



New York State Department of Labor

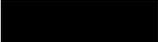
David A. Paterson, *Governor*

M. Patricia Smith, *Commissioner*

August 25, 2008



Re: Request for Opinion
Commission Salesperson
RO-08-0064

Dear 

I have been asked to respond to your letter of May 27, 2008. Please accept my apology for the late response to your request. Your letter states that you were formerly employed as a sales representative for a company selling new and used mobile homes for which you were paid both a salary and a commission. Your letter states that your employer has written you letters demanding that you repay salary and commissions earned and threatening to commence legal action if you do not. Please accept the following in response to both your letter and to the series of questions contained therein.

Initially, please note that the New York State Department of Labor does not pursue issues regarding the terms and conditions of an employment contract unless such terms violate the New York State Labor Law. As such, you should consult a private attorney should the employer follow through on the threat to take legal action against you. The New York State Bar Association may provide you assistance in finding a lawyer in your area. (NYSBA Lawyer Referral and Information Service Tel: 1 (800) 342-3661).

Unfortunately, no definitive answers may be provided to your questions since they do not provide enough information upon which an opinion may be rendered. The questions you ask depend on the facts of the particular case. Although you do not provide enough information for definitive answers to your questions, please accept the following general synopses of law as answers to your questions.

1. *Under the New York State Labor Law, what is the distinction between independent contractor and employee status?*

The New York State Labor Law does not define the term “independent contractor.” Therefore, there are no statutory means by which one may differentiate independent contractors from employees. However, the courts have well established that in New York State Law the “determination of whether an employer/employee relationship exists rests upon evidence that the

employer exercises either control over the results produces or over the means used to achieve these results. (Bhanti v. Brookhaven Memorial Hospital Medical Center, Inc., 260 A.D.2d 334, 335 (2nd Dept. 1999).) The Supreme Court of the United States has phrased the “central inquiry” in applying the Fair Labor Standards Act, a Federal labor law, to this question, as “whether the alleged employer possessed the power to control the workers in question...with an eye to the ‘economic reality’ presented by the facts in each case.” (Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961).) The ‘economic reality’ test is meant to determine whether the worker depends upon someone else’s business for the opportunity to render service, or is in business for their own self. (Brock v. Superior Care, Inc., 840 F.2d 1054 (2nd Cir. 1988).) A contract that provides that the alleged employee is an independent contractor is not determinative in establishing that the employee is an independent contractor since such a determination requires an examination of the actual course of conduct between the two parties. (See, Matter of Webley, 133 A.D.2d 827 (3rd Dept. 1987); Matter of Mauro, 79 A.D.2d 1049 (3rd Dept. 1981); In re Morton, 284 N.Y. 167 (1940).)

2. *Is there a difference in pay entitlements, laws and protections for workers in either status as contractor or as an employee, paid salary or paid commissions?*

Generally, employees are entitled to the protections contained in the Labor Law, while independent contractors are not.

Please take note that Labor Law §190(6) provides the following definition:

“Commission salesman” means any 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. The term "commission salesman" does not include an employee whose principal activity is of a supervisory, managerial, executive or administrative nature.

Employees within this definition are subject to specific requirements for the payment of wages under the Labor Law. (See e.g., Labor Law §191(1)(c).)

3. *If the employer pays a draw on commissions, is there an obligation to pay minimum wage or overtime pay to contractors or employees, even if the contractor or employee makes more than the minimum wage.*

All “employees” are entitled to be paid at a rate no less than the minimum wage for the first forty hours worked in a workweek. (See generally, Labor Law Article 19.) All non FLSA-exempt “employees” are entitled to overtime pay for all hours in excess of forty at a rate no less than one and one half times their regular rate of pay. (See generally, Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR §142-2.) However, the factors used in determining whether a worker is considered to be a non-exempt “employee” depend on the specific circumstances surrounding the employee’s duties, and his/her relationship with the

employer. It is worth pointing out that the Fair Labor Standards Act exempts persons working at retail or service establishments whose regular rate is at least one and one half times the minimum wage and more than half of his/her compensation is based on commissions, from Federal overtime provisions. (See, 29 CFR §779.412.) Workers who are FLSA-exempt, but still “employees” under the New York State Labor Law, must be paid overtime at a rate not less than one and one half times the minimum wage rate.

4. *What is the Labor Law and requirements that must be met that obligate an employee to repay wages or commissions or re-pay a draw against commission.*

No such obligation exists in the New York State Labor Law. However, there may be contract provisions that may obligate an employee to repay wages, commissions, or a draw against commission. Without reading the contract, there is no way to tell if such a provision is present. Again, you should consult a private attorney to discuss such matters.

5. *Is my previous employer’s request for repayment legally sufficient?*

The documents received by this Department did not include your employer’s request for repayment, but, nevertheless, the Department does not have jurisdiction to determine or opine on the sufficiency of such a request or filing. (See answer “4” provided above.)

This opinion is based on the information provided in your letter of May 27, 2008. A different opinion might result if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel

By: Jeffrey G. Shapiro
Associate Attorney

JGS:jc
cc: Carmine Ruberto