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Post-Termination Commissions and Renewals: Who Has to Pay What to Whom?

Ordinarily, an employer has no obligation to pay a former at-will employee renewal commissions after the termination of the employment relationship. Typically, however, a written agreement may define the commission structure. Such an agreement may provide for the payment of renewal commissions

agent by the insurer at the time that it places the business.

Oral Promises to Pay Commissions

An oral promise to pay renewal commissions following the termination of an at-will employment relationship is

instance, where an insurance broker sued an insurer for breach of an oral contract to pay commissions, a New York court found that a letter written by the insurer to the broker regarding the payment of renewal commissions contained all the material terms of the alleged oral agreement. This writing, albeit just a signed letter, was sufficient to satisfy the Statute of Frauds.ⁱⁱ Notably, that letter stated, “[w]e will maintain the current brokerage commission splits providing [you do not divert future revenues to another agency].” The court seemed open to looking to the parties’ past practices.

Whether a court will consider a letter or memorandum sufficient to satisfy the Statute of Frauds may depend upon whether the writing includes key terms, such as when commissions are “earned” and how commissions are calculated and paid. A court may also look to whether a former employee is asserting an indefinite and unlimited claim to commissions on certain accounts or whether such a claim is limited in duration and scope.

Formal Agreements to Pay Commissions

Even where a formal agreement exists, interpreting whether a former employer is obligated to pay post-termination commissions and/or renewals is not always so simple.

For example, in one case, a former employee sued its former employer to recover commissions for her placement of two accounts that were finalized by the employer after she no longer worked there.ⁱⁱⁱ The parties disputed whether she was entitled to the commissions for accounts she originated but had not finalized in securing before she left the company. The court looked to the provision on commissions contained in the agreement and reasoned that the words

But the absence of a formal written agreement may not be fatal to a claim for post-termination commissions. For instance, where an insurance broker sued an insurer for breach of an oral contract to pay commissions, a New York court found that a letter written by the insurer to the broker regarding the payment of renewal commissions contained all the material terms of the alleged oral agreement.



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on accounts placed while employed at the company or it may preclude the payment of renewal commissions after the employee’s termination of employment. What if there is no written agreement but an oral promise to pay renewal commissions? Read on, as you may be surprised to learn what courts applying New York law look have found and how the Office of General Counsel treats commission payments to brokers and agents who are no longer licensed.

By way of background, Section 2102 of New York Insurance Laws provides: “(e) (1) No person shall accept any commission, service fee, brokerage or other valuable consideration for selling, soliciting or negotiating insurance in this state if that person is required to be licensed under this article and is not so licensed.” And, in order for a licensed New York insurance agent to receive commission payments, the agent must be both licensed and appointed as

unenforceable. The Statute of Frauds requires an agreement to be in writing and signed if such agreement “[b]y its terms is not to be performed within one year of the making thereof.” As a result of this rule, a service contract of indefinite duration, where one party agrees to procure customers or accounts on behalf of another, is not by its terms performable within a year, and therefore must be in writing.ⁱ

Of course, an agent or broker can pay commissions and renewal commissions pursuant to an oral understanding, but an oral understanding, without more, leaves a former employee with little recourse if the agent or broker refuses to continue to pay such commissions.

Written Promises to Pay Commissions

But the absence of a formal written agreement may not be fatal to a claim for post-termination commissions. For

“placements originated by you,” did not specify when or how the placement must be completed. According to the court, if the employer wanted to foreclose the possibility of paying the employee post-termination commissions, it should have explicitly stated so in the agreement.

The court noted that in drafting the provision on commissions the employer could have stated, “placements originated and completed by you” or “placements originated by you which occur during your employment here.” Due to the absence of any language foreclosing the possibility of post-termination commissions, the court held the employee was entitled to commissions on accounts she originated but had not finalized before she left the company.

Recently, a New York Court addressed the issue of post-termination commissions in *Arbeeny v. Kennedy Executive Search, Inc.*, 893 N.Y.S.2d 39 (1st Dept. 2010). In that case, the written agreement between the employee and the employer (KES) provided that the employee was eligible “to earn commission compensation in respect of placements *arranged* by Employee” (emphasis added). The commission agreement also provided, “[n]o commission shall be due” in the event employee “is not in the employ of KES at the date the commission payment would otherwise be made.”

The court interpreted these provisions to mean that the former employee could claim commissions for placements he “arranged” prior to his termination but the employee could not claim a right to prospective commissions after his termination.

It is important to keep in mind that under New York Labor Law, once a commission is *earned* it cannot be forfeited and an employer cannot lawfully withhold compensation for earned commissions. For this reason, compensation provisions should clearly define when a commission is considered “earned.”

Exception Under Section 2102(e) of the Insurance Laws

Assuming a written agreement to pay commissions exists and is unambiguous and enforceable, can a licensed broker or agent pay contractually agreed to renewal

As explored more fully below, the Department has applied this exception to allow for the payment of commissions and renewal commissions to agents or brokers whose licenses have lapsed, expired or have been revoked and even to the unlicensed spouse of a deceased licensee.

commissions to persons who are no longer licensed? Although the Insurance Laws generally prohibit the receipt of commissions by unlicensed persons, Section 2102 provides an exception to this general prohibition for unlicensed persons who were licensed at the time they sold, solicited or negotiated insurance business. Specifically, Section 2102(e)(2) provides: “Renewal or other deferred commissions may be paid to a person or other entity for selling, soliciting or negotiating insurance in this state *if the person or other entity was required to be licensed under this article at the time of the sale, solicitation or negotiation and was so licensed at that time.*” (Emphasis added).

As explored more fully below, the Department has applied this exception to allow for the payment of commissions and renewal commissions to agents or brokers whose licenses have lapsed, expired or have been revoked and even to the unlicensed spouse of a deceased licensee. In doing so, the Department has acknowledged that renewal rights are contractually determined and there is no statutory prohibition against the payment of renewal commissions on accounts or policies procured by a former licensee.

Expired License / Retired Agent

For instance, an insurance agent who sold a policy while licensed but whose license expired, may be entitled to receive commission payments during the period from the date the license expired through the date when the license was subsequently renewed.

The Department applied a similar analysis in addressing the situation of a retired insurance agent who desired to let his license expire yet continue to receive renewal commissions. He had a written contract with his former employer, an insurance agency, which provided that the agent will continue to be paid renewal commissions for the rest of his life on

business he wrote while licensed. The agent was licensed at the time he sold the insurance for which he will continue to receive renewal commissions after his license expires. The Department explained that as long as the renewal commissions arise from insurance he sold, solicited or negotiated when he was a licensed insurance agent, he may continue to receive renewal commissions after his license has expired.

Consistent with this analysis, on April 2, 2009 the Department opined that commissions that accrue from policies placed by an insurance agent prior to the agent’s resignation may be payable to the agent even if he is no longer an appointed agent of the insurer at the time payment is made. (See OGC Op. No. 09-04-01) Additionally, the Department has consistently opined that a formerly appointed agent of an insurer could receive vested commission on business that he placed while an appointed agent of the insurer, provided that the agent’s agreement with the insurer did not prohibit such an arrangement.^{iv} In fact, depending upon the language of the agency agreement, an insurer may be contractually obligated to pay renewal commissions to the former agent who wrote the accounts.

Revoked Licensees

The Department has even extended the exception in 2102(e)(2) to permit an insurance broker to pay earned commissions as well as *future* commissions that were contractually agreed upon to a revoked licensee, on policies that have already been placed. (See OGC Op. No. 07-07-01, July 2, 2007). The Department was faced with the situation in which an agency purchased another agency that had contracts with certain employee-insurance brokers. Those contracts provide for payment of commissions on renewal policies to the insurance brokers. However, the acquiring agency learned that one of

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those brokers was arrested for alleged insurance fraud. The Department quoted an earlier Office of General Counsel Opinion and explained, "a license revocation does not extinguish a broker's right to receive commissions earned while licensed, including commissions from automatic renewals."^v

The Department's analysis consistent with the plain language of §2102(e)(2) and New York case law, as applied and quoted by the Department. "New York courts have generally held that absent an agreement to the contrary, a licensed insurance agent or broker earns its commission when it brings about the relationship of insurer and insured."^{vi}

Commission Payments to Spouse of Deceased Broker

The Department has even applied the principals and case law discussed above to permit the payment of commissions to an

unlicensed spouse of a deceased broker. (See OGC Op. July 21, 2005). The Department has found that the deceased broker earned his commission, including renewal commissions, at the time that the service was rendered. As long as the spouse of the deceased broker is not acting as an insurance broker and is merely receiving future commissions and renewals earned by the deceased broker on business placed prior to his death, the licensee could pay her commissions due to her deceased husband. She could not, however, service the deceased broker's accounts without at least a temporary license.

In fact, the licensee could be obligated to pay the spouse future commissions,

"New York courts have generally held that absent an agreement to the contrary, a licensed insurance agent or broker earns its commission when it brings about the relationship of insurer and insured."

including the renewals, on policies placed by the deceased broker, for however long the licensee would have had to contractually pay the deceased broker on policies that her placed.

In sum, an insurance broker, insurance agent, or insurer, may pay contractually agreed upon earned commissions as well as renewal commissions to a Department licensee who is under investigation for alleged violations of the Insurance Laws, whose license has lapsed, expired, or has been revoked (or even to the spouse of a deceased broker). So long as the person who earned the commission was licensed at the time of the sale, solicitation or negotiation of insurance, the commission payment should fall within the exception set forth in Section 2102(e). How commissions are earned, the method for calculating the amount of such commissions, the rights to renewals, and any time limitations, are some of the terms that should be in writing or you could end up financially obligated to a former employee simply because you failed to properly foreclose the possibility of post-termination commissions. [A]

This article is for informational purposes only and is not intended to give legal advice. For more information, please contact Sari Gabay-Rafiy at (212)941-5025 or gabay@gabaybowler.com.

i See, e.g., *Gersten-Hillman Agency, Inc. v. Heyman*, 68 A.D.3d 1284 (3d Dep't 2009) (involving oral agreement between insurance agency and insurance broker).

ii See *Schleger v. The Teiber Group LLC*, 303 A.D. 2d 335 (1st Dep't 2003); see also *Whitehorn Assoc. v. One Ten Brokerage*, 264 A.D.2d 516 (2d Dep't 1999).

iii *Yudeell v. Israel Assoc.*, 248 A.D.2d 189 (1998).

iv See OGC Op. 03-06-09, June 11, 2003; OGC Op. 02-06-25, June 20, 2002; OGC Op. 02-04-18, Apr. 11, 2002.

v See OGC Op. No. 02-04-18 (Apr. 11, 2002).

vi See *Hamond v. Risk Specialists*, 210 A.D.2d 202 (2d Dep't 1994); *Western Nat. Ins. Co. v. Haph Brokerage*, 277 A.D. 6 (1st Dep't 1950), aff'd, 302 N.Y. 678 (1951).

Answers to puzzle on page 38.

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