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ATTORNEYS AT LAW

Commission Agreements

What You Need to Know

When a business decides to bring on new employees, it may decide to compensate them "on commission". If a business chooses to do so, it is important to be aware that the New York State Labor Law contains certain requirements relating to payment of wages to individuals that work on a commission basis.

Several years ago, in an effort to cut down on "he-said-she-said" disputes between employers and employees, the Department of Labor (DOL) worked with the Legislature to pass legislation that required employers to prepare and execute written commission agreements with commissioned sales staff. If the employer is unable to present a written agreement to the DOL upon request, then the law presumes that any terms of the commission arrangement as described by the employee are, in fact, accurate.

The Labor Law requires that a written commission agreement must be signed by both the employer and the salesperson. Generally, it must also contain the following information:

- A description of how wages, salary, drawing accounts, commissions, and all other monies earned and payable will be calculated;
- How often the employee will be paid;
- The frequency of reconciliation (if the agreement provides for a recoverable draw); and
- Any other details pertinent to the payment of wages, salary, draws, commissions, and all other monies earned and payable when the employment relationship ends.

One of the main items that should be addressed in the commission agreement is the circumstances under which a commission will be considered “earned”. If the agreement is silent on this topic, a commission is considered to be due “for merchandise which has actually been delivered to, accepted by, and paid for by the customer.” Once a commission is “earned,” it is legally considered “wages” under the Labor Law and subject to all other provisions of the Labor Law regarding the payment of wages. All earned commissions must be paid to the salesperson even if the employment relationship with the employer has ended. If the commissions have not yet been earned, the terms of the written agreement – which must include language addressing this situation – will control.

Once a commission agreement is entered into, the employer should establish internal controls that will ensure that the terms of the commission agreement are followed by both parties. This will help resolve disputes before they progress too far. A quick resolution is important because the Labor Law states that failure to pay a sales representative his/her earned commissions in a timely manner can result in civil liability for double damages. A clearly worded commission agreement also provides employers with the protection of knowing that employees will not attempt to advance mistakenly false or intentionally fraudulent wage claims. Employers should also consider including language further supporting the position that the employee is an "at-will" employee and that the commission agreement is simply a description of the compensation arrangement between the parties, not a promise of continued employment. The agreement should specify that it can be terminated by the employer at any time, with or without cause.

As with any legal document, consult legal counsel about developing and implementing a commission agreement that fits the needs of your business and complies with the law.