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## ***Commissioned Salesperson Agreements Must Be In Writing***

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*January 27, 2010* — Effective as of October 2007, New York State Labor Law requires that commissioned salesperson employment agreements be written and signed by the salesperson and the employer. The written agreement must satisfy statutory requirements. Agreements that are outdated, insufficient, or merely verbal can result in serious consequences for employers.

### Required Terms and Best Practices

A commissioned salesperson is an employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance, or any article or thing and whose earnings are based in whole or in part on commissions.

New York State Labor Law requires that the terms of employment of a commissioned salesperson be written, signed, and kept on file by the employer for three years. Best practice, however, would be to retain the written document for six years after termination of employment in case of claims for commissions during that time.

The written agreement must address the following issues:

1. Method of calculation of wages, salary, drawing account, commissions, and other earned and payable money.
2. If there is to be a recoverable draw (an advance on future commissions), the agreement must specify the frequency of draw reconciliations.
3. Whether or not wages and other compensation will be considered earned and payable after termination of employment, and if so, how those monies will be calculated.

The signed written agreement and statements of earnings paid or due and unpaid must be available for review upon request of the employee or the State Commissioner of Labor.

### Inadequate Agreements Result in Serious Consequences for Employers

If an employer is unable to produce a signed written agreement and a statement of earnings to the Commissioner of Labor, it will be presumed that the salesperson's understanding of the terms of employment is true and accurate. Without any evidence to the contrary, any terms that are absent or uncertain will be decided by the Department of Labor in favor of the commissioned salesperson and the employer will be forced to pay all wages, commissions, and other earnings claimed by the salesperson.

In addition, a prevailing employee in a wage claim may recover from the employer reasonable costs and attorney's fees. Furthermore, willful nonpayment of wages or previous violations may result in liquidated damages equal to twenty five percent of the total amount of wages found to be due, plus a civil penalty equal to double the amount due.



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**Employer Protection: Write it Down!**

A written employment agreement signed by both the employer and the employee must be established for each commissioned salesperson before beginning employment. For salespersons currently employed without a signed written agreement, the terms of employment must be put into writing and signed by both parties. Pre-existing employment agreements should be reviewed for compliance with the current law and revised as needed. Statements of earnings for each commissioned salesperson must be generated, retained, and available for review upon request.

Employers should also re-evaluate the duties of their workforce to determine who is an employee (versus an independent contractor), who is engaged in sales, and who earns any commissions. Job duties may have evolved over time and certain employees may now be considered commissioned salespersons.

In addition to these protections, the written agreement provides the employer the opportunity to specify certain other conditions of employment including at-will employment, termination with or without cause, confidentiality provisions and non compete provisions.

For questions regarding employment agreements, commissioned salespersons, and compliance with the New York State Labor Law, please contact Raquel Laude at (585) 512-3514 or [rlaude@mccmlaw.com](mailto:rlaude@mccmlaw.com).

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