

One Minute Memo®



New York State Legislature Imposes New Standards For Written Employment Agreements With Commissioned Salespersons

Recently, the New York State Legislature mandated written employment agreements for commissioned salespersons. Moreover, the New York Court of Appeals will consider what type of employee and what type of compensation is covered under the wage deduction provisions of the New York Labor Law. Employers should be aware of the compliance issues raised by these events.

New York State Legislature Amends Labor Law to Require Written Employment Agreements for Commissioned Salespersons

Effective October 16, 2007, Section 191(1) of the New York Labor Law will require that employers of commissioned salespersons reduce the terms of employment to a writing signed by both the employer and the employee.¹ The amendment represents a significant change in the nature of employment agreements between commissioned salespersons and employers, and in employers' duties in relation to those agreements.

The amendment imposes specific recordkeeping and content requirements. Employers must keep the written

¹ The text of the legislation is available at <http://assembly.state.ny.us/leg/?bn=S03674&sh=t>

agreement on file for at least three years and make the agreement available to the New York State Department of Labor upon request. The content of the writing must include a description of how wages, salary, drawing accounts, commissions and all other monies earned and payable shall be calculated. Additionally, the writing must describe what monies are earned and payable if the employee is terminated or resigns. Where the writing provides for a recoverable draw, the frequency of reconciliation must be included.

Importantly, employers face adverse consequences if the terms of the agreement are not reduced to writing. If the commissioned salesperson files a wage claim with the Department of Labor, the employer must provide the written agreement upon request. *Failure to do so will subject employers to a presumption that the terms of employment represented to the Department of Labor by the employee are the agreed-upon terms of employment.*

Overall, the new amendment raises the stakes for employers to provide specific information and convert commission plans into written agreements. A commission plan standing alone will not satisfy this statute unless it meets the new requirements of Section 191.

New York Court of Appeals to Decide Whether Executives are “Employees” and When Commissions are “Earned” for Purposes of Wage Deductions

While the New York State Legislature has attempted to resolve one element of commissioned salespersons' compensation, on October 12, 2007, the Southern District of New York certified two related questions for decision by the state's highest court. The New York Court of Appeals will consider the following questions under Section 193 of the New York Labor Law: (1) whether an executive is an “employee” and consequently covered by the statute's provisions limiting deductions from wages; and (2) when commissions are “earned” and consequently deemed to be “wages” which are subject only to limited deductions outlined in the statute. The Court of Appeals decision will reconcile conflicting interpretations of the statutory definitions and give employers of exempt and commissioned employees clearer guidance for compliance with Section 193.

We will continue to monitor these and other developments in the State Legislature and courts. Should you require any assistance in this area, or have questions regarding any other workplace issue, please contact your Seyfarth Shaw attorney or any Labor & Employment attorney on our website, www.seyfarth.com.

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