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Overview of Sales Representation Agreements - Florida

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Florida's Regulatory Regime: Under § 686.201 of the Florida Statutes, any person or business that manufactures, produces, imports or distributes a product or service and enters into a commission agreement with a sales representative to pay commissions as a percentage of dollar value of the order must contract by written agreement. Commission agreements with employees are exempt from this statute. The written agreement must describe how the commission will be calculated and paid. And, under the statute the manufacturer is obliged to obtain a written receipt from the sales representative at the time the manufacturer delivers its signed agreement to the sales representative. Under Florida law, a sales representative working under an oral agreement is entitled to full payment of commissions owed within 30 days of the termination date. If a manufacturer fails to pay the commissions owed in that 30-day period, it may be liable for triple the amount of commissions found to be due, and it may be liable for the sales representative's attorneys' fees and costs incurred collecting commissions owed. Manufacturers who operate under written agreements with sales representatives can avoid these penalties.

Considerations at Commencement and During the Term: The agreement between the sales representative and the manufacturer should describe clearly the legal relationship between the parties, specifying whether the sales representative is an independent contractor or an agent or an employee. An independent contractor cannot enter into agreements on behalf of the manufacturer. An agent may be granted authority to act on behalf of the manufacturer, including the authority to enter into binding agreements on behalf of the manufacturer. The sales representative agreement should describe the manufacturer's specific grant of authority and any limitations the manufacturer wishes to place on that authority. In practice, the distinctions between an independent contractor and an agent can become unclear; the parties' business practices may blur the lines. A manufacturer that exercises too much control over the activities of its non-employee sales representative exposes itself to the risk of having the legal relationship challenged as an employee relationship. Disgruntled sales representatives may claim an entitlement to employee benefits. The taxing authorities may claim unpaid payroll taxes. The written agreement will include provisions for some or all of the following: (1) The territory in which the sales representative will be selling and whether its rights are exclusive or non-exclusive; (2) sales quotas and any penalties for failing to meet quotas—whether the manufacturer may terminate the agreement prior to the end of the term or whether the renewal of the agreement is tied to quotas; (3) the sales forecasts that will provide the basis for setting quotas, including which party will provide the forecast and what market data will support it; (4) the term of the agreement (bearing in mind that long-term agreements tend to look more like employment contracts); (5) when commissions accrue and how they are calculated—whether at the time a contract is signed by a customer or when a product is installed or after payment of fees by the customer or upon the occurrence of any other event; (6) when commissions will be paid and whether they will be limited in any way (for example, if the product is sold outside the sales representative's territory), or adjusted at any time (for product returns or order cancellations) or if commissions will be split (with other representatives or with the manufacturer); (7) whether the manufacturer will supply marketing or other promotional materials; (8) a precise description of any intellectual property rights owned by the manufacturer—whether the sales representative is granted the right to use trademarks, service marks or corporate names and logos in its marketing; (9) whether the sales representative is required to possess any specific technical knowledge—whether installation, maintenance or other customer support are required or form any part of the sales representative's entitlement to commissions; (10) a clear description of the sales representative's other obligations under the agreement—whether the sales representative will be required to provide a list of leads to the manufacturer, to complete training, to maintain confidential information; and (11) whether the manufacturer agrees to reimburse the sales representative

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for certain costs incurred by the sales representative in preparing the market for sale of the manufacturer's goods or services. Also, a manufacturer would be wise to preserve the right to approve any change in control of the sales representative's business entity during the term of the sales representative's agreement. The manufacturer may seek in the contract a limit of liability to the sales representative in the event of a dispute, since the State of Florida recognizes a cause of action in tort for a party to recover its "economic loss" as an alternative to suing under a written contract, even if the losses are extrinsic to the contract.

Termination Issues: If manufacturer terminates rather than renews, it should evaluate the sales representative's asserted or unasserted claims for reimbursement of expenses. Florida law recognizes a sales representative's right to recoup its reasonable expenses when the court finds that a principal did not provide its agent with a sufficient opportunity to recoup its costs incurred in good faith in serving the principal. Florida courts have found manufacturers liable under the "recoupment doctrine" when there is no specific agreement between the parties describing how expenses will be reimbursed. Upon termination, any marketing or training materials or confidential information should be returned to the manufacturer; this is especially important if the sales representative has a limited right to use the manufacturer's trade or service marks or other proprietary or intellectual property.

About the Author

Claudia F. Haines is a member of Dean Mead's Corporate Law Team. She represents clients in the area of business/corporate law with an emphasis on business combinations and divestitures, corporate governance, business contracts, the legal and business issues unique to technology start-ups, and business negotiations, including informal dispute resolution.

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