

Payment of Commissions Frequently Asked Questions (FAQ)

Article 6 of the New York State Labor Law sets forth various requirements relating to the payment of wages to individuals who work on a commission basis.

Commissions: A commission is compensation based on a percentage of or some other amount based upon a salesperson's orders or sales.

Commission Salespersons: Under the Labor Law, a commissioned salesperson is an employee whose principal activity includes sales and who is paid, in whole or part, on a commission basis. The Labor Law excludes employees whose principal activity is of a supervisory, managerial, executive, or administrative nature.

Written Agreement: The Labor Law requires that a commission salesperson's pay/employment agreement must be in writing and signed by both the employer and the salesperson. It must contain:

- A description of how wages, salary, drawing accounts, commissions, and all other monies earned and payable will be calculated
- How often the employee will be paid (See [Frequency of Pay FAQs](#))
- The frequency of reconciliation (if the agreement provides for a revocable draw)
- Any other details pertinent to the payment of wages, salary, drawing accounts, commissions, and all other monies earned and payable when the employment relationship ends

Statement of Earnings: The employer must provide the commission salesperson, upon written request, with a statement of earnings paid or due and unpaid.

When is a commission considered to be "earned?"

The commission will be considered "earned" at the time specified in the written employment agreement. If the agreement is silent on this topic, a commission is considered to be earned in accordance with the past dealings between the employer and commission salesperson. If there are no such past dealings, then a commission is considered earned when the commission salesperson produces a person ready, willing, and able to enter into a contract upon the employer's terms. Once a commission is "earned," it is legally considered "wages" under the Labor Law and subject to all other provisions of the Labor Law regarding the payment of wages.

What, if any, deductions may an employer take from a commission salesperson's commission?

Unearned Commissions (non-wages): Employers may make adjustments and/or apply charges in accordance with the applicable terms of the written employment agreement. *For example,*

an employer may reduce an employee's unearned commissions by any expenses incurred by the employee.

Earned Commissions (wages): Once earned, commissions are considered wages and deductions are limited to those permitted by Section 193 of the Labor Law. (See [Wage Deductions FAQs](#))

Do any commissions have to be paid to a commission salesperson who has been terminated or left employment?

All commissions *earned* by a commission salesperson are legally considered wages and must be paid to the salesperson even if the employment relationship with the employer has ended. If the commissions have not yet been earned, the terms of the written employment agreement – which must include language addressing this situation – will control.

What is a draw against commissions?

A draw is a payment to a commissioned employee that is credited, in whole or in part, against future commissions. Draws typically function like an advance or guaranteed minimum payment of commissions subject to settlement at set intervals. At the settlement, draws made are supplemented by any additional commission earnings that exceed the amounts previously paid. The frequency and terms of the settlement must be included in the commission agreement for such settlement/recovery to be permissible. Draws are typically paid to employees like a salary, and are deemed to be earned in the same fashion.

A draw can only be reconciled against *future* commissions. Employees who leave the employer's employment cannot be required to repay this type of draw. Draws cannot be recouped from earnings other than commissions; as such recoupment is an illegal [deduction from wages](#).

May a commission salesperson be required to repay an employer for draws against commission?

The New York courts have repeatedly held that unless there is a specific agreement saying otherwise, a commission salesperson who receives draws against anticipated commissions is not required to repay those draws if the commission does not become finally due and payable to the salesperson. If there is a specific agreement providing otherwise, the Labor Law requires that such an agreement must be in writing and, if the draw is recoverable by the employer, the frequency of reconciliation must be included.

In other words, the employment agreement must specifically say that draws must be paid back, and must specifically describe the time periods of payback. (For example, there will be a calculation every 90 days to determine if the commission salesperson has earned commission of less than the draw paid during that time and that if the draw paid is greater than the earned commission, the salesperson must pay the difference to the employer.)

Without such a specific statement in the employment agreement, the commission salesperson may not be required to repay any draw against commission.

Are commission salespersons subject to the State Minimum Wage and Overtime requirements?

While no State minimum wage and [overtime](#) exception exists for commission salespersons, outside salespersons are exempted from such requirements. Commission salespersons who meet requirements for outside salespersons are exempt from the State minimum wage and overtime requirements.

If a non-exempt commission salesperson's draw and commissions do not equal or exceed the amount computed as the minimum wage for the agreed pay period, the employer must make up the difference on the same payday.

What is the difference between an "outside salesperson" and a "commission salesperson"?

As stated above, a commission salesperson is an employee whose principal activity includes sales and who is paid, in whole or part, on a commission basis. An *outside salesperson* is an employee:

- Whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer
- Who is customarily and regularly engaged away from the employer's place or places of business

An employee may be both a commission salesperson and an outside salesperson if he or she fits the definitions for both of those terms.

Do commission salespersons have to be paid overtime?

Commission salespersons are entitled to overtime pay, unless they are outside salespersons. (See, [Overtime Frequently Asked Questions](#).) Outside salespersons are exempt from overtime requirements.

What is the difference between a commission and a bonus?

A "bonus" is money paid by an employer to an employee when both the fact and amount of payment are wholly at the discretion at the employer. True bonuses are not considered wages under the Labor Law. If, however, the employee is given reason to believe that if he/she performs a certain amount of orders or sales then he/she will be paid a certain amount of compensation, then the money to be paid is a commission.

How long must employers keep a commission salesperson's employment agreement?

The employment agreement between an employer and a commission salesperson must be kept on file by the employer for the duration of the employment relationship and for at least three years after the employment terminates. The agreement must be made available to Department of Labor investigators at their request. If the employment agreement is not made available, then the Department must presume that the commission salesperson's version of the agreed terms of employment is correct.

For example, if a commission salesperson makes a complaint to the Department of Labor that his employer failed to pay commissions on the agreed terms – 10% of the purchase price of the product/service – and if the employer fails to produce a written, signed, employment agreement that provides for a different commission rate, absent sufficient contrary evidence or circumstances, then the Department of Labor may assume that the commission salesperson has correctly described the agreed commission rate.

Does the Department enforce commission claims from stockbrokers?

In general, wage claims for unpaid commissions from stockbrokers are not taken by the Department due the preemptive effect of an arbitration clause contained in the Uniform Application for Securities Industry Registration. (*See, Perry v. Thomas*, 482 U.S. 483 (1987).)

Stockbrokers should review their employment agreement for the presence of an arbitration clause prior to filing a claim with the Department and pursue such arbitration, should the need arise.

Are sales representatives who are independent contractors protected by the Labor Law?

Yes. Labor Law Section 191-c sets forth requirements for the payment of sales commissions to independent contractors. Section 191-c provides:

- All contracts between independent contractor sales representatives and principals must be in writing
- The written contract must specifically identify the commission payment method
- When the contract is terminated, all commissions earned must be paid within five business days after termination or after they become due (in the case of commissions not yet due when the contract is terminated)

Please note, however, that the status of a sales representative as an independent contractor is a complex matter that depends on a number of factors.