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**Re: New Legal Requirements for Companies with Commission Sales People**

Several months have passed since the effective date of a new law<sup>1</sup> that requires companies to take action to document the employment terms of their “commission salespersons.”

***The New Requirements.***

This law establishes the following requirements for companies that employ commission salespersons in New York<sup>2</sup>:

1. the employment terms must be stated in writing,
2. the writing must be signed by both the employer and the commission salesperson,
3. the employer must keep the writing on file for a period not less than three years and
4. the writing must be made available to the Commissioner of Labor upon request.

Moreover, the writing must include at least the following terms of the arrangement between the parties:

- a description of how wages, salary, drawing account, commissions and all other monies earned and payable, are to be calculated,
- where the arrangement includes a recoverable draw, it must also set forth the frequency of reconciliation, and

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<sup>1</sup> The new law, which is an amendment to §191 of the New York State Labor Law, took effect on October 16, 2007.

<sup>2</sup> Although the law is not 100% clear, one can presume that it may be applied whenever the company or the salesperson has any meaningful connection with New York State.

- details of how the payment of wages, salary, drawing account, commissions and all other monies earned and payable, will be affected if the employment terminates.

### ***What Disputes with Commission Salespeople are Most Likely to Arise?***

Disputes with commission salespeople will often arise after the relationship terminates. Such disputes are likely to center on: (a) the company's right to recover draw that has been paid, but not earned; (b) the salesperson's right to commissions on orders that have been placed, but not shipped or paid for. In many cases, these disputes might involve significant amounts of money.

### ***What is the Salesperson's New Right?***

The new law establishes a very specific and severe remedy that can only benefit the salesperson:

“The failure of an employer to produce such written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms of employment.”

### ***Where will this Law be Applied?***

The law seems to be intended for application in wage claim proceedings before the New York State Department of Labor. Any person that is owed wages or commissions<sup>3</sup> by an employer, may file a complaint with the Labor Department. If the complaining employee is a commission salesperson; and the economic terms of the agreement are in dispute; and the company does not produce the writing required by the new law; then the Labor Department must “presume” that the version of the economic terms presented by the employee is accurate. While the company may try to rebut that presumption with contrary evidence, that may be a very difficult task in the absence of a writing.

We believe that the presumption in favor of the employee may also be applied by tribunals other than the Labor Department. For example, one can readily envision a New York judge applying this statutory presumption, if the employee asserts the wage claim in a New York State Court. A wage claim is more likely to be asserted in Court where a significant amount of money is involved. When this occurs, it can present substantial economic risk for the employer, since the Labor Law<sup>4</sup> authorizes awards of attorneys fees and, in some cases, liquidated damages, in addition to an award of the unpaid wages!

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<sup>3</sup> Labor Law Section 190 (1.) provides: "'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." [emphasis added]

<sup>4</sup> Labor Law Section 198 (1.a.) provides: "In any action instituted upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was

### ***Does this Law apply to Independent Sales Reps?***

The new law seems to only apply to “employees” and not to representatives that are truly independent contractors. However, other parts of the Labor Law do cover the relationship between company and independent representative, and those sections<sup>5</sup>: (1) require a written agreement between the company and any independent rep that solicit orders in New York State; (2) require that commission payments be made within five business days of the date they come due; and (3) authorize awards of attorneys fees and **double damages**, on top of the unpaid commissions, when the company fails to comply.

### ***What should a Company Do?***

Any company that employs commission salespeople, or contracts with independent sales representatives, should protect itself from future expensive litigation by adopting agreements to use for all cases where these laws may apply.

Richard H. Waxman, P.C. will answer your questions about this and other employment laws, and how they might apply to your business; and we will help you prepare the required documents, all for a reasonable fee.

Please call or e-mail if you have any questions.

Very truly yours,  
*Richard H. Waxman*

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willful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due.”

<sup>5</sup> Labor Law Sections 191-a through 191-c .