NADC
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DEFENDER

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In this Issue:

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Mandatory Arbitration Agreements After The Supreme Court's *Epic* Decision–Is it Time to Consider Them for Your Dealerships?

By Rick Warren and Kimberly Ross, *FordHarrison, LLP*

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On May 21, 2018, the U.S. Supreme Court decided *Epic Systems Corp. v Lewis*, ruling that employers can enforce class or collective action waivers in arbitration agreements without violating the National Labor Relations Act ("NLRA"). This decision resolved legal uncertainty that existed since 2012 when the National Labor Relations Board ("NLRB") first asserted such waivers violated employees' rights under the NLRA to act collectively. Federal courts of appeals had been divided over the NLRB's legal position. Consequently, a number of employers decided not to make a decision on mandatory arbitration agreements until the NLRA issue was resolved. Now is an appropriate time for dealers and other employers to assess whether such agreements should be implemented in their workplaces.

Pros and Cons of Arbitration Agreements

Employers should evaluate the pros and cons of arbitration agreements for their workplaces. Multiple factors should be considered, including:

- How large is your workforce?
- Do you have multi-state operations?
- In which states do you operate? Are you in employer-friendly jurisdictions?
- What is your history of workplace disputes?
- What would be the impact on employee morale and company culture?
- Would implementing an agreement put you at a competitive disadvantage in recruiting and retaining employees?

Some of the pros of arbitration agreements include:

- A deterrent to plaintiffs and their attorneys to bring an action in the first place;
- Confidential process and decisions;
- A more streamlined process and shorter timeline to decision;
- Finality, as there is limited ability to appeal arbitration decisions;
- Elimination of class and collective action claims and a requirement that claims to be arbitrated on an individual basis; and
- Elimination of runaway jury awards and jury trials altogether.

Some of the cons of arbitration agreements include:

- Employer costs for arbitration process and arbitrator's fees could be more expensive, particularly in cases in which class action lawyers file large numbers of individual claims;
- Arbitrators may be less likely to grant dispositive motions, believing a claimant should take his or her claim to an evidentiary hearing;
- Arbitration agreements and class/collective action waivers might not be effective as to all claims. For example, California law permits employees to file representative actions under the Private Attorneys General Act ("PAGA claims"), and New York and Maryland recently enacted legislation barring mandatory arbitration of sexual harassment claims; and
- Arbitrators might be more inclined to issue split decisions.

Considerations in Drafting an Enforceable Agreement

In light of the Supreme Court's decision, some plaintiffs' lawyers have indicated that a new focus of attack on arbitration agreements will be their valid formation under state law. Accordingly, the employer must be able to prove that the parties agreed to arbitrate their claims. Can the employer prove that the employee consented to arbitration? Is the claim involved covered by the arbitration agreement? Is there valid consideration and mutuality of obligation to support the arbitration agreement?

Like other contracts, arbitration agreements may be invalidated by generally applicable contract defenses such as fraud, duress, and unconscionability. Arbitration agreements must not be unconscionable, either procedurally or substantively. Procedural unconscionability is determined by analyzing the circumstances surrounding the contract's formation, such as whether it is an adhesion contract (*i.e.,* "take it or leave it") and the relative bargaining power of the parties. Substantive unconscionability relates to the content of the contract terms and whether they are illegal, contrary to public policy, or grossly unfair.

Nearly all arbitration agreements in the employment setting will, to a certain extent, be considered one-sided, therefore making the substantive unconscionability factors very important. Some factors courts consider in a substantive unconscionability analysis include whether the arbitration agreement:

- Provides for a neutral arbitrator;
- Allows for "more than minimal" discovery;
- Requires a written opinion explaining decision;
- Allows for all forms of relief that would be obtainable in court;
- Does not require employees to pay unreasonable fees or costs;
- Establishes fair procedures for both sides;
- Provides fairness in choosing location of arbitration;
- Contains a notice period to existing employees before the agreement applies to them;

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Step 4: The following information should appear stating «2018 NADC Fall Conference» with the rate of $295.00 showing for a City-View Room. Click on «Select Room» and follow prompts to confirm reservation

To Call In:
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- Requires the employer to give up its right to change or terminate the agreement once the employee asserts a claim under it; and
- Is written in simple, understandable English (plus, other languages as needed), prominently advising employees of class/collective action and jury trial waivers.

Generally, in order to invalidate a contract there must be both procedural and substantive unconscionability. The test for unconscionability varies from the state to state.

Employers may want to consider the scope of claims covered by the arbitration agreement. The claims could be limited to those which the employer feels most vulnerable, such as wage and hour claims. Employers also could carve out claims not to be covered, such as sexual harassment.

Conclusion

Employers that make the business decision to move forward with mandatory arbitration agreements with class or collective action waivers should do so after consulting and with the assistance of employment attorneys experienced in this area of the law. This is a dynamic area with standards and restrictions that can vary from state to state. Employers should consider the timing of implementing such agreements and how to communicate this change to existing employees, ensuring that adequate notice is provided. Similarly, employers with existing arbitration agreements should have them reviewed by counsel to ensure they comply with recent legal developments and to strengthen the likelihood of enforceability if challenged. Additionally, class and collective action waivers should now be added to existing mandatory arbitration agreements. ■

Rick Warren and Kimberly Ross are partners in the national labor and employment law firm FordHarrison, LLP, in the Atlanta and Chicago offices, respectively. They represent automotive dealerships throughout the country in labor and employment matters.

Updated Member Contact Information

Please make sure to notify NADC Staff (info@dealercounsel.com) if your contact information has changed so that your records can be updated accordingly. We list updated contact information in *The Defender* so all members can be aware of the change.

NADC Welcomes New Members

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NADC Member Announcements

Do you have an announcement or accomplishment that you would like to share with the NADC community?

Please send any news that you would like to share to: emurphy@dealercounsel.com.

Executive Director's Message

Erin H. Murphy
NADC Executive Director

Attention NADC members! Do you use the NADC logo to promote your practice and advertise your membership with the organization? We hope that you do! In fact, our hope is that use of the NADC mark will benefit members by demonstrating their participation in a network of attorneys that are actively engaged in the industry, and we encourage all who wish to take advantage of use of NADC's logo and/or name to do so without hesitation.

The National Association of Dealer Counsel service mark has been officially registered with the U.S. Patent and Trademark Office as of 2016. We have updated our logo to give notice that the mark is registered by placing the ® symbol next to the mark. Please contact me at emurphy@dealercounsel.com if you would like the NADC logo in an EPS format (or any other format you would like).

This is also a reminder that NADC has developed a policy outlining the guidelines for members who wish to use the NADC mark in promoting their practice. Please find the policy below.

Please feel free to use the NADC member logo on your business card, personal stationery, electronic mail and transmissions, website, firm biography, blog, and promotional materials provided that you adhere to the established guidelines and report use of the mark according to the procedures outlined in the below policy:

NADC TRADEMARK, LOGO USE POLICY AND LICENSE

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In order to indicate their membership in NADC, NADC individual members are permitted to use the NADC member logo on their business cards, personal stationery, electronic mail and transmissions, websites, firm biographies, blogs, and promotional materials on which the member is identified by name. However, individual members and firms must adhere to the following rules:

1. "NADC" and the NADC member logo are service marks owned by the National Association of Dealer Counsel. These marks may be used only by members in good standing if and only if such use is made pursuant to the terms and conditions of this limited and revocable license. Any failure by a user to comply with the terms and conditions contained herein may result in the immediate revocation of this license, in addition to any other sanctions imposed by NADC. The interpretation and enforcement of these terms and conditions and compliance therewith shall be made by NADC in its sole discretion.
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6. All elements of the logo typeface and graphics must be clearly legible.
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8. Use of the logo shall create no rights for users in or to the logo or its use beyond the terms and conditions of this limited and revocable license. The logo shall remain at all times the sole and exclusive intellectual property of NADC. NADC shall have the right, from time to time, to request samples of use of the logo from which it may determine compliance with these terms and conditions. Without further notice, NADC reserves the right to prohibit use of the logo if it determines, in its sole discretion, that a user's logo usage, whether willful or negligent, is not in strict accordance with the terms and conditions of this license or otherwise could discredit NADC or tarnish its reputation and goodwill, or that the user is not an NADC member in good standing.

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NADC TRADEMARK, LOGO USE POLICY AND LICENSE
Continued

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   (a) Prior to using the logo in any promotional materials, mass media, internet, websites, flyers or other materials, written or electronic, members must report their intended use of the logo by sending a report to trademark@dealercounsel.com. Please provide a short concise statement giving a name of the member and a brief general description of the proposed use; the nature of the promotion or advertisement and the targeted audience. You will be requested to provide an update on promotional use of the logo annually. You will receive a prompt via email and an updated report should be filed within ten (10) days of receipt of the prompt.
6. All elements of the logo typeface and graphics must be clearly legible.
7. Preferred colors are:
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8. Use of the logo shall create no rights for users in or to the logo or its use beyond the terms and conditions of this limited and revocable license. The logo shall remain at all times the sole and exclusive intellectual property of NADC. NADC shall have the right, from time to time, to request samples of use of the logo from which it may determine compliance with these terms and conditions. Without further notice, NADC reserves the right to prohibit use of the logo if it determines, in its sole discretion, that a user's logo usage, whether willful or negligent, is not in strict accordance with the terms and conditions of this license or otherwise could discredit NADC or tarnish its reputation and goodwill, or that the user is not an NADC member in good standing.

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Prior to using the logo in any promotional materials, mass media, internet, websites, flyers or other materials, written or electronic, members must report their intended use of the logo by sending a report to trademark@dealercounsel.com. Members must provide a short concise statement giving a name of the member and a brief general description of the proposed use; the nature of the promotion or advertisement and the targeted audience. Members will be requested to provide an update on promotional use of the logo annually. Members will receive a prompt via email and an updated report should be filed within ten (10) days of receipt of the prompt.

PROCEDURE:

1) Members provide usage statement via email to trademark@dealercounsel.com. This address will be monitored by NADC staff.
2) NADC Executive Director will review usage statements for possible disqualifying information.

If usage report is approved:

1) NADC staff will inform the member via email within ten (10) days.
2) NADC staff will prompt the member annually to provide an update on promotional use of the logo. An updated report must be filed within ten (10) days of receipt of the prompt. Misuse of the NADC logo or failure to file the annual usage report may result in penalties, including loss of membership in NADC.
3) NADC Executive Director will review annual reports and provide notice to the board only if member has deviated from original usage.

If usage report is denied:

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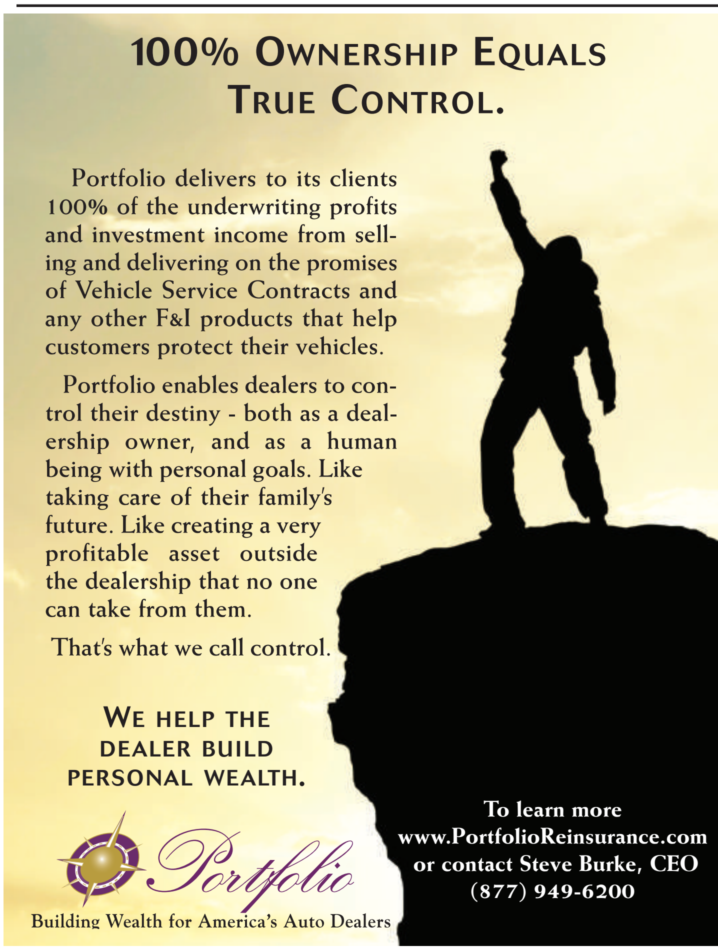
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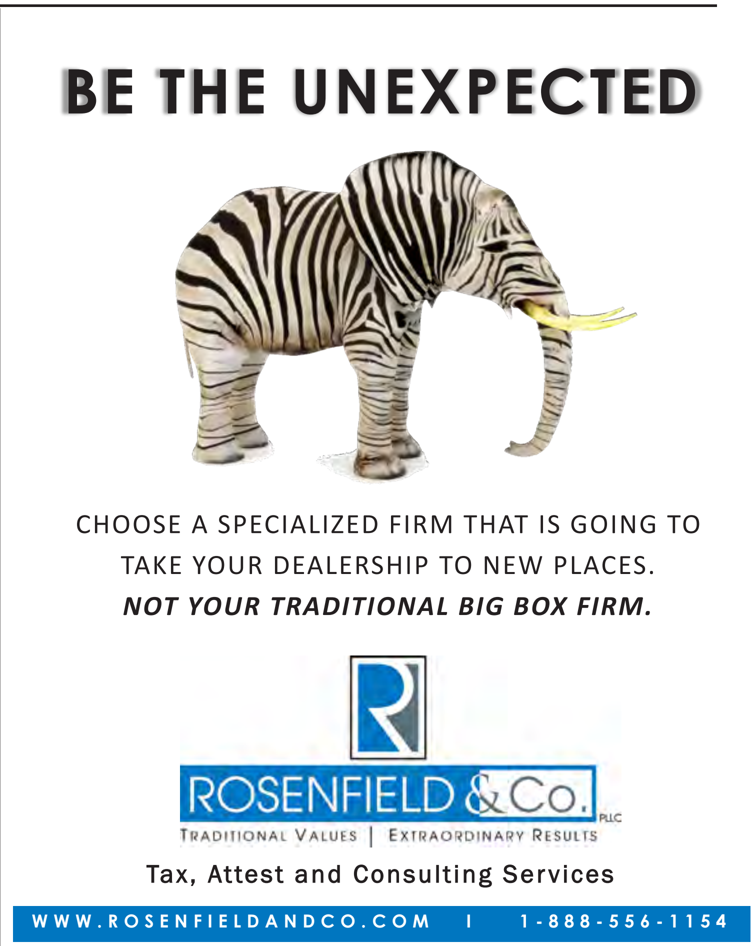
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Written Pay Agreements Can Save Auto Dealerships Wage and Hour Headaches

By Nicholas A. Devyatkin, *Tully Rinckey, PLLC*
Carol A. Crossett, *Tully Rinckey, PLLC*

Auto dealerships have paid their salespersons on commission for decades and can easily fall victim to wage and hour claims, especially claims for non-payment of commissions by their employees (commission salespersons).

There are different considerations in place when there is a wage and hour claim under both federal and state law, such as the statute of limitations applicable to such claims, and what category the claimant falls into under state and federal law. The Fair Labor Standards Act ("FSLA"), for instance, sets forth certain classifications of employees under the FLSA that are exempt from minimum wage and overtime pay requirements (*i.e.,* some salespersons are exempt from the overtime requirements while others are not). *See* 29 U.S.C. § 207(i); 29 C.F.R. §§ 779.410 - 779.421. For instance, commission sales employees referred to as inside sales employees distinguish them from outside sales, another exempt classification under the FLSA. To qualify for the exemption, the commission sales employee must: (1) be employed by a retail or service establishment; (2) earn a regular rate of pay that exceeds 1.5 times the applicable minimum wage; and (3) receive commissions on the sale of goods or services that equal more than half of his or her total earnings for a representative period. 29 C.F.R. §§ 779.410 - 779.421.

Dealers should take notice of the FSLA, as well as the state laws that apply in their own state, as most dealers rely upon commission salespersons for business. Under the New York State Labor Law (NYLL), for example, a commissioned salesperson who is protected by the wage and overtime provisions is someone not primarily active in a supervisory or managerial role. For independent contractors different rules apply. Salespersons who are not exempt from the law (like outside salespersons) must earn at least minimum wage and overtime laws apply. In *Karic v. Major Automotive Companies, Inc.* 992 F.Supp.2d 196 (E.D.N.Y. 2014), the U.S. District Court for the Eastern District of New York found that there were weeks where the employees, who were commissioned salespersons, did not earn minimum wage because lower sales resulted in reduced commissions that were not equal to or below minimum wage. Even though defendant argued that its employees made a yearly average of $50,000 in pay and commission, the court ruled that employees were entitled to minimum wages and any overtime for any week when commissions were not equal to or less than the minimum wage for the pay period.

The law in many states treat commissions as wages once the commissions are earned. The definition of when a commission is earned and becomes a wage subject to a state's labor law may be the subject of a written agreement between employer and employee (express) or if not, (implied) when deemed earned under that state's law or in accordance with past dealings between the employer and commissioned salesperson. In one New York case, the court held a commission is earned as determined by the contract or if none, at the time "the employee's production of a ready willing and able purchaser of the service's". *Pachter v. Bernard Hodes Group, Inc.* 861 N.Y.S.2d 246 (2008). Without a proper written agreement in place, dealers fall victim to wage and hour claims when earned commissions (wages) are subjected to unlawful deductions, and for claims related to unpaid commissions.

There are numerous determinations for a dealer to make that, if left unattended, can unintentionally result in a dealer being in violation of the applicable state's labor law, and subject a dealer to a claim before the state's labor department, a complaint in a court proceeding, or the worst scenario – class and collective action proceedings commenced by former employees. In New York, for example, an individual in the auto industry, such as a dealer/operator or dealer/principal or any individual who has hiring and firing authority, or who controls the work schedule and supervises employees (sets the conditions of employment), determines the rate and method or payment (salaries or payment of commissions), and maintains employee records (drafts employments agreements or sets policies pertaining to same), can be held liable as an employer, under the NYLL § 190(3), including under the FSLA, which construes the definition of employer rather broadly. *See Karic,* 992 F.Supp.2d at 203.

Because of the interplay between when commissions are earned and treated as wages subject to the state's law, a well written agreement can mean the difference between a presumption in favor of the employees claims and exposure to a variety of applicable damages and penalties, and the ability to defend against such claims. The ability, when available to establish the parties' history and course of dealings as a defense, is difficult and in other cases impossible as it is dependent on whether there is a written employment agreement since an agreement can be express or implied. *See, e.g. Pachter v. Bernard Hodes Group, Inc.* 541 F.3d 461 (2d Cir. 2008) (holding that consideration of course of dealings is appropriate only when there is no written agreement). The best way for dealers to avoid wage and hour claims is to be as transparent as possible with their commissioned salespeople. Dealers need to continually monitor their own compliance with these agreements, and ensure that they are complying with all applicable minimum wage and overtime laws. Avoiding such claims, and an unwitting violation, including the imposition of liquidated damages and pre-judgment interest in the event liability is found, requires care and attention. *See, e.g., Saloin Chen v. East Market Restaurant, Inc. d/b/a East Market Restaurant,* 2018 WL 340016 (S.D.N.Y. Jan. 1, 2018) (calculation of statutory damages on unpaid wages and for other violations of the federal and state labor law).

Some states require employment agreements based on commissions to be in writing or have enacted laws specifically aimed at covering such employees. For example, employees in California whose compensation includes payment of commissions must be provided with a written employment agreement specifying the method for computing and paying the commission. Cal. Lab. Code § 2751(a). The California Supreme Court also recently broadened the definition of employee for purposes of determining who is an employee for purposes of minimum wage orders and wage orders applicable to certain industries, as opposed to who falls under the category of being deemed an independent contractor. Commissions are wages under Oregon law. ORS § 646A.097(1)(a); *Hekker v. Sabre Const. Co.,* 510 P.2d 347, 350 (Or. 1973). Employment agreements govern the terms of when commissions are earned, when payment is due in the event of a termination, and when, and if, commissions may be forfeited *Waldrip v. Dependable Bldg. Maint. Co., Inc.,* 652 P.2d 4 (Or. Ct. App. 1982); *Nestlen v. City Liquidators, Inc.,* 2005 WL 6396053 (Or. Cir. Ct. July 6, 2005).

Even cities such as Seattle, Washington have enacted protections for certain employees. When it comes to non-exempt employees that are subject to the law, employees other than hourly or salary must receive a detailed, printed accounting of commissions, piece rate, or other methods of pay. *See* Seattle Municipal Code § 14.20. In the District of Columbia, the law requires an itemized statement showing: the date of wage payment; gross wages, with earnings separated by straight-time, overtime; and for commissioned employees, commissions and non-commission straight-time. Other states or regions may not require written commissions agreements, but the application of common law or other doctrines in those states may create a presumption in favor of an individual employee who is paid by commissions in the event there is no agreement or if the agreement in place is silent on the issue when there is a dispute, for instance, whether about the calculations of commissions, or whether an advance or draw is recoverable by an employer.

Wage and hour claims such as in *Karic*, *supra*, are still a fact of life for auto dealerships. Dealerships in particular must be diligent because they so heavily rely on their commissioned salespersons. Typically, a commissioned salesperson's pay is reliant on the amount the salesperson can make in commissions from auto sales. Reduced sales mean reduced commissions. Before you know it, the dealer has a situation where one or more of his or her employees is making less than the minimum wage. Sometimes commissioned salespersons are allowed to take a draw, but that is also risky because deductions from a draw and the timing and frequency of reconciliation and a dealer's ability to recoup same, must also be detailed in writing. Any contrary belief can lead to litigation. A dealer will run afoul of the law if the dealer decides to charge back a portion of a salesperson's draw on future commissions with no agreement or a less than explicit agreement concerning the frequency of reconciliation and calculation.

Commission agreements are troublesome when they do not comply with state law concerning the timing of payments, fail to address the entitlement to commissions after discharge, or upon leaving employment, or when commissions are subject to unlawful penalties or forfeitures. The timing for the payment of commissions earned at the time of termination of employment differs among states, and in some, must be paid at the time of termination. Under New York law, commissioned salespersons must be paid earned commissions no later than the end of the last day of the month following the month in which the commissions were earned. If employment is terminated wages and commissions must be paid no later than the regular payday for the period in which the termination occurred. In comparison, the Illinois Sales Representative Act: 820 ILCS 120/0.01*et seq*, requires an employer to pay a sales representative all commissions due within thirteen days after termination. For commissions due after termination, the employer must pay the commissions within thirteen days after the commissions become due. *See* 820 ILCS 120/2. Business entities that fall under the definition of covered employers subject to the Act, are those that: (1) manufacture, produce, import, or distribute a product for sale; (2) contract with a sales representative to solicit orders; and (3) compensate a sales representative, in whole or in part, by commissions. *See* 820 ILCS 120/1(3), 120/2. Similarly, in South Carolina, when a contract between a principal and a sales representative for the solicitation of wholesale orders is terminated for any reason, the principal must pay the representative all commissions that have or will accrue under the contract, and which law contains a definition of principal that is nearly identical to Illinois S.C. Code Ann.§ 39-65-10; § 39-65-20. Sales representatives also have a private cause of action, and can enforce this statute through a civil suit against a principal that fails to pay and, if liable, may be entitled to: all amounts due the sales representative; punitive damages not to exceed three times the amount of commissions due the sales representative; and attorneys' fees and court costs. S.C. Code Ann. § 39-65-30. Virginia has special wage and hour rules pertaining to independent sales representatives *See* Virginia Independent Sales Representatives Law: Va. Code Ann. §§ 59.1-455 - 59.1-459. A sales representative is someone who contracts with a principal to solicit wholesale orders or sales and is compensated, in whole or in part, by commissions. Va. Code Ann. § 59.1-455. Sales representatives may file a claim in court for an employer's failure to timely pay commissions. Private rights of action may not be waived by contract Va. Code Ann. § 59.1-458. Following an employee's termination, employers must pay commissions during the same time frame as all other wages. If a contract between a sales representative and a principal is terminated for any reason, the principal must pay the sales representative all commissions accrued under the contract within fourteen days after the effective date of the termination. ORS § 646A.097(2).

If there is a dispute involving the amount of commissions due between the salesperson and the employer, and there is not a written agreement, it's presumed that the salesperson's understanding of the terms in many, if not most states, is accurate. If there is an agreement, but it is unclear and open to interpretation, the ambiguities will be construed against the drafter, which in such cases is the employer.

Ultimately, the burden of compliance is placed squarely on the dealer/owner to know the law of the subject jurisdiction, including if the law requires written commission agreements. A dealer/owner must keep in mind that if the law requires a written agreement and there is none, in such states there will be a presumption of a violation and/or that the employee's version of the terms of any agreement to pay commissions is the correct one. Whether the law requires it or not, a well written commission agreement which contains specific detail of the calculation of commission that is understood and agreed to between the salesperson and employer, which is not open to interpretation or vague, and which addresses issues such as when a commission accrues, whether there is a draw or advance and the terms of reimbursement and reconciliation of same, and the terms of when payment is due at termination, among other issues, and which complies with the state law, can mean the difference in defending against, or avoiding the possibility of a claim for violation of wage and overtime laws, and/or a claim for unpaid commissions. Conversely, an evasively written agreement that is open to interpretation or one that obscures or fails to address these issues, defaults to the law of the jurisdiction and can run afoul of the law.

A well written agreement as opposed to the lack of an agreement or an agreement that is silent on such issues can be the determining factor as to whether there is a defense against a claim for unpaid commissions. ■

Carol A. Crossett, Esq. is Partner at Tully Rinckey PLLC's New York City office on the firm's commercial litigation team. She is a member of the National Association of Dealer Counsel and has a wide range of experience representing automobile dealerships, other commercial business owners, and the marine industry, involving general to complex litigation between consumers, franchise disputes, manufacturers, dealership purchasers, employees and shareholders, commercial transactions, and business succession and estate planning.

Nicholas Devyatkin represents employees and employers in federal, state and private employment law matters, including claims of discrimination, harassment, retaliation, whistleblower actions, prohibited personnel actions, disability retirement applications and disciplinary matters, and wage and hour litigation. Nicholas also represents clients in the firm's New York civil and commercial litigation and transactional practice, handling construction law issues, property disputes, contracts, shareholder agreements, mechanic's liens, landlord-tenant issues, and many other matters. Nicholas has experience in a variety of dispute resolution mechanisms including mediation, arbitration, and court proceedings.


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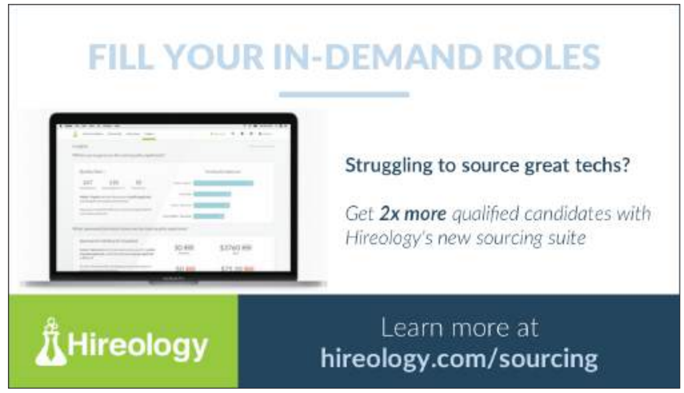
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