

EMPLOYMENT LAW ALERT

January 2010

Ruskin Moscou Faltischek's Employment Law Capabilities

- Sexual Harassment Prevention
- Discrimination Avoidance
- Restrictive Covenants (non-compete, non-solicitation) and Unfair Competition
- Protection of Trade Secrets, Proprietary Information and Business Opportunities
- Employment At Will, Breach of Contract and Termination for Cause
- Employee Policy Manuals
- Family and Medical Leave
- Wage and Hour Requirements
- Employee vs. Independent Contractor
- Executive Employment Agreements and Severance Packages
- Comprehensive Litigation Services

For further information, please contact these Employment Law Group members:

Jeffrey M. Schlossberg
Chair
(516) 663-6554
jschlossberg@rmfpc.com

Douglas J. Good
(516) 663-6630
dgood@rmfpc.com

Joseph R. Harbeson
(516) 663-6545
jharbeson@rmfpc.com

Kimberly Malerba
(516) 663-6679
kmalerba@rmfpc.com

Beware Commission Confusion

By: Jeffrey M. Schlossberg



Earlier this month, a New York State appellate court sent a warning to employers about the effect of having a commission agreement that is less than crystal clear. In this case, the employee signed an at-will contract that permitted the company to fire him at any time with or without cause or prior notice. As to commissions, the agreement stated that the employee would be paid for contracts he "arranged" in the month following the company's receipt of payment. In an apparent attempt to limit the company's obligations post-termination, the agreement stated that no commission would be due in the event the employee no longer worked for the company at the time a commission payment would otherwise be payable.

The company fired the employee in March 2007 and the employee subsequently sued for projects that he had arranged prior to his departure but for which the company received payment after his termination.

Despite what might appear to be express language preventing the employee from collecting commissions for payments the company received after his departure, the court held in the employee's favor. The court interpreted the post-termination language only to bar payment for prospective commissions in the indefinite future. The court stated that the contract did not "explicitly express an intent that earned commissions will be retroactively lost upon termination."

In addition, the court permitted the employee to pursue a claim based on the implied covenant of good faith in contracts based on the employee's allegation that the employer specifically terminated him to prevent having to pay commissions that were due to him.

Significantly, the law gives employers great leeway in establishing the terms of a commission arrangement, including the ability to

[Previous Alerts](#)

[December 2009](#)

[November 2009](#)

[October 2009](#)

[September 2009](#)

[August 2009](#)

[July 2009](#)

limit payment of commissions post-termination. The key to achieving this goal is careful drafting. Although the court found the contract language in this case to be unclear, the lesson for employers is clear: commission agreements must be carefully written to avoid unintended consequences when the time for payment arrives. This message is consistent with a 2007 amendment to New York Labor Law stating that the lack of a written commission agreement will create a presumption in favor of the employee as to the agreed-upon arrangement. (See, [RMF Employment Alert October 2007](#)).

[New York Pay Notice Update](#)

As an update to our [August 2009 Alert](#), the New York State Department of Labor has issued new forms for employers to use in order to satisfy their obligations to notify new hires of their applicable pay rates. These notices supersede the notice identified in our October 29, 2009 special Alert. The most frequently used forms are available by clicking on the links below:

[Hourly Rate](#)

[Multiple Rate](#)

[Weekly Rate or Fixed Number of Hours](#)

[Exempt Employees](#)

If we can be of assistance on these or any employment law issues, please do not hesitate to contact us.



East Tower, 15th Floor
1425 RXR Plaza, Uniondale, NY 11556-1425
516.663.6600
www.rmfp.com

Attorney Advertising

Employment Law Alert is a publication for distribution without charge to our clients and friends. It is not intended to provide legal advice, which can be given only after consideration of the facts of a specific situation.

[Forward email](#)

✉ **SafeUnsubscribe®**

This email was sent to jschlossberg@rmfp.com by jschlossberg@rmfp.com.
[Update Profile/Email Address](#) | Instant removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).

Email Marketing by

