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Commission-Based Compensation Programs: Important Considerations for Employers

To increase productivity and reward effort, many employers use commission programs as part of a compensation package for their sales team. Although common, many such programs do not adequately consider all aspects of how and when commissions will be earned and paid. As a result, employers are often faced with the possibility of expensive litigation when disagreements arise over an employee's entitlement to commissions. But this risk can be mitigated through unambiguous policies or agreements that clearly set out the employee's right to commissions and the limitations on that right. Every employer should, at a minimum, consider these items when establishing a commission-based compensation program:

- **Have a written policy or agreement.** The employer may choose to have a standard policy that applies to multiple employees. But all employees should receive a copy of the policy and sign a form acknowledging that they have received it and are bound by it. Otherwise, employers should set out the terms governing individual employees in an offer letter or some other document, such as a commission agreement, that the employee will sign.

- **Define when a commission is earned.** In preparing a commission program, the employer may determine when a commission is to be earned. If the employer fails to specify this term, however, Wisconsin law provides that an employee is entitled to the commission when he procures an order from a buyer, and the employer receives the order—regardless of whether the employer received payment from the customer. Thus, every agreement should set out the exact conditions that must be fulfilled for the employee to become entitled to the commission. The agreement should also detail whether employees can "earn" commissions following termination of employment.

- **Specify when commissions will be paid.** For current employees, this could mean quarterly or some other set period. Former employees should be paid for all commissions that have been "earned" under the terms of the agreement upon separation of employment, and the agreement should state when this payment will be made.

- **Clearly state how commissions will be calculated.** For example, will commissions be earned on gross sales, net, or on some other basis? Employers

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https://www.reinhartlaw.com/people/robert-driscoll should also address the level of involvement the employee must have in procuring the sale to earn a commission, including how commissions will be calculated if more than one employee had a role in the sale.

- **Address advances on commissions.** If employees are allowed to take an advance on commissions, the agreement should specify how much money will be advanced and how it will be paid back to the employer if the advance exceeds earned commissions. In addition, employers should set a maximum negative balance for employees. Once the negative balance reaches this maximum amount, the employee is no longer allowed to take an advance.
- **Check state law.** Many states have additional requirements that apply to commissioned employees. Some states even require employers to have written agreements for employees who receive commissions.

If you have questions about commission programs for your employees, please contact Katie Triska, Rob Driscoll, or your Reinhart attorney. They will be happy to assist you.