VOL. 50, NO. 4 SPRING 2025

Employee Relations LAW JOURNAL

Legal Tips and Considerations for Hiring Salespeople

By Amy C. Schwind

In this article, the author addresses many significant legal considerations and common pitfalls associated with hiring salespeople.

Typically some of the first roles hired by an employer, particularly in the tech sector or as a company expands in the United States, are salespeople. According to the U.S. Bureau of Labor and Statistics, there are over 13 million people employed in sales and related occupations in the United States. Given the importance and prevalence of these positions, it is important for employers to be aware of specific considerations when it comes to employing salespeople to avoid headaches down the line. While below is not an exhaustive guide on the topic, it addresses many significant legal considerations and common pitfalls associated with hiring salespeople.

CLASSIFICATION ISSUES

As an initial matter, employees must be classified as exempt or non-exempt from the minimum wage and overtime requirements of the federal Fair Labor Standards Act and applicable state law. For salespeople, it does not automatically follow that they are exempt. The most likely overtime exemptions for non-managerial salespeople are the "outside sales" or "inside sales" exemptions. Under federal law, to qualify for the "outside sales" exemption, generally the employee's primary duty must be making sales and the employee must be customarily and regularly engaged away from the employer's place of business. With respect to the latter, any fixed site, whether home or office, used by a salesperson for telephonic sales solicitation is considered one of the employer's places of

The author, counsel in the New York office of Lowenstein Sandler LLP, may be contacted at aschwind@lowenstein.com.

business, meaning if a person is doing the selling remotely from home, this element is not fulfilled.

Under federal law, to qualify for the inside sales exemption:

- The employee must be employed by a "retail or service establishment";
- The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a week in which overtime hours are worked; and
- More than half the employee's total earnings in a representative period must consist of commissions.

However, to be exempt, employees must meet not only a federal exemption but also any state-specific requirements. In particular, there are states that do not recognize the "inside sales" exemption, which presents an issue for an employer trying to rely on the exemption.

Among other possible exemptions, it is unlikely that a salesperson will meet the "administrative" exemption given the nature of the work and also may be difficult to establish a case for the "highly compensated exemption" which, again, is not recognized in every state. Managerial salespeople who, for instance, manage the sales department and regularly direct the work of at least two others, may qualify for the executive exemption.

Put simply, employers should not automatically assume that a salesperson, even with six-figure compensation, is exempt from overtime. A non-managerial salesperson who does not travel regularly to solicit sales may not qualify for exemption. And for those employees who do not qualify for exemption, commissions are factored into employees' regular rate of pay used to calculate overtime.

COMMISSION PLANS

Typically, salespeople are compensated in part by commissions based upon sales. A common issue that arises when it comes to employing a salesperson is with respect to a commission plan – either an employer does not have one or does not have a sufficient one.

Indeed, often employers eager to onboard salespeople will do so without a commission plan in place. States like New York and California, however, require a written commission plan for commissioned salespeople that states the method by which commissions will be computed and paid. Under California law, employers must provide a signed copy of the commission plan and also obtain a signed receipt from the employee. New York law explicitly states that the failure of an employer to produce

a written commission plan gives rise to a presumption that the terms that the commissioned salesperson has presented are the agreed terms.

In addition to having a commission plan (ideally in place prior to the applicable plan term so as to avoid disputes), it is also important to avoid ambiguity within the terms of the commission plan. Any ambiguity in the plan will typically be construed against the employer in favor of the employee. Among other things, commission plans should be clear regarding:

- For what type of sales the employee is eligible to earn commissions;

- When commission is earned (i.e., is it based upon the customer contract being signed, payment being received from the customer, the employer making payment to the employee, or something else?);

- How commission is calculated; and

- When commission is paid.

Often, employers incorporate a "chargeback" or "clawback" provision in the event that a customer returns a product or cancels a service. In doing so, however, they need to be mindful of when commission is deemed to be "earned" to avoid running afoul of wage and hour law by taking deductions from earned wages. These aspects can be addressed in various ways to avoid an issue. Employers also may want to offer advances on commission or "draws," which involves specific drafting and careful implementation to again ensure compliance with wage and hour law.

Of course, an employer cannot retroactively change a plan to adversely impact an employee or to avoid paying an employee commission already earned. Employers are best served in reviewing their plans annually and allowing time to make any desired prospective changes.

A commission plan should also ideally address what happens with respect to commissions following termination from employment (that is, is the employee still eligible to earn commissions?). This aspect may be impacted by applicable state law. In general, employers need to be mindful of any state-specific commission requirements, as some state laws dictate payment timing and other aspects. A failure to address commission in a commission plan or to comply with state requirements could lead to wage and other disputes. Further, if an employer is considering a sale or related corporate transaction, written commission agreements with salespeople are routinely examined during the employment diligence process.

REMOTE WORK CONSIDERATIONS

It is increasingly common for employers to have remote workers – often salespeople – in various states across the country. Employers must comply with the state law where the employee is located. Some states, for instance, require temporary disability insurance. The number of states requiring paid family leave insurance is on the rise. There are also a host of tax, withholding, and business registration considerations with respect to remote employees.

Employers must provide any legally mandated training (such as state required anti-harassment training) or required job notices. With respect to notices, in many cases, these requirements can be satisfied by providing notice via email or within an employee handbook, but they are required even for remote employees. There are also business expense reimbursement statutes in certain states like California and Illinois, which may require reimbursement for expenses like mileage, home internet, and data plans.

RESTRICTIVE COVENANTS

In a similar vein, the enforcement of restrictive covenants are state-specific matters. While non-compete agreements have been at the center of recent nationwide scrutiny with the Federal Trade Commission's proposed non-compete ban, and existing non-compete laws vary state to state, non-solicits of clients may be of even greater import to a business when it comes to its salespeople. Employers should be aware that there are varying state laws when it comes to non-solicits, as well. For instance, prohibited post-employment non-competes in California also include post-employment customer/client non-solicitation provisions. In other states, like Colorado and Illinois for example, a non-solicit is unenforceable against an employee unless the employee's earnings meet a set compensation threshold.

The net result of varying restrictive covenant laws is that two salespersons working remotely from their respective homes and covering different territories may have different post-employment legal obligations to their employer.

CONCLUSION

Ultimately, salespeople are often an integral part of a company's workforce. It is imperative that employers consider legal requirements and best practices when hiring their salesforce.

Copyright © 2025 CCH Incorporated. All Rights Reserved. Reprinted from *Employee Relations Law Journal*, Spring 2025, Volume 50, Number 4, pages 46–49, with permission from Wolters Kluwer, New York, NY, 1-800-638-8437, www.WoltersKluwerLR.com