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Good Company

After a Recent New Hampshire Supreme Court Decision, Businesses Should Take Another Look at Their Commission Agreements With Their Sales Forces

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In a recently decided case, the New Hampshire Supreme Court clarified certain rules relating to the manner in which salespeople may — or may not be — paid for commissions. The case, *New England Homes, Inc. v. R. J. Guarnaccia Irrevocable Trust*, Nos. 2003-271, -272 (April 16, 2004), concerned commissions allegedly earned by salespeople who terminated their employment prior to the actual closing of the sale and payment of the final purchase amount by the company's customer.

The fundamental point from *New England Homes* is that if a business wants to make payment of commissions to their salespeople contingent on final delivery of the product to the purchaser and payment by the purchaser, the business must expressly say so in its commission plan or agreement with its sales force.

The case involved two wage claims by modular home salesmen. The central issue on appeal was whether the salesmen were entitled to commissions on modular home orders they procured. At the time of the salesmen's resignation, their employer, a modular home manufacturer, had accepted the orders for the homes but had not yet delivered them, nor even completed manufacture. In addition, the homes had been paid for only after the salesmen resigned. The employer contended a commission is not owed, as a matter of law, until the product was delivered and paid for; that is, until the sales had actually "closed." The salesmen asserted that the commission was earned as soon as the employer accepted the order for the product.

The Court ruled in favor of the salesmen, relying on its previous decision in *Galloway v. Chicago-Soft*, 142 N.H. 752, 756-57 (1998). The Court explained that in *Galloway* it had decided that "a person employed on a commission basis to solicit sales orders is entitled to his commission *when the order is accepted by his employer*. The entitlement to commissions is not affected by the fact that payment for those orders may be delayed until after they have been shipped." The Court dismissed the employer's argument that *Galloway's* statement that an "employee is entitled to commissions on sales *closed*" mandated a different result. The Court reasoned that the "remainder of [*Galloway*] makes clear that closed sales are synonymous with accepted orders."

Galloway allows parties to change by contract, or conduct, the default rule that commissions are earned upon the employer's acceptance of an order. To do so, however, the sales or commission plan or agreement must "unambiguously demonstrate" an intent to depart from the general rule

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that acceptance by the employer triggers the payment obligation.

In *New England Homes*, the employer argued that the parties had changed the default rule by agreeing to a "Letter of Understanding" between the employer and the salesman. The Court disagreed. The Letter of Understanding stated "Commissions are credited to the [salesman]'s account when contract and terms are *paid in full!*" The Court concluded that the meaning of the statement was ambiguous, because it could reasonably be interpreted as merely setting the time when the commission is to be paid by the employer. In other words, it did not necessarily state that commissions were contingent on final delivery and payment of the final product.

The lesson is this: Employers with commissioned sales representatives working out of or with a principal place of business in New Hampshire need to take a hard look at their commission plans. In addition to compensation arrangements, commission plans can be (and perhaps should be) used to establish rules relating to the employee's or representative's follow-through with respect to a sale. If a business wishes to make payment of a commission contingent on the completion of such follow-through work, it needs to take a close look at its commission plan to ensure it passes muster under *New England Homes*.

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