



## New York's Mandatory Commission Sales Employment Agreement Compliance Guide

This Guide has been developed by the Printing Industries Alliance in conjunction with its General Counsel, Nicholas J. Fiorenza, Esq., exclusively for the benefit of its membership. The information contained in this Guide is intended for information purposes only and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. Readers should not act upon any information contained herein without seeking professional counsel.

### New Law

Beginning on October 16, 2007, a new New York State law will require all employers to have written employment contracts with their commissioned salespeople. The new law requires that the contract must include the following:

- A description of how wages, salary drawing accounts, commissions and all other monies earned and payable are calculated on a regular basis;
- A description of how wages, salary drawing accounts, commissions and all other monies earned and payable are calculated in the case of termination of employment by either party; and
- Where the contract provides for a recoverable draw, the frequency of reconciliation payments.

The new law also creates a "presumption" in favor of the employee when no agreement is present. In other words, the Department of Labor will presume that the terms of employment set forth by the salesperson are accurate, if the salesperson's employer does not have a written agreement to the contrary.

There are a number of options as to how to structure sales policies and procedures, but whatever option is selected, these basic points must now be committed to a written contract.

### Sample Agreement/Checklist

The enclosed Sample Agreement between Printing/Graphic Arts Companies and their Salespeople does not cover all possible situations, but is intended only as a checklist of the matters that **must** be covered by the new New York State Law and other matters that a company **may** wish to cover. **PLEASE NOTE THAT THIS NEW LAW ONLY REQUIRES THAT YOUR SALES EMPLOYEE CONTRACT CONTAIN THE THREE BULLETED ITEMS LISTED ABOVE. ALL OF THE REMAINING PROVISIONS OF THE SAMPLE AGREEMENT ARE TYPICAL PROVISIONS CONTAINED IN PRINTING SALES AGREEMENTS.**

**THIS SAMPLE SHOULD NOT BE CONSTRUED AS A RECOMMENDATION, BUT AS A REVIEW OF POSSIBILITIES. EVERY RELATIONSHIP BETWEEN A COMPANY AND ITS SALESPEOPLE IS DIFFERENT AND CANNOT BE COVERED BY ONE STANDARD AGREEMENT. EACH AGREEMENT SHOULD BE INDIVIDUALLY PREPARED AND NEGOTIATED, AND YOUR ATTORNEY SHOULD BE CONSULTED THROUGHOUT THE PROCESS.**

### Questions You Should Consider When Entering into an Employment Agreement with Your Sales Employee

- Will the individual worker be a sales broker or employee?

Not every individual who sells or promotes your company's products/services has to be an employee. Many printing/graphic arts companies utilize the services of sales brokers to accomplish the same basic tasks of sales employees.

Sales brokers are independent contractors. They, in essence, have their own business selling jobs for different companies and sometimes different industries. Accordingly, if you enter into a contract for their services, your company would not be responsible for the typical employee expenses, e.g., salary, benefits, workers' compensation premiums, unemployment insurance, etc. Instead, you would be paying the broker a set fee for each sales made on your company's behalf.

On the downside, you would also not be able to exert much control over when and how the broker does his/her job. In fact, companies which attempt to do so can create for themselves a host of legal problems. In fact, unless the brokerage relationship is arranged carefully, the broker may be determined to be an employee rather than an independent contractor. Under those circumstances, the company would be held liable for all of the typical employee expenses, as well as fines and other charges resulting from misclassifying the individual as an independent contractor.

**Should you decide to contract with a sales broker, you will need to use a different agreement from the Sample provided herein. The Sample should only be used when structuring a commission sales employee agreement.** Help is available through our member Employment and Human Resource Services Program. For more information, contact the Association office or PIA's General Counsel Nicholas J. Fiorenza, Esq. at 315-437-7600 (or [njfiorenza@ferrarafirm.com](mailto:njfiorenza@ferrarafirm.com)) today.

- **Will our commission sales employees still be considered "at-will" employees?**

While the answer to this question is still unclear, employers subject to the new law must be prepared for the probability that these employees are no longer "at-will" employees. As you probably know, New York has long been an "at will" employment state. This is a legal principle that was set down in the early 1900's which holds that in the absence of a written contract of employment, the employment relationship can be terminated by either the employer or employee on an "at will" basis (i.e., for any reason, good or bad, or for no reason at all). However, when a written contract of employment exists, the employment relationship can **only** be terminated as provided in that contract. Since New York employers are now required to have written contracts with their commission sales staff, those employees will only be able to be terminated as provided in that contract.

The Sample Agreement (**in Article 2**) provides that the employment relationship can be terminated by either party for any reason upon seven days written notice. We chose this arrangement rather than providing that it could be terminated immediately by either party, because one of the elements necessary for creating an enforceable contract (i.e., consideration) would be missing. We also chose seven days rather than a longer period to give employers as much flexibility in this regard as possible.

- **How are commissions and draws to be calculated? Can unmet draws be recovered?**

If we surveyed 50 companies with respect to how they calculate commissions and draws, we would likely get 50 different answers. In fact, many companies do not pay the same commissions to the individual salespeople on their staffs. Employers have a great deal of discretion with respect to how they wish to compensate their sales staffs. The Sample Agreement provided herein gives you but one example of how it may be structured.

However you decide to structure it, there are a few things you need to consider. You are not required to pay a draw. If you choose to, you will need to consider what to do in the event that a salesperson fails to earn commissions sufficient to cover that draw. Unless you have a clear agreement with the sales employee to repay the shortfall and the terms are set prior to a problem arising, you will not be able to recover that excess draw. You may adjust a salesperson's draw if, for example, their draws are consistently lower than their actual commissions. However, those adjustments are **only** prospective. In other words, you cannot adjust a salesperson's draw retroactively after you discover there is a problem.

Assuming you have a clear understanding with your sales employee as to how he/she will repay excess draws, it is important to remember that New York State law does not permit an employer to deduct such overpayments from the employee's compensation. The employer would be required to demand the excess and, if need be, take the employee to court to recover it.

The new law requires that if you can recover an excess draw, the agreement must state the frequency with which it can be recovered. **The Sample Agreement covers this in Article 1(c) of Appendix A.**

- **When are commissions earned and payable? Does this occur when the job is sold, booked, billed or paid?**

With respect to commissions, you need to carefully consider — and clearly state in the Commission Sales Employee Agreement — when they are earned. **This is covered in Article 1 of Appendix A.** Assuming that you will want to modify the Sample Agreement to cover your specific preferences, you will need to answer the following questions:

- Are they earned at the time of sale?
- Are they earned at the time of payment or collection?
- Are they earned **only** by active employees?

It is important to remember that while you have the discretion to determine when and how commissions are paid, once you have put it in writing, it becomes enforceable by the New York State Department of Labor. One of the reasons that the new law was enacted was to facilitate the Department of Labor's role in recovering monies owed to commission sales employees following a termination of the employment relationship. As the sponsors of the legislation noted:

Wage payment claims for commission salespersons are very difficult to investigate when there is no written agreement detailing the terms of employment, when and how commissions are earned, what offsets against wages are to be computed, and when commission payments cease after termination of employment. By requiring written agreements, and by creating a presumption in the employee's favor in the absence of such an agreement, the Department of Labor will be able to more effectively and efficiently investigate commission salespersons' wage complaints.

- **What happens upon separation of employment? Do rights to commissions stop?**

As noted above, while you have the discretion to determine when and how commissions, draws, and incentives are paid, once you have put it in writing, it becomes enforceable by the New York State Department of Labor. Accordingly, whatever you decide must be clearly stated in the Commission Sales Employee's Agreement. **This is covered in Article 1 d) and e) of Appendix A.**

- **What about non-competition, non-solicitation and confidentiality agreements?**

Generally speaking, these sorts of provisions are difficult to enforce. Courts are hesitant to enforce them, wanting instead to promote competition within the marketplace rather than restrict it. However, given that employers are now required by law to have written agreements with their sales employees, employers should take advantage of the opportunity to at least attempt to protect themselves against unfair competition. **The Sample Agreement includes all three types of restrictive covenants in Article 10.**



- **What about territories and expenses?**

To avoid disputes that can often lead to lawsuits, you should consider including clear statements in the Commission Sales Employee Agreement as to what territories and/or customers the employee is to cover and for what expenses he/she can expect to be reimbursed. **This is covered in Article 1 of the Sample Agreement.**

- **Should you include a customer "entertainment" (i.e., drinking) policy?**

Your sales staff are ambassadors of your company. If a sales employee becomes drunk while entertaining a customer or potential customer, it may reflect poorly on your company's image. It also may create serious and expensive legal problems for your company. If an employee gets drunk and then commits some bad act (e.g., causes an accident while driving drunk), the employer may be held liable for the damages caused by the salesperson. This is based on the legal principle of "*respondeat superior*" which holds an employer liable for the acts of the employee, when those acts are within the scope of his/her duties. In other words, if the employer expects — or even permits — the employee to drink as a part of his/her job, it can be held responsible for the effects caused by that action.

By including a provision prohibiting or limiting drinking in the Commission Sales Employee Agreement (and strictly enforcing it), an employer can not only protect its image, it can insulate itself somewhat from the potential lawsuits. **The Sample Agreement addresses this issue in Article 2 of Appendix A.**

For more information, contact the Association office or PIA's General Counsel Nicholas J. Fiorenza, Esq. at 315-437-7600 (or [njfiorenza@ferrarafirm.com](mailto:njfiorenza@ferrarafirm.com)) today.