New York State Department of Labor
David A. Paterson, *Governor*
M. Patricia Smith, *Commissioner*

September 23, 2008

[redacted]

Re: Request for Opinion:
Commission Salesperson - Definition
File No.: RO-07-0126

Dear [redacted]

I have been asked to respond to your letter of November 26, 2007. Please accept my apology for the late response to your request. Your letter asks whether a person who is engaged in leasing rather than selling commercial space to tenants is still considered a "commission salesman" under Article 6 of the Labor Law.

Labor Law §190(6) states:

> 6. "Commission salesman" means any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions. The term "commission salesman" does not include an employee whose principal activity is of a supervisory, managerial, executive or administrative nature.

In interpreting this section of law to answer the question you've raised, we are guided by decisions of the New York Court of Appeals providing that the Labor Law should be read broadly in favor of worker protections (See, Red Hook Cold Storage Co. v. Department of Labor, 295 N.Y. 1 (1945)).

> The courts construe such statutes liberally in an endeavor to apply the Labor Law's protections where protection is needed and where the operations conducted are of the sort as to which the Legislature wished to protect employees (See, Surace v. Danna, 248 N.Y. 18, 21; Met. Life Ins. Co. v. Labor Relations Board, 280 N.Y. 194, 205). We should not force the Legislature, in its proper purpose of furnishing such protection in all appropriate situations, to continue

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> adding new and precise language to describe accurately and closely every particular special operation."

Pursuant to this, the phrase "selling of...services" should be read liberally in order to apply the protections of the Labor law to individuals engaged in the *leasing* of commercial space. Although the end result of the individual's activities may be an agreement for lease rather than sale, the activities engaged in to induce the long term lease of property are not substantially different from those of a person selling real estate. Moreover, to make such a distinction based upon sale vs. lease of property would, in essence, create a statutory exception for an entire segments of the real estate industry and also geographic areas where leasing rather than sale of real estate is the norm. We do not believe that was the intent behind this section of the Labor Law.

It is also interesting to note that 12 NYCRR §142-2.14(5) provides that an "outside salesperson means an individual who is customarily and predominantly engaged away from the premises of the employer and not at any fixed site and location for the purpose of: (i) making sales; or (ii) selling and delivering articles or goods; or (iii) obtaining orders or contracts for service or for the use of facilities." The clear import of section 142-2.14(5) is that the term "sales" should be read to include obtaining contracts for service and for the use of facilities. Therefore, the interpretation of §190(6) set forth above is consistent with other sections of regulation that cover similar activities.

For all the above reasons, the Department interprets the definition of "commission salesman" to include a person who is engaged in leasing commercial space to tenants. Therefore, individuals engaged in the leasing of commercial space must be paid commissions in the frequency set out in Labor Law §191(1)(c).

This opinion is based on the information provided in your letter of November 26, 2007. A different opinion might result if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel

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JGS:jc

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