



New York State Department of Labor  
Elliot Spitzer, Governor  
M. Patricia Smith, Commissioner

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February 6, 2008

[REDACTED]

Re: Request for Opinion  
Commissioned employee  
File No. RO-07-0134

Dear [REDACTED]

I have been asked to respond to your correspondence of December 12, 2007, in which you request a written opinion on a number of issues concerning a commissioned employee. You state that your company is a national recruitment and placement firm, and that the employee in question is on full commission and therefore receives no salary. You further state that said employee placed an applicant with a law firm in May 2007; the law firm paid a fee for the placement per an agreement. That agreement, between your company and the law firm, stated that if the applicant leaves at any time within twelve (12) months, your company refunds a pro rata share of the placement fee to the law firm. As a result of that placement your company paid the employee the commission due her. The applicant's employment with the law firm was later terminated within twelve (12) months, and your company had to return a pro rata portion of the fee paid back to the law firm. At this time your company seeks to recover a pro rata share of the commission paid to the employee. In that regard, your letter asks four (4) questions as follows:

1. Do [you] have the right to ask for the money back from your employee?
2. Is there any section of New York State Department of Wage and Labor that we can refer to?
3. Is there statute of limitations regarding when we can ask for the money back from our employee?
4. If [you] can recover said funds from our employee, can [you] withhold the funds from future commission payment?

Section 193 of Article 6 of the New York State Labor Law provides in relevant part:

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1. No employer shall make any deduction from the wages of an employee, except deductions which:

- a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
- b. are expressly authorized by the employee and are for the benefit of the employee.

Section 190 (1) of the New York State Labor Law defines wages as “earnings of an employee for labor services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis.” Therefore, it would be unlawful to withhold the funds from future payments of earned commissions to the employee. Such a recoupment would constitute a deduction from wages within the meaning of Section 193 of the Labor Law.

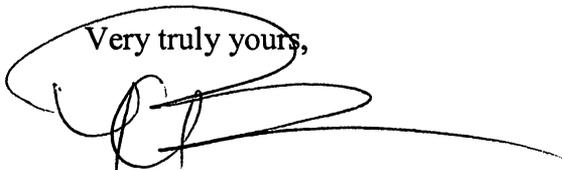
Regarding your inquiry as to whether there is a section of Labor Law you can refer to, Labor Law Section 191 (1)(c) as amended provides that the terms of an employment agreement between an employer and a commission salesperson shall be in writing, and shall describe how and when a commission is earned. Therefore, your employment agreement, which as you state is subject to change without notice, would not be in compliance with New York State Labor Law.

Your remaining questions, regarding whether you can request the commissions back from your employee, and if there is a statute of limitations to recover the same, cannot be addressed as New York State Labor Law is not applicable to those queries. I would suggest you consult a private attorney of your choosing regarding these breach of contract issues.

Please note that this opinion is based solely upon the information you provided in your correspondence of December 12, 2007. A different opinion could result if the information you provided was inaccurate, or if relevant facts were not disclosed.

Should you have any further questions please do not hesitate to contact me.

Very truly yours,



Kristen L. Broden, Esq.  
Senior Attorney

KLB

cc: Carmine Ruberto  
Opinion File