

## Smart Steps Toward Compliance with New Commission Salesperson Law in New York: New York Labor Law § 191(1)(c)

What was formerly a matter of good business practice is now the law. As of October 16, 2007, Section 191(1)(c) of the New York Labor Law requires employers to put pen to paper and document the compensation arrangements they have with their commission salespersons. Employers who already have written commission plans should take heed: the new law also requires that the written agreement be signed by both parties and kept on file for a minimum period of three years.

To be compliant, the commission agreement must set forth all material terms and details of a salesperson's compensation package, such as the amount and payment of any wages or draws against commissions, as well as the calculation, amount and payment of commissions, incentive payments, bonuses, and any other earned and payable compensation. In the case of recoverable draws, employers must also set forth the frequency of reconciliation. In addition, the agreement must provide details pertinent to the payment of commissions upon termination of employment.

The new law compels employers to action by creating a presumption that strongly favors salespeople over employers if no written agreement is in place. Under amended Section 191(1)(c), if a dispute arises over payment and the employer cannot present a written agreement to the Labor Commissioner, whatever terms are presented by the salesperson will be presumed accurate. This presumption renders non-compliant

employers vulnerable to uncertain, potentially costly payouts.

Accordingly, it is crucial for employers to take swift but calculated action to bring their commission agreements into compliance. The first step toward compliance is to identify all covered employees. The term "commission salesperson" is defined broadly under the Labor Law to include almost any salesperson who is paid in whole or in part on commission, regardless of whether the commission is dubbed an "incentive payment," a "bonus," or the like. However, Section 191(1)(c) does not apply to a commission salesperson whose principal activity is of a supervisory, managerial, executive or administrative nature.

Employers reviewing or drafting their Section 191(1)(c) agreements should take the following steps:

- (1) Determine who is covered.
- (2) Review the terms of existing oral and/or written commission arrangements to be certain that they are legal and enforceable.
- (3) Preserve the at-will employment relationship: be sure to incorporate a disclaimer in your agreements and avoid any language that creates contractual obligations.
- (4) Consider incorporating confidentiality, non-solicitation, or non-compete provisions into your Section 191(1)(c) agreements.

**For more information and advice on compliance with the new commission salesperson law, or any other labor and employment matter, please contact:**

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