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MEMORANDUM

TO: Our Valued Clients
DATE: October 11, 2007
SUBJECT: Commissioned Salesperson Law

We are writing to inform you that Governor Spitzer has approved legislation designed to assist the New York State Department of Labor in determining when commissions are due commissioned salespersons, as follows:

Effective October 16, 2007, employers of commissioned salespersons¹ in New York State must have a written agreement with each salesperson containing at least the following provisions:

- A description of how wages, salary, draw on commissions, commissions, and all other amounts earned and payable are to be calculated;
- The frequency of reconciliation between draw and earned commissions, if the agreement provides for a recoverable draw; and
- Details regarding payment of wages, salary, draw, commissions and all other monies earned and payable in case of termination of employment by either party.

The employer must retain each such agreement for at least three years and make it available to the Commissioner of Labor upon request.

The penalty for an employer's failure to have such an agreement is that the law will presume that the commissioned salesperson's version of his compensation, and not the employer's, is correct. The burden will then be on the employer to prove that it, and not the salesperson, is correctly stating the compensation structure.

Existing commission agreements may not comply with the requirements of the new law, and we suggest that employers immediately review existing agreements for compliance. We also suggest that any agreements executed with an employee contain a statement that the employee is an "at will" employee, unless a different agreement exists with a particular employee.

Feel free to contact us if you have any questions regarding this amendment. We will be happy to be of assistance to you.

¹ A commission salesperson is "any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article of thing and whose earnings are based in whole or in part on commissions." N.Y. Lab. Law § 190(6). It does not include "any employee whose principal activity is of a supervisory, managerial, executive or administrative nature."