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ATTORNEYS AT LAW

# WATSON BENNETT BULLETIN

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## DO YOU HAVE WRITTEN COMMISSION AGREEMENTS WITH ALL OF YOUR SALES PEOPLE?

A 2007 amendment to the New York Labor Law added a new requirement that all commission arrangements be put into writing. Failure to comply with the specific requirements of the law exposes an employer to significant liability should a departing employee dispute the amount of commissions owed to him or her.

New York Labor Law Section 191 (c) now requires businesses employing commissioned salespersons to enter into written agreements detailing their compensation terms. This agreement must be signed by both the employer and the salesperson and must cover specific items set forth in the statute, including details of what the salesperson will be paid in the case of termination of employment by either party.

The law requires that employers keep the written agreements on record for three years (we recommend they be retained for the full six year statute of limitations) and provide them to the Department of Labor on request. Most significantly, in the event of a dispute, if an employer is unable to produce a written agreement, the law presumes that the terms asserted by the salesperson were the agreed upon terms, making it much more likely that the former salesperson will succeed in his or her claim.

To add insult to injury, Section 198 of the Labor Law provides that a successful salesperson is entitled to recover legal fees, and, if the employer is found to have willfully withheld payment, the salesperson will be entitled to an additional sum equal to 25% of the total amount of the wages found to be owed to him or her.

Similar Labor Law provisions protect outside sales representatives. New York requires that sales representatives be given written agreements detailing the method of calculating compensation and when it will be paid. Commis-

### STATUTE OF LIMITATIONS

NEW YORK LABOR LAW ALLOWS A LAWSUIT FOR UNPAID WAGES TO BE BEGUN BY AN EMPLOYEE OR BY THE DEPARTMENT OF LABOR AT ANY TIME WITHIN SIX YEARS FROM THE TIME THE CLAIMED WAGES SHOULD HAVE BEEN PAID.

sions for sales representatives must be paid not later than five (5) days after (i) the commissions are earned, or (ii) when the contract between the principal and the sales representative is terminated. Each sales

representative must be provided a copy of their agreement and the principal must obtain a written receipt from the sales representative.

Failure to pay sales representatives in accordance with the statute subjects the principal to a civil action in which the sales representative may be entitled to double damages plus legal fees.

*Article continued on Page 2*

COMMISSION AGREEMENTS -  
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## YOU'VE GOT MAIL, YOU MAY HAVE A PROBLEM!

Where does your email and other Electronically Stored Information ("ESI") go when you hit "Delete?" If you are like most people, you have no idea. This lack of knowledge is creating legal issues for today's business owner. Recent case law dealing with ESI has held that businesses have an absolute duty to preserve all relevant data once the business reasonably anticipates litigation. Establishing and implementing a well crafted Electronic Data Retention Policy goes a long way in safeguarding rights, protecting valuable information, and avoiding unwanted litigation costs.

2006 amendments to the Federal Rules of Civil Procedure changed the rules regarding the storage and production of ESI. Businesses are now required to preserve, protect in anticipation of, and produce ESI during litigation. Business owners need to be aware that courts across the country are far less likely to accept as an excuse the accidental deletion of files that should have been protected. In fact, courts are increasingly penalizing businesses for their non-compliance with the 2006 rules.

Having an Electronic Data Retention Policy is the first step in managing information and mounting a good defense against the claim of improper destruction of ESI evidence. By creating procedures for handling aged and deleted documents a business can arm itself with a vital tool if

**WATSON BENNETT** is pleased to announce that Nick Falkides, Esq. has joined the firm. Nick has over twenty years of experience handling complex litigation of all types. He received his Juris Doctorate from the University of Pennsylvania Law School and prior to that he graduated from the Wharton School of Business at the University of Pennsylvania.

Mr. Falkides will head our Commercial Litigation department, and may be contacted at [nfalkides@watsonbennett.com](mailto:nfalkides@watsonbennett.com) or by calling our office at 716-852-3540.

We are confident that the addition of Nick to our firm will allow us to better serve our clients whenever the need for litigation arises.

documents are ever requested as part of an audit, a regulatory investigation or a law suit.

Many business owners do not appreciate the magnitude of the potential cost of not deleting old e-mail and electronic documents. Studies have shown that approximately 50% of all litigation costs can be attributed to discovery, and this percentage climbs rapidly where attorneys use motion practice to aggressively pursue lengthy discovery. Discovery is the pre-trial exchange of information between the parties of a lawsuit. Today's average personal computer's hard drive has the capacity to store up to 60 gigabytes of data – or the equivalent of "60 stacks of paper 85 feet high." The costs of reproducing this data, and having it sifted through by attorneys can be enormous. Add to this the lost man hours spent responding to questions about the documents produced. A properly structured Electronic Data Retention Policy minimizes these costs by ensuring that old data is deleted in a timely manner, while remaining in compliance with the legal requirements to preserve documents in certain cases.

Proper implementation of an Electronic Data Retention Plan requires the participation of three parties. First and foremost is the business itself. The business will need to estab-

lish the policies for retention and deletion, to set the priorities for cataloging data based on its specific needs and ability of its technology, and to implement and enforce compliance with the establish procedures. Proper and continued compliance with the enforcement procedures is vital under the new rules concerning litigation.

Second, is the collaboration with your legal advisor. Legal counsel should review the Electronic Data Retention Plan to ensure that it complies with the new rules. This includes ensuring that there are adequate procedures to prevent the deletion of information once litigation is reasonably anticipated. Watson Bennett has been a leader in this area, advising clients to establish and implement their Electronic Data Retention Plans previous to litigation and even previous to the recent amendments.

Lastly is the coordination of hardware and software needs with your IT professionals. By articulating your business' needs and sharing the suggestions of your legal advisors, these computer professionals are able to deliver a flexible and automated system that can meet your needs.

In conclusion, every business should evaluate its current policies regarding Electronic Data Storage and Deletion. If the policy is antiquated or non-existent, seek help. If the policy is not in writing, seek help. If the policy is not being followed, seek help. The issues related to ESI will only continue to grow, and if you wait until you are anticipating or in litigation the cost could be exorbitant. As with any aspect of technology, the environment changes rapidly. Be ahead of the curve and be ahead of your adversaries.

## ARE YOUR EMPLOYEE RECORDS AND LUNCH ROOM POSTERS UP TO DATE?

Making sure that your employee records are complete and up to date can save you time, money and aggravation in the long run.

A complete employment file should include the following:

- A completed Form I-9 with photocopies of supporting identification.
- Completed Federal Form W-4 and the equivalent State Form (for New York, Form IT-2104).
- Annual written evaluations of the employee.
- Written notation of significant work related incidents, and disciplinary matters.

The New York State Department of Labor routinely conducts audits of employment records, and employers can face fines if their records are missing or incomplete. In addition, routinely completed evaluations and reports of work related incidents can be valuable evidence in defending against wrongful termination, discrimination and similar work related claims.

Finally, you should verify that your employment law posters are up to date. The requirements have changed recently. Information on current Federal and State requirements can be obtained at:

[www.dol.gov/compliance/topics/posters.htm](http://www.dol.gov/compliance/topics/posters.htm)

and

[www.labor.state.ny.us/workerprotection/laborstandards/employer/posters.htm](http://www.labor.state.ny.us/workerprotection/laborstandards/employer/posters.htm).

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A MEMBER OF



**IN THIS ISSUE** we review several legal issues that will face most, if not all, businesses in the New Year.

- The need to document in writing your commission agreements with all inside and outside sales people. (Page 1)
- New requirements for the preservation of electronic data, including e-mails sent and received. (Page 2)
- Updated requirements for personnel files and postings. (Page 3)

Hopefully, these articles will help you make and keep some practical New Year's resolutions for your Business.

**HAPPY NEW YEAR FROM WATSON BENNETT!**