



The Michigan Sales Representative Act: Have You Reviewed Your Commission Agreements Recently?

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We have all heard stories about sales representatives and employer relationships gone awry. If that day comes, and a dispute over commissions arises, a business should have a clear, objective sales rep agreement to rely upon and not scribbles on a napkin. That's because the Michigan Sales Representative Commission Act (SRCA - MCL 600.2961) provides for triple damages, plus attorney fees, for unpaid commissions owed to a sales rep. The good news is with a little bit of planning and foresight, these damages can be avoided. Let's start by reviewing what the SRCA is, what risks it poses to businesses and then address how these risks can be mitigated.

The SRCA covers sales reps if they are employed or contracted by a "Principal" to sell tangible goods to customers and are paid a commission from the sales. Principals are individuals and legal entities that (i) manufacture, produce, import, sell or distribute a product in Michigan, or (ii) contract with a sales rep to solicit orders for, or sell, a product in Michigan. The statute applies when payment on an expected commission is due and the compensation the sales rep is entitled to receive is not collected.

WHEN ARE COMMISSION PAYMENTS DUE UNDER THE SRCA?

Commission payments are due in accordance with the terms of the parties' contract. If no due date is specified in the contract, then the history of the parties will control. If the parties have no prior history, then industry custom will determine when commission payments are due.

WHAT CAN A SALES REP RECOVER?

All commissions due at the time of termination of the sales rep agreement (whether written or oral) shall be paid within 45 days after the date of termination or the sales rep can bring suit. This is where things can get dicey for a business. Not only can the sales rep recover the commission due, but the SRCA provides that the business can be

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liable for two times the commission owed (up to \$100,000) as additional damages, plus attorney fees and court costs. The additional damages can be assessed if the business "intentionally failed to pay."

In *Peters v. Gunnell, Inc.*, the Michigan Court of Appeals interpreted the SRCA and held that "intentional" failure to pay did not require bad faith, only that the Principal purposefully withheld payment, irrespective of the reasons or state of mind.

ORAL AGREEMENTS AREN'T COVERED, ARE THEY?

Yes, they are. In *Ramirez v. International Business Machines*, the U.S. District Court for the Eastern District of Michigan applied the terms of the SRCA to disputes involving oral sales rep agreements. This was not the first court to reach this conclusion, but this 2011 decision is a fresh reminder that just because something wasn't written down doesn't mean it won't come back to bite you.

WHAT IF THE SALES REP IS HOLDING COMPANY PROPERTY, SUCH AS PRODUCT SAMPLES? CAN YOU OFF-SET COMMISSIONS OWED?

The *Peters v. Gunnell* court dealt with this issue, too. The court held that nothing in the SRCA allows a Principal to reduce, or set-off, a commission payment based on damages or expenses that might subsequently be owed by the sales rep to the Principal. The Principal would need to bring a separate claim to recover amounts due. The SRCA does not give the Principal an excuse to not pay the commission earned by the sales rep.

SO WHAT IS A PRINCIPAL TO DO?

The harsh penalties that the SRCA imposes on Principals can be avoided. While business people often bemoan the risk-averseness of their legal advisors, in the case of agreements with sales reps in Michigan (as well as other states with similar statutes), prudence and careful documentation is necessary. Always avoid oral and back-of-the-napkin agreements with sales reps. Work with your legal team to think through as many questions, uncertainties and contingencies as possible. A few issues to consider include:

1. How is a commission determined? Based on profits earned, revenues generated or what? Make it objective and clear to calculate.
2. When is a commission earned by a sales rep? For example, is a commission earned when a customer issues a purchase order, or only after payment has been made? What if payment is never made after delivery, or has to be returned?
3. How quickly must a commission be paid after a customer payment is received?
4. Is a sales rep entitled to commissions for sales after he quits or is terminated? If so, for how long?
5. How should set-off claims be dealt with?
6. Are there appropriate safeguards in place in a sales rep agreement to protect the company's customer relationships such as a covenant not to compete or a non-solicitation agreement?



These are just a few of the many issues that should be considered when entering into an agreement with a sales rep. The bottom-line is that such agreements should be as specific as possible. The more ambiguous an agreement is, the more likely it is that the provisions of the SRCA – with its harsh remedies – will come into play. To avoid paying triple commissions and attorney fees to a sales rep, address these issues up-front.

If you would like to discuss these issues in further detail or have other specific concerns, feel free to contact Andrew C. Vredenburg at 616-726-2234.