15. Brief for Defendant-Respondent at 4, Guiry v. Goldman, Sachs & Co., 814 N.Y.S.2d 617 (1st Dep't 2006), *appeal withdrawn*, 7 N.Y.3d 809 (2006) (No. 101929/04).

16. Brief for Plaintiff-Appellant, *supra* note 13, at 3.

17. Brief for Defendant-Respondent, *supra* note 15, at 4.

18. Brief for Plaintiff-Appellant, *supra* note 13, at 4.

19. *Id.*

20. Brief for Defendant-Respondent, *supra* note 15, at 5.

21. *Id.*; *see also* Guiry v. Goldman, Sachs & Co., 814 N.Y.S.2d 617, 618 (1st Dep't 2006), *appeal withdrawn*, 7 N.Y.3d 809 (2006).

22. Brief for Defendant-Respondent, *supra* note 15, at 5.

23. *Id.*

24. *Guiry*, 814 N.Y.S.2d at 618. "Vested" is defined as having become "a completed consummated right for present or future enjoyment; not contingent; unconditional; absolute." BLACK'S LAW DICTIONARY 1595 (8th ed. 2004).

25. *Guiry*, 814 N.Y.S.2d at 618.

26. *Id.*

27. *Id.*

2000, 2001, and the first six months of 2002, Guiry generated revenue of $8.7 million for Goldman.[28] Based on his revenue production in 2000 and 2001, Guiry was awarded equity-based compensation worth approximately $140,000 and $33,000, respectively.[29] This equity-based compensation consisted of both vested and unvested RSUs and stock options.[30] However, significant portions of these earned amounts were subject to vesting dates; specifically, November 2003 for a portion of the amount earned in 2000 and November 2004 for a portion of the amount earned in 2001.[31] Goldman denied that Guiry had a right to that compensation upon his termination because Guiry was terminated prior to the vesting dates attached to portions of this equity-based compensation.[32] Additionally, since Guiry was terminated prior to the 2002 fiscal year-end, he was not compensated with the equity-based component of his 2002 performance.[33] Given the compensation system in place at the time of his termination, he would have been awarded approximately $35,000 in vested and unvested stock options for his six months worth of revenue generation in 2002.[34]

On February 6, 2004, Guiry filed a claim against Goldman in the Supreme Court, New York County, to recover the unvested portion of his deferred equity-based compensation earned in the years 2000, 2001, and 2002.[35] In response, Goldman filed a motion to dismiss Guiry's Labor Law Article 6 claims, arguing that Guiry's deferred equity-based compensation did not constitute "wages" under New York Labor Law Article 6, Section 193, and therefore could be withheld since only statutory "wages" were protected. On October 6, 2004, the Supreme Court, granted Goldman's motion to dismiss.[36] Without focusing on whether Guiry's compensation constituted "wages" the court held that Guiry was not a "commission salesman" as defined in Labor Law Article 6, Section 190(6), and that instead, he fell within an "executive exception," which placed him outside of the type of employee whose wages were protected by Labor Law Article 6.[37] Based on this finding alone, the lower court did not address whether the unvested

28. Brief for Plaintiff-Appellant, *supra* note 13, at 5–9.

29. *Id.* at 6–8.

30. *Id.* at 6–9.

31. *Id.*

32. *Id.* at 8–9.

33. *Id.*

34. *Id.* at 8.

35. *Id.* at 9; *see also* Brief for Defendant-Respondent, *supra* note 15, at 7. Guiry also alleged a cause of action for employment discrimination based on his hemochromatosis. The employment discrimination cause of action was not objected to by Goldman in its motion to dismiss; hence, it was not addressed in the lower court nor was it addressed by the appellate court's decision at issue in this comment. *Id.* at 7–9.

36. Brief for Plaintiff-Appellant, *supra* note 13, at 1.

37. Guiry v. Goldman, Sachs & Co., 814 N.Y.S.2d 617, 621 (1st Dep't 2006) (Tom, J., dissenting), *appeal withdrawn*, 7 N.Y.3d 809 (2006); *see also* Brief for Defendant-Respondent, *supra* note 15, at 8–9 (contending that Guiry's position as a member of PCS at Goldman was mainly of a "supervisory, managerial,

deferred equity-based compensation fell within the definition of "wages," as defined in Labor Law Article 6.[38] Guiry timely appealed that ruling on February 7, 2005.[39]

On appeal, Guiry alleged that the deferred equity-based compensation provisions, agreed upon in the year 2000, were in violation of Labor Law Article 6.[40] Additionally, Guiry argued that his unvested deferred equity-based compensation did qualify as "wages" and, as a result, he was entitled to the wage protections found in Labor Law Article 6, Section 193.[41]

In a three-to-two opinion written by Justice Friedman, the Appellate Division, First Department, held that Guiry's unvested deferred-equity based compensation was not "wages" as defined in Labor Law Article 6.[42] Applying *Truelove v. Northeast Capital & Advisory*,[43] the court held that Guiry's unvested deferred equity-based compensation was a form of "incentive compensation," compensation designed to give employees the incentive to maintain their present employment and maximize their productivity for the benefit of the firm.[44]

In *Truelove*, the New York Court of Appeals held that the plaintiff's bonus was not "wages" as defined in Labor Law Article 6 and thus could be withheld by the defendant, Northeast Capital & Advisory, Inc. ("Northeast Capital").[45] In that case, the defendant had paid plaintiff his first quarter bonus, but refused to make further bonus disbursements after plaintiff's resignation.[46] The plaintiff in *Truelove* explicitly knew that his bonus compensation was dependent on his continued employment with the defendant.[47] Additionally, as stated in several memoranda from the CEO, Northeast Capital would have to make a "certain stated minimum of revenue" in order for a bonus pool to be available.[48] Furthermore, if Northeast Capital was successful enough to declare a bonus pool, an

executive or administrative nature," thus placing him outside of the protected class of "commission salesman"); *see also* N.Y. LAB. LAW § 190(6) (Consol. 2006).

38. *Guiry*, 814 N.Y.S.2d at 621 (Tom, J., dissenting).

39. Brief for Plaintiff-Appellant, *supra* note 13, at 9.

40. *Id.* at 2.

41. *Guiry*, 814 N.Y.S.2d at 617–18. *See also* N.Y. LAB. LAW §§ 190(1), 193 (Consol. 2006).

42. *Guiry*, 814 N.Y.S.2d 617.

43. 95 N.Y.2d 220 (2000).

44. *Guiry*, 814 N.Y.S.2d at 619. *See generally* Susan J. Stabile, *Motivating Executives: Does Performance-Based Compensation Positively Affect Managerial Performance?*, 2 U. PA. J. LAB. & EMP. L. 227 (1999) (discussing contingent executive compensation and its effectiveness as a motivational force in the workplace).

45. *Truelove*, 95 N.Y.2d at 222–23.

46. *Id.* at 223.

47. *Id.* at 222–23

48. *Id.* at 222.

employee's entitlement to a bonus and the bonus amount were entirely dependent upon the "non-reviewable" discretion of the CEO.[49]

In *Guiry*, the appellate court held that the plaintiff's compensation was similar to the discretionary bonus in *Truelove*, and was thus outside the statutory definition.[50] Furthermore, applying the direct language of the *Truelove* opinion, the court stated that Guiry's compensation lacked "the 'direct relationship between an employee's own performance and the compensation to which that employee is entitled' [as] contemplated by Labor Law Article 6."[51] Moreover, the court stated that the value of Guiry's unvested compensation "was 'dependent, at least in part, on the financial success of the business enterprise,'" thereby placing it in the category of incentive compensation and thus outside the scope of Labor Law Article 6 wage protections.[52] Notably, the court did not rule as to whether the deferred equity-based compensation was mandatory or discretionary, and instead stated that a finding on that matter would not discourage the holding that the compensation at issue was "incentive compensation."[53]

In a dissenting opinion, Justice Tom questioned the majority's application of *Truelove* to the facts of *Guiry*.[54] The dissent argued that the two main factors used by the majority in *Truelove* to determine that the compensation was "incentive compensation" were misapplied to the facts of *Guiry*.[55] The dissent disagreed with the majority's finding that the unvested deferred equity-based compensation lacked a connection to the employee's performance, stating, "the amount of . . . compensation is determined by the employee's productivity, as measured by the amount of commission income earned in preceding months."[56] Moreover, the dissent argued that a major "criterion" that the majority applied to the facts of *Guiry*, that the value of the unvested equity-component needed to be tied to the employee's productivity, was not found in the rationale or language of *Truelove*.[57] In addition, the dissent questioned both the lower and appellate court's overall holdings due to the lack of what the dissent considered two critical pieces of evidence: Guiry's employment contract and Goldman's stock incentive plan.[58]

49. *Id.* at 222–23.

50. Guiry v. Goldman Sachs Co., 814 N.Y.S.2d 617, 619 (1st Dep't 2006), *appeal withdrawn*, 7 N.Y.3d 809 (2006) (citing *Truelove*, 95 N.Y.2d at 224).

51. *Id.*

52. *Id.* at 619–20.

53. *Id.*

54. *Id.* at 620–23 (Tom, J., dissenting).

55. *Id.* at 622–23 (citing *Truelove*, 95 N.Y.2d at 224).

56. *Id.* at 622.

57. *Id.*

58. *Id.* at 621–23 ("Since no employment contract has been furnished, the capacity in which plaintiff was hired . . . cannot be ascertained, and further proceedings are required to determine plaintiff's employment

In *Guiry*,[59] the court held that the plaintiff-appellant's unvested deferred equity-based compensation was found not to constitute "wages" as defined in Labor Law Article 6, Section 190[60] and thus was properly withheld by the employer because it was not entitled to the protections of Labor Law Article 6, Section 193.[61] The issue in *Guiry* was whether the plaintiff had a cause of action under Labor Law Article 6 to recover for the loss of earned wages, that is, wages in the form of equity-based compensation, after being terminated by his employer without cause.[62] In *Guiry*, the court failed to recognize the critical factual distinctions between *Guiry* and *Truelove*; namely the entirely different objective and subjective compensation systems at issue, and the correlation between the compensation awarded and the revenue generated by the employees.[63] Furthermore, the court should have foreseen the potential future compensation issues that will arise as a result of its ruling and, therefore, should have held that Guiry's unvested deferred equity-based compensation was "wages" as defined in Labor Law Article 6.[64]

The majority in *Guiry* misapplied the *Truelove* precedent by failing to make several critical factual distinctions between *Guiry* and *Truelove*. First and foremost, the compensation at issue in *Guiry* in no way parallels the discretionary bonus sought by the plaintiff in *Truelove*.[65] In *Truelove*, the plaintiff's offer of employment explicitly stated that a "bonus, if paid, w[ould] reflect a combination of the individual's performance and Northeast Capital's performance."[66] The bonus was dependent on Northeast Capital's performance because it was dependent on a "bonus pool."[67] The scheme based the cumulative bonus to be awarded to all employees based on the company's revenue that exceeded the minimum revenue requirements as determined by the CEO.[68] Therefore, the awarding of any bonus was entirely dependent on the performance of Northeast Capital because no bonus would have been awarded if the firm did not make a certain

status . . . . Although it might be dispositive, the stock *incentive plan is not contained in the record*, and the effect of its provisions cannot otherwise be determined . . . . The majority speculates, based on *missing documentary evidence* . . . that the amount of the bonus pool is dependent upon the firm's financial performance . . . .") (citations omitted) (emphasis added).

59. *Id.* at 617 (majority opinion).

60. N.Y. LAB. LAW § 190(1) (Consol. 2006).

61. N.Y. LAB. LAW § 193 (Consol. 2006).

62. *Guiry*, 814 N.Y.S.2d at 617.

63. *Compare* Truelove v. Northeast Capital & Advisory, 95 N.Y.2d 220 (2000) (involving a conditional bonus plan contingent upon a performance-based analysis as well as the CEO's discretion) *with Guiry*, 814 N.Y.S.2d 617 (involving a trifurcated compensation system, consisting of three components: cash-commission, subjective, and equity based).

64. N.Y. LAB. LAW § 190(1).

65. *Truelove*, 95 N.Y.2d. at 224.

66. *Id.* at 222.

67. *Id.*

68. *Id.*

amount of revenue. Additionally, it was expressly stated in interoffice memoranda that the bonus was to be awarded at the "sole discretion" of the CEO and based on an "acceptable" employee performance evaluation.[69] This directly contrasts with the facts of *Guiry* where the plaintiff was to be awarded stock options and RSUs based on a fixed equity-award table and the employee's revenue generation.[70] The two compensation systems are neither similar in their substance nor their form. The compensation scheme in *Truelove* was based on the performance of the *employer* as a whole, subject to the discretionary, subjective determination of the CEO.[71] The compensation system at issue in *Guiry* was based on the personal productivity of the *employee* and a fixed, objective equity-award table.[72] The *Guiry* court should have recognized these critical factual distinctions.[73]

As stated by the court in *Truelove*, "[d]iscretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship, falls outside the protection of the statute."[74] Guiry, however, was not rewarded for the "*employer's* entrepreneurship," but was instead rewarded for his *own* entrepreneurship.[75] It was up to Guiry to successfully manage Goldman's wealthy clients' financial assets[76] using a variety of financial instruments available to him, from equity and fixed-income to alternative investments.[77]

Furthermore, the court in *Guiry* stated that "incentive compensation" did not fall under the statutory wage protections because incentive compensation fell outside the scope of the Section 190 definition of "wages," which states that wages are "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis."[78] However, the court's categorization of Guiry's compensation as incentive compensation, defined as compensation lacking a "direct relationship

69. *Id.* at 222–23.

70. Guiry v. Goldman Sachs Co., 814 N.Y.S.2d 617, 618 (1st Dep't 2006), *appeal withdrawn*, 7 N.Y.3d 809 (2006).

71. *Truelove*, 95 N.Y.2d at 224.

72. Brief for Plaintiff-Appellant, *supra* note 13, at 4; *see also* Reply Brief for the Plaintiff-Appellant at 20, Guiry v. Goldman, Sachs & Co., 814 N.Y.S.2d 617 (1st Dep't 2006), *appeal withdrawn*, 7 N.Y.3d 809 (2006) (No. 04/101929).

73. *See infra* pp. 131–32 (drawing a comparison of Goldman's objective compensation determination to the objective formula-based compensation determination in Reilly v. NatWest, 181 F.3d 253 (2d Cir. 1999), a factor deemed dispositive in defining the compensation as Labor Law Article 6 "wages" in *Reilly*).

74. *Truelove*, 95 N.Y.2d at 224.

75. *Id.* (emphasis added).

76. Guiry v. Goldman Sachs Co., 814 N.Y.S.2d 617, 618 (1st Dep't 2006), *appeal withdrawn*, 7 N.Y.3d 809 (2006).

77. Brief for Defendant-Respondent, *supra* note 15, at 4.

78. *Guiry*, 814 N.Y.S.2d at 617. *See also* N.Y. LAB. LAW § 190(1) (Consol. 2006).

between an employee's own performance and the compensation to which that employee is entitled," was incorrect.[79] The unvested deferred equity-based compensation at issue in *Guiry* was directly tied to Guiry's productivity because it was awarded based on the revenue he grossed for Goldman.[80]

On the face of Truelove's complaint, it was evident that the issue of whether the compensation at issue was a "bonus" or not was conceded by the plaintiff.[81] However, nowhere in Guiry's complaint did Guiry allege that the compensation at issue was a "bonus."[82] Before December 1999, Guiry was compensated on an "all-cash commission-only basis;" Goldman instituted the trifurcated compensation system, however, post-December 1999.[83] The trifurcated compensation system simply awarded deferred equity-based compensation based on a firm-wide equity-award table, set by Goldman on a yearly basis.[84] Because "the higher the employee's total compensation, the greater the percentage allocated to the equity component," it was simply a percentage of his entitled income, not a "bonus" layer in addition to his entitled income.[85]

Moreover, the court should have distinguished *Guiry* from *Truelove* because Truelove was in a "non-revenue generating position" with Northeast Capital,[86] whereas Guiry was in a position to, and in fact did, generate substantial revenue for Goldman.[87] In 2000, 2001, and the first six months of 2002, Guiry generated revenue of $4.6 million, $2.9 million, and $1.2 million for Goldman, respectively.[88] Based on this factual distinction, it is apparent that Guiry's services rendered for Goldman were of substantial value. It would seem illogical on the basic contract principle of restitution interest[89] and against Labor Law Article 6, Section 193, to withhold compensation earned on account of value-rendering services already performed.[90]

79. *Guiry*, 814 N.Y.S.2d at 619.

80. *Id.* at 618; *see also* Reply Brief for Plaintiff-Appellant, *supra* note 72, at 20.

81. Truelove v. Northeast Capital & Advisory, 95 N.Y.2d 220, 222 (2000) ("[Truelove's] complaint alleges that his bonus constituted 'wages' within the meaning of Labor Law § 190(1) . . . .").

82. *See generally* Brief for Plaintiff-Appellant, *supra* note 13. *See also Guiry*, 814 N.Y.S.2d 617.

83. *Guiry*, 814 N.Y.S.2d at 618.

84. Brief for Plaintiff-Appellant, *supra* note 13, at 4.

85. *Id.* at 4–5.

86. *Truelove*, 95 N.Y.2d at 222.

87. Brief for Plaintiff-Appellant, *supra* note 13, at 6–9.

88. *Id.*

89. "Restitution interest" is defined as "a nonbreaching party's interest in preventing the breaching party from retaining a benefit received under the contract and thus being unjustly enriched. The benefit may have been received from the nonbreaching party or from a third party." BLACK'S LAW DICTIONARY 829 (8th ed. 2004).

90. N.Y. LAB. LAW § 193 (Consol. 2006). *See also* Reply Brief for Plaintiff-Appellant, *supra* note 72, at 20.

Furthermore, Truelove voluntarily resigned from his employment with Northeast Capital,[91] whereas Guiry was terminated by Goldman without cause.[92] Truelove had the option of maintaining his employment with Northeast Capital; however, even with the explicit knowledge that his bonus was contingent on his continued employment with the defendant, he resigned.[93] In contrast, Guiry was terminated without cause and under the alleged ground of employment discrimination.[94] Guiry had no choice as to whether to continue employment with his firm and, in effect, Goldman was able to preserve to itself the value of Guiry's previously-rendered services.[95] While this in no way should have been the deciding factor, it should have been a significant distinguishing factor in the *Guiry* court's rationale. The majority in *Truelove* clearly recognized in its determination that the plaintiff's resignation had factual significance.[96]

Reilly v. NatWest, decided by the United States Court of Appeals for the Second Circuit, lends further support to Guiry's position.[97] In *Reilly*, the defendant, investment bank NatWest, hired the plaintiff, employee Michael Reilly, at a salary of $200,000 plus a bonus; the bonus was to be determined by a "Percentage Bonus formula."[98] After approximately a year and one-half of employment, Reilly was fired by NatWest and was denied his bonus.[99] Reilly sued NatWest to recover his compensation under Labor Law Article 6.[100] The Second Circuit stated, "[the defendant's] pay was guaranteed under the Percentage Bonus formula to be a percentage of the revenue he generated, and was not left to NatWest's discretion."[101] Based on this finding, the court in *Reilly* held that Reilly's bonus was within the scope of "wages" as defined in Labor Law Article 6, and, by implication, protected by Labor Law Article 6 wage protections.[102] Like the commission in *Reilly*, the compensation at issue in *Guiry* was granted ac-

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91. *Truelove*, 95 N.Y.2d at 223.

92. Guiry v. Goldman, Sachs & Co., 814 N.Y.S.2d 617, 618 (1st Dep't 2006), *appeal withdrawn*, 7 N.Y.3d 809 (2006); *see also* Brief for Plaintiff-Appellant, *supra* note 13, at 3.

93. *Truelove*, 95 N.Y.2d at 223. Both the terms of Truelove's bonus plan and the continued employment contingency were expressly stated in two memos issued by Northeast Capital & Advisory, Inc.'s CEO. *Id.* at 222–23.

94. *See supra* note 35 and accompanying text.

95. *Guiry*, 814 N.Y.S.2d 617.

96. *Truelove*, 95 N.Y.2d at 225. *See infra* pp. 132–33 (discussing how the holding in *Guiry* may enable employers to take advantage of employees through unvested compensation and terminations without cause).

97. 181 F.3d 253 (2d Cir. 1999).

98. *Id.* at 259.

99. *Id.*

100. *Id.*

101. *Reilly*, 181 F.3d at 265.

102. *Id.*

cording to a fixed equity-award table, as a percentage of Guiry's revenue generation for Goldman.[103] Therefore, the unvested deferred equity-based compensation was not based on Goldman's discretion and should have been held to constitute "wages" as defined under the statute.

In *Daley v. Related Companies*,[104] the Appellate Division, First Department, held that the plaintiff's compensation was not "incentive compensation," but rather "wages" as defined in Labor Law Article 6, Section 190, and thus entitled the plaintiff to his commissions.[105] William Daley, the plaintiff-appellant in *Daley* and former Vice-President of the defendant, The Related Companies, Inc., sued the defendant for his commission compensation derived from real estate syndications he was involved in during his employment.[106] The *Daley* court based its decision on the fact that the employment agreement between the parties "did not guarantee" the defendant a fixed-base salary tied with additional incentive compensation.[107] Similar to Daley, Guiry was never guaranteed a fixed-based salary at any point in his employment with Goldman.[108] The court should have noted this in determining whether Guiry's compensation constituted "wages" as defined in Labor Law Article 6. This factual similarity would have led the court to conclude that Guiry's compensation was not "incentive compensation," and thus was entitled to Labor Law Article 6 wage protections.

Finally, the *Guiry* court should have realized the potential future compensation issues that may arise as a result of its holding. The purpose of Labor Law Article 6, Section 193, is to prevent employers from making deductions from wages of an employee except in certain statutorily-specified instances.[109] If employers may deduct compensation awarded to an employee based on that employee's already-rendered services simply because the awarded compensation is, at the time of that employee's termination, "unvested," then employers would be creating a deduction that is not within the allowable statutorily-specified instances laid out in Labor Law Article 6, Section 193.[110] In *Truelove*, the defendant paid the plaintiff his first quarter bonus installment, but refused to make further payments after plaintiff's resignation.[111] The plaintiff in *Truelove* knew explicitly that his compensation was dependent on his continued employ-

103. Brief for Plaintiff-Appellant, *supra* note 13, at 4; *see also* Reply-Brief for Plaintiff-Appellant, *supra* note 72, at 19–20.

104. 581 N.Y.S.2d 758 (1st Dep't 1992).

105. *Id.* at 761; *see also* N.Y. LAB. LAW § 190(1) (Consol. 2006).

106. *Daley*, 581 N.Y.S.2d at 759.

107. *Id.* at 761; *see also* Reply-Brief for Plaintiff-Appellant, *supra* note 72, at 23–24.

108. *See supra* pp. 123–24.

109. N.Y. LAB. LAW § 193(1)–(2) (Consol. 2006).

110. *Id.*

111. Truelove v. Northeast Capital & Advisory, 95 N.Y.2d 220, 223 (2000).

ment with the defendant.[112] The plaintiff had the choice to stay with his firm, but instead chose to resign and thus "willfully" forfeited his discretionary bonus.[113] In contrast, Guiry was terminated and then denied his unvested deferred equity-based compensation.[114] Consequently, the court's holding, in the context of a termination without cause, undermines the wage protections laid out in Labor Law Article 6, Section 193.[115]

It is important to note that stock option compensation was partially in the interests of the companies that provided it.[116] Companies that offered stock options to their employees at fair market value did not need to report this type of compensation "expense" on the company balance sheet.[117] Instead, investors funded the stock option compensation, as opposed to corporate profits.[118] In 2002, 37 percent of the nation's employers used stock option compensation to compensate its employees.[119] Nearly 26 percent of the nation's employers provided some form of equity-based compensation to employees, usually in the form of stock options, in 2006.[120] While the exact number of employees within the percentage is unclear, a study in 2000 estimated that between seven million and ten million employees received stock options in the year 2000 alone.[121]

While *Guiry* may be a New York employment law case, the growth in the number of people being compensated with stock options is growing nationally, as well as in the state of New York.[122] By denying the protections of Labor Law Article 6, Section 193, to unvested stock option compensation, employers can com-

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112. *Id.*

113. *Id.*

114. *See supra* p. 130 (describing the revenue Guiry generated at Goldman and the manner in which he was terminated).

115. N.Y. LAB. LAW § 193.

116. Gunsauley, *supra* note 1.

117. *Id.*

118. *Id.*; *see* SHARE-BASED PAYMENT, Statement of Fin. Accounting Standards No. 123, at ii (Fin. Accounting Standards Bd. 2004) (requiring the cost of equity compensation to be reflected in the financial statements of public entities by measuring "the cost of employee services received in exchange for an award of equity instruments based on the grant-date fair value of the award . . . .").

119. *See* Lydell C. Bridgeford, *2007 Salary Forecast Reveals Modest Pay Raises for Average Workers*, EMPLOYEE BENEFIT NEWS, Oct. 1, 2006, *available at* 2006 WLNR 17037717.

120. *See* Leah Carlson Shepherd, *Exercising stock options: When is the right time?*, EMPLOYEE BENEFIT NEWS, Sept. 1, 2006, *available at* 2006 WLNR 15164419.

121. Gunsauley, *supra* note 1.

122. *See* Greg Ip, *How Stock Options Muddle the Relationship Among Wages, Corporate Profits, and Inflation*, WALL ST. J., Sept. 18, 2006, at A2 ("The answer seems to be stock options, a growing part of compensation for top-end workers."). A majority of the stock option compensation plans affect those in the financial services industry. New York City is considered the financial capital of the country, if not the world; thus, it would seem implicit that stock option issues would have a significant impact on New York State. *See* Shepherd, *supra* note 120 ("The benefit has a higher penetration in the service and finance industries . . . .").

pensate an employee for his or her valuable services with a small cash commission and tie a higher percentage of that employee's compensation to deferred equity-based compensation with a distant future vesting date.[123] Then, after the valuable services are rendered, the employer could terminate the employee before the vesting date of the equity-based compensation, pay the employee the small cash commission for the valuable services rendered, and then deny the employee any right to the whole of the unvested stock option compensation because it is not protected by Labor Law Article 6, Section 193.[124] Thus, the ruling in *Guiry* effectively allows employers to take advantage of employees by denying unvested equity-based compensation that has already been rightfully earned by the employee, the same protections as those which apply to statutorily defined "wages."

123. Compensation in the form of deferred equity-based compensation with a future vesting date is the equivalent of unvested deferred equity-based compensation, such as that at issue in *Guiry*.

124. N.Y. LAB. LAW §§ 190(1), 193 (Consol. 2006).