Sold!
Sales Industry Employment 101

2019 Fall Forum
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Wage & Hour Issues

Presented by
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Wage and Hour Issues

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Fair Labor Standards Act

- Enterprise Coverage
  - Fair Labor Standards Act (FLSA) covers employers with at least 2 employees that (1) do $500k or more in annual sales; or (2) who participate in interstate commerce.
- Individual Coverage
  - FLSA covers employees who are engaged in interstate commerce.

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FLSA

- Requires that all non-exempt employees be paid at least the federal minimum wage of $7.25 per hour and be paid overtime wages for all hours worked over 40 hours per workweek.

FLSA Issues

1. Commissions
2. Offsets
3. Individual Liability under FLSA
4. FLSA Penalties
5. Erosion of “De Minimis” Rule

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FLSA Issues

Commissions

- The Utah Payment of Wages Act (UPWA) defines “wages” to include “amount due the employee for labor or services,” including amounts “fixed or ascertained on a . . . commission basis.” U.C.A. § 34-28-2(1)(i)
- The UPWA requires that employers pay out wages owing within 24-hours for terminated employees or at the next pay period for employees who resign. U.C.A. § 34-28-5(1)(a) and (2).
- Pro Tip: Always utilize compensation agreements with employees who earn commissions to protect yourselves against disputes involving unpaid commissions.

FLSA Issues

Compensation Agreements

- *Vander Veur v. Groove Entm't Techs.*, 2019 UT 64, ____ P.3d ____
- Opinion issued October 29, 2019.
- Majority held that the employee's compensation agreement's plain language restricted his ability to collect alleged unpaid commissions.
  - Agreement expressly stated that Employee was only entitled to commissions once the system was *installed*, and when he was terminated, he had six accounts he had procured that were not installed until after his termination. Majority held the plain language of the agreement precluded recovery of commissions because such a remedy would contradict the terms of the agreement.
  - Minority – Justices Pearce and Himonas – dissented, stating that the court can provide a remedy for an alleged breach of contract, even if such remedy appears to contradict the agreement's terms.

Takeaway: If a compensation agreement expressly dictates when commissions are earned, Utah courts will defer to such plain language. So, use compensation agreements!

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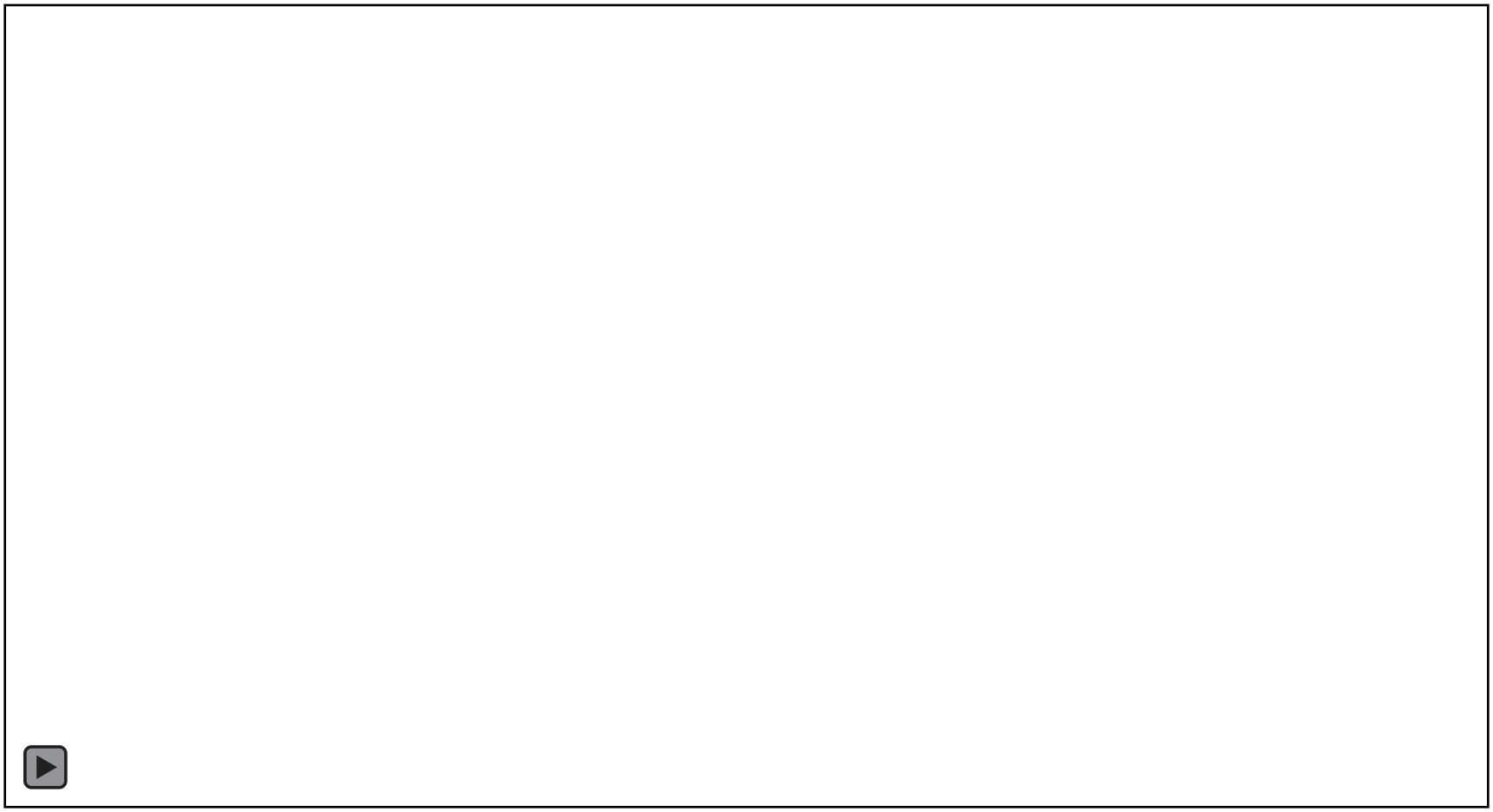
How Not to Deal with Wage Issues



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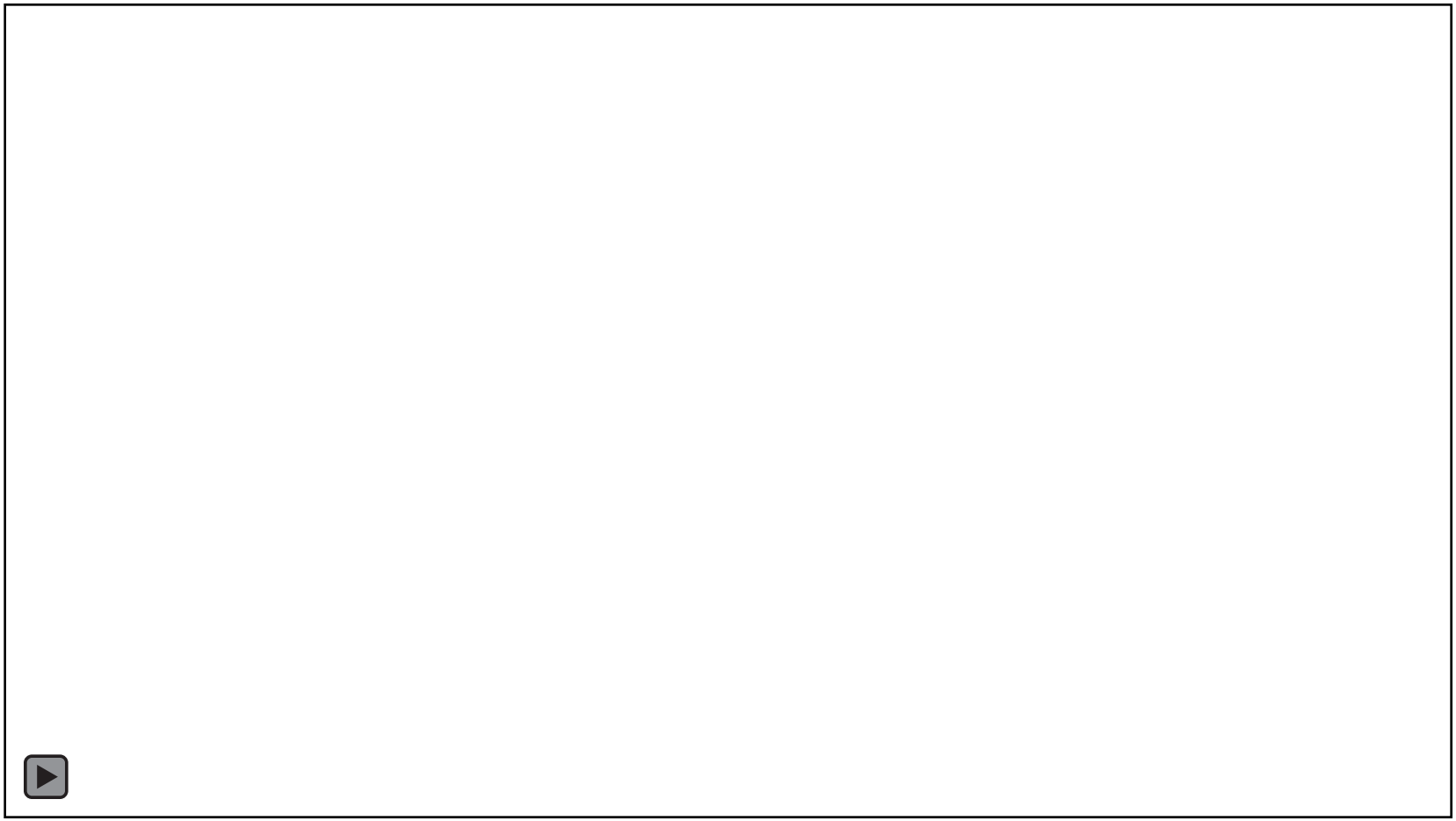
How Not to Deal with Wage Issues



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FLSA Offsets

Offsets

- Employers cannot withhold an employee's wages unless:
  - Required by court order or federal/state law;
  - Employee expressly authorizes the withholding in writing;
  - Employer presents evidence that in the opinion of a hearing officer or ALJ would warrant an offset; or
  - Employer withholds wages as contributions to a contract or plan.

U.C.A. § 34-28-3(6).

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FSLA Offsets

"Employer presents evidence that in the opinion of a hearing officer or ALJ would warrant an offset."

- *Utley v. Mill Man Steel, Inc.*, 2015 UT 75, 357 P.3d 992
  - Utah Supreme Court held that an employer may withhold wages as an offset if it believes it has evidence that an offset is appropriate and will present that evidence to a hearing officer or ALJ.
  - Employee fired for misappropriation of company's steel – company withheld wages to offset misappropriation amount – employee sued alleging the offset was improper because the statute requires that an employer receive a hearing officer's or ALJ's opinion *before* the withholding, not *after* it.

(continued)…

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FLSA Offsets

- The Utah Supreme Court interpreted the offset statute "to allow an employer . . . to seek a post-withholding opinion of a court or administrate law judge that an offset was warranted." *Id.* at ¶ 2.
- However, the employer takes a risk that if the ALJ or hearing officer rules against it and "the offset is not found to be warranted, the employer will be subject to liability and penalties under the UPWA." *Id.*

Takeaway: An employer can withhold wages as an offset, but the employer runs the risk of the withholding being in appropriate and then being subject to penalties for the withholding.

Individual Liability under FLSA

- An employee may sue his or her company for violations of the FLSA, but may also sue individuals within the company for the same violations.

- Tenth Circuit has not issued an opinion on this topic yet, but other circuits have, allowing for individual liability under the FLSA if certain factors are met.

Individual Liability under FLSA

Economic Realities Test

- Differs slightly by circuit, but essentially analyzes:
  1. Individual's power to hire and fire employees.
  2. Supervision or control of employee work schedules or conditions of employment.
  3. Determination of the rate or method of payment.
  4. Maintenance of employee records.

FLSA Individual Liability Across Circuits

- First Circuit: *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 48 (1st Cir. 2013)
  - "Operational control over significant aspects of the business"
- Second Circuit: *Irizarry v. Catsimatidis*, 722 F.3d 99, 117 (2d Cir. 2013)
  - "[H]is active exercise of overall control over the company, his ultimate responsibility for the plaintiffs' wages, his supervision of managerial employees, and his actions in individual stores – demonstrate that he was an 'employer' for purposes of the FLSA."
- Fifth Circuit: *Gray v. Powers*, 673 F.3d 352, 355 (5th Cir. 2012)
  - The Fifth Circuit analyzed (1) an individual's power to hire and fire employees, (2) supervision or control of employee work schedules or conditions of employment, (3) determination of the rate or method of payment, and (4) maintenance of employee records.

FLSA Individual Liability Across Circuits

- Sixth Circuit: *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991)
  - Whether individual "has operational control of significant aspects of the corporation's day to day functions" represented the most important factor in finding individual liability.
- Ninth Circuit: *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009) (emphasis added)
  - "Where an individual exercises control over the nature and structure of the employment relationship or economic control over the relationship, that individual is an employer within the meaning of the Act, and is subject to liability." Examples of such control include where the officers had a "***significant ownership interest*** with operational control of significant aspects of the corporation's day-to-day functions; the power to hire and fire employees; the power to determine salaries; and the responsibility to maintain employment records."
  - Ninth Circuit seemingly requires that an individual have "significant ownership interest" in the company to allow for individual liability, whereas other circuits do not have the same requirement.

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FLSA Individual Liability Across Circuits

Eleventh Circuit: *Patel v. Wargo,* 803 F.2d 632, 636 (11th Cir. 1986), affirmed by Alvarez *Perez v. Sanford-Orland Kennel Club, Inc.*, 515 F.3d 1150, 1161 (11th Cir. 2008).

- "Operational control" is key to determining individual liability and that *actual control* is necessary to incur liability, not just the *authority* to control: "unexercised authority is insufficient to establish liability as an employer" under the FLSA.
- Eleventh Circuit held that the *authority* to satisfy the factors is insufficient, but the individual must have actually *acted* to satisfy the factors to incur individual liability.

FLSA Penalties

- Penalties
  - $2,014 per violation for “repeated[] or willful[] violat[ions]” of minimum wage or overtime laws. 29 C.F.R. § 578.3(a)
- Liquidated Damages
  - Equal to the amount of unpaid wages or overtime. 29 U.S.C.A. § 216(b)
- Attorneys’ Fees and Costs
  - Courts may “allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” 29 U.S.C.A. § 216(b)

FLSA De Minimis Rule

Erosion of "De Minimis" Rule

- The FLSA states that "infrequent and insignificant periods of time beyond the scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded" because "such periods of time are de minimis[.]" U.S. Dept. of Labor, *FLSA Hours Worked Advisor.*
- Courts are slowly eroding this rule.
- *Troester v. Starbucks Corp.*, 421 P.3d 1114 (Cal. 2018).
  - California Supreme Court held that the time spent walking out of the Starbucks store after clocking out, locking the door, and occasionally letting employees back in to retrieve items was *not* de minimis and must be compensated.

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Misclassification of Workers

- Employee vs. independent contractor
- Courts utilize two tests to determine the status of a worker:
    1. U.S. Dept. of Labor's Economic Realities Test
    2. IRS Test

DOL Economic Realities Test

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.
- The nature and degree of control by the principal.
- The alleged contractor's opportunities for profit and loss.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation.

IRS Test

- Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- Financial: Are the business aspects of the worker's job controlled by the payer? (These include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- Type of Relationship: Are there written contracts or employee type benefits (i.e., pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

Thank You!

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Exemptions for Sales Employees

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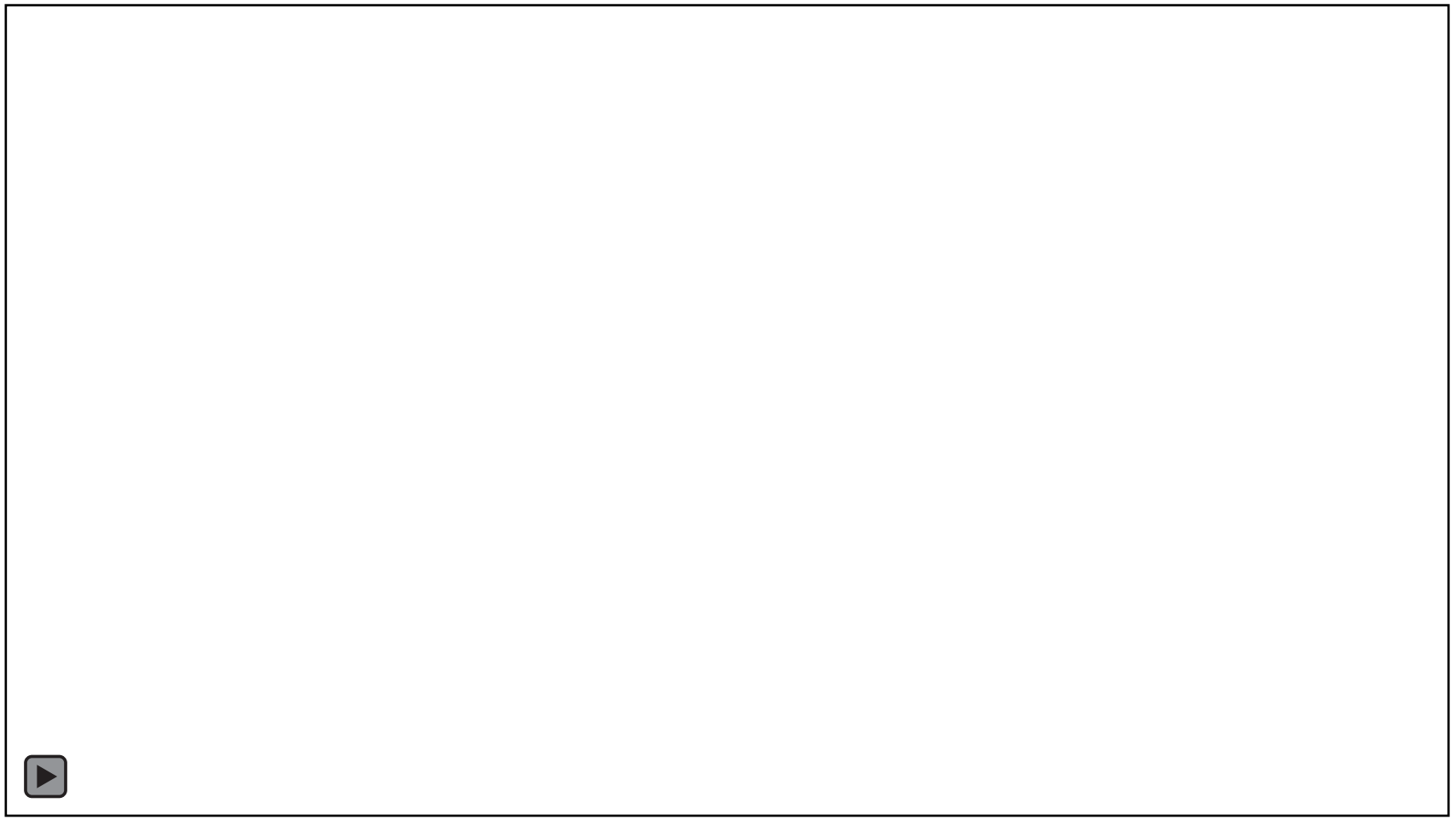
Motivational Video



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D2D Hard Facts

- Expensive and sometimes inefficient
- 50-100 knocks a day with 1-2 completed sales average
- More than 15.1 million people in direct sales = overwhelmed and distrustful consumer
- Sales employees are typically young in the 18-25 year range

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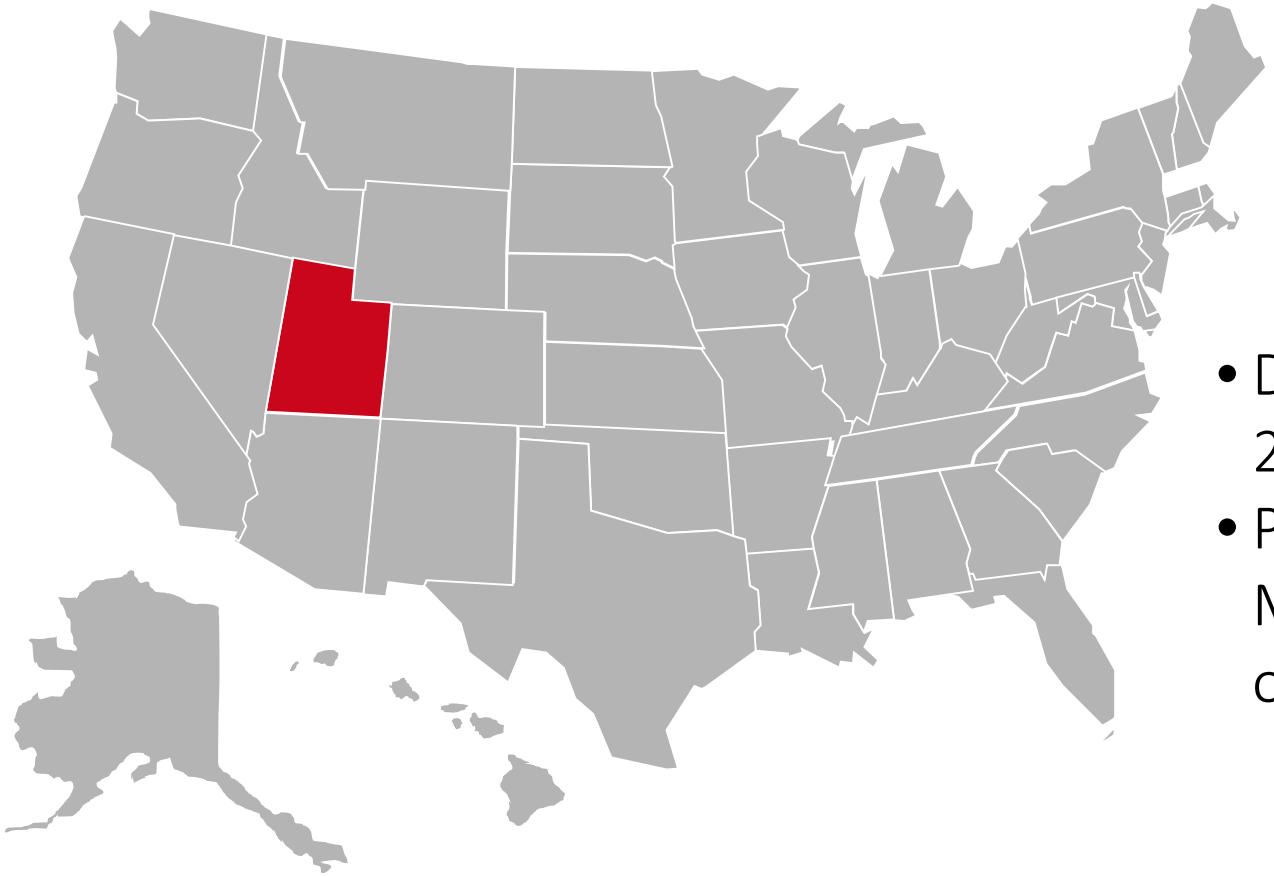
Utah and Direct Sales



- Direct Sales is the 2nd biggest industry.
- Per capita, has more MLMs than any other state.

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Exemptions for Sales Employees

- FLSA Outside Sales Exemption
- IRS Direct Seller Exemption

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FLSA Outside Sales Exemption

- Section 13(a)(1) provides an exemption from minimum wage and overtime.
- Requirements:
  (1) The employee's primary duty must be sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

  (2) The employee must be customarily and regularly engaged away from the employer's place or places of business.
- FLSA salary requirements do not apply.

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Primary Duty Requirement

"I got three orders today, 'get lost', 'put a sock in it' and 'drop dead'!"

- Sales must be the principal, main major or most important duty that the employee performs. 29 CFR § 541.700
- Courts will look at character of employee's job as a whole, not necessarily amount of time spent selling.
- Work performed incidental to or in conjunction with sales is exempt work.

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Primary Duty Requirement

Factors to Consider:

1. Relative importance of outside sales duties vs. non-outside sales duties.
2. Amount of time spent performing non-exempt work.
3. Employee's relative freedom from direct supervision.
4. Relationship between employee's salary and the wages paid to other employees for the kind of non-exempt work performed by the employee.

Primary Duty Requirement

True or False

Recruiting sales representatives is not making sales and automatically disqualifies the recruiter from the exemption.

True

False 

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Work Away From Place of Business

- "Place of Business" = Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales even though the employer is not the owner or tenant of the property. 29 C.F.R. § 541.502.
- *Freeman v. Kaplan, Inc.*, 132 F. Supp. 3d 1002 (N.D. Ill. 2015). A law school was considered Kaplan test prep's "place of business" where it rented space from the law school to sell its products and maintains sales employees at the school.

Work Away From Place of Business

- Burden of proof: employer must prove by a preponderance of the evidence that sales employee qualified for outside sales exemption.
- Few hours each day spent performing paperwork in the office was incidental to sales work.
- Butler was hired for his sales experience and connections, often visited current an prospective clients away from office, with minimal supervision, and paid in form of commissions.

Does the Exemption Apply?

For his first week of training for his new sales role, Mack is required to attend 3-hour long seminars each day to learn about the products he will be selling and to engage in role plays to practice his sales pitch. For his second week of training, Mack will knock doors with Jason, an experienced salesman.

Is Mack's training exempt under the FLSA outside Sales Exemption?

Training & The Outside Sales Exemption

- Does NOT apply to trainees who are not actually performing the duties of an outside sales employee. 29 CFR § 541.705.
- Attending training classes or seminars or participating in practice sessions learning the company's product or policies is not exempt work.
- If trainee accompanies an experienced outside salesperson while actually making sales, this training is exempt.

"Today's lecture is about 'Inertia Selling'."

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Direct Seller Exemption

- Direct sellers are statutory non-employees for federal tax purposes.
- Products vs. Services.

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26 U.S.C. § 3508

Direct seller is a person:

1. Engaged in selling consumer products in the home or otherwise than in a permanent retail establishment;
2. Substantially all the renumeration for performance of the services is directly related to sales or other output rather than the number of hours worked; and
3. The services performed are pursuant to a written contract that provides the person will not be treated as an employee with respect to such services for Federal tax purposes.

Permanent Retail Establishment

- Any retail business operating in a structure or facility that remains stationary for a substantial period of time to which consumers go to purchase consumer goods.
- Ordinarily, portable or mobile structures, facilities, and equipment do NOT constitute permanent retail establishments.
- Does NOT apply to sales made at permanent retail establishments. Can only work very little at permanent establishment w/o losing exemption.

Direct Work vs. Retail Work

True or False

Sales Employees can make sales in a permanent retail establishment and still retain the direct seller exemption.

True 

False

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Direct Seller Renumeration

Commissions

Bonuses

Overrides

Prizes, awards and gifts received for meeting sales quotas

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Confessions of Judgment

- Utah Code §78B-22-102
  - Void if executed on or after May 14, 2019
  - Valid only if after a default giving rise to an action in which the judgment under the agreement/stipulation is to be confessed.

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Agreement Best Practices

- MUST include provision that seller is a statutory non-employee for Federal tax purposes.
- Specify where and what duties the sales employee will perform.

- Clarify that any duties other than outside sales (paperwork, phone calls, etc.) are incidental to sales work.
- Include a class action waiver.
- No COJs

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Thank You!

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Restrictive Covenants and the SRCPA

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Why Have a Non-Compete?

Protect company interests such as:

- Trade secrets;
- Business good will;
- Extraordinary investment in training or education of employees.

Sources: *Sys. Concepts, Inc. v. Dixon,* 669 P.2d 421, 426 (Utah 1983); *Robbins v. Finlay,* 645 P.2d 623, 627–28 (Utah 1982)

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Why Have a Non-Compete?

What business data do Utah employees have access to?

Sample Size	2,000
Valid Cases	2,000
Secret formulas or processes	366
Technical data	987
Proprietary information	793
Customer or vendor lists	1,089
Pricing information	1,010
Sales strategies	621
Marketing materials	808
Business plans	679
None of the above	350

Source: Salt Lake Chamber of Commerce 2016-17 Non-Compete Study, Agreement Research Employee Survey Crosstab Report, available at https://slchamber.com/wp-content/uploads/2017/02/Utah-Non-compete-Agreement-Research-Employee-Survey-Crosstab-Report-2017-02.pdf

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Post-Employment Restrictions Act

- Restricts length of non-competes entered "on or after May 10, 2016" to a "period of [no] more than one year" from the day of the employee's separation from the company. Common-law requirements also still apply to non-competes.
  UTAH CODE ANN. § 34-51-201.
- "Post-Employment restrictive covenant" includes written or oral agreements "under which the employee agrees that the employee, either alone or as an employee of another person, will not compete with the employer" by providing products, processes, or services that are similar to the employer's . . ."
  UTAH CODE ANN. § 34-51-102(4)(a).
- "Post-employment restrictive covenants" do not include non-solicitation agreements, non-disclosure agreements, or confidentiality agreements.
  UTAH CODE ANN. § 34-51-102(4)(b).

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Exceptions to Post-Employment Restrictions Act

Severance

- The Act "does not prohibit a reasonable severance agreement mutually and freely agreed upon in good faith . . . That includes a post-employment restrictive covenant." UTAH CODE ANN. § 34-51-202(1).
- Severance Agreements remain subject to the common law. *Id.*

Business Exception

- The Act "does not prohibit a post-employment restrictive covenant related to or arising out of the sale of a business, if the individual subject to the restrictive covenant receives value related to the sale of the business." UTAH CODE ANN. § 34-51-202(2).

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Common Law Requirements

Covenants Not to Compete:

- Must be “supported by consideration;”
- May not be negotiated in bad faith;
- Must be “necessary to protect the goodwill of the business;”
- Must place only reasonable restrictions “as to time and area;”
- Services rendered must be “special, unique, or extraordinary.”

Elec. Distributors, Inc. v. SFR, Inc., 166 F.3d 1074, 1084 (10th Cir. 1999) (citing *System Concepts v. Dixon*, 669 P. 2d 421, 425-26 (Utah 1983); *Allen v. Rose Park Pharmacy,* 237 P.2d 823, 828 (Utah 1951); *Robbins v. Finlay,* 645 P.2d 623, 627-28 (Utah 1982)).

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Reasonable Time Restrictions in Sales?

- Agreements entered after **May 10, 2016** must be limited to one-year or they are **void** (unless an exception applies).
- *System Concepts v. Dixon*, 669 P. 2d 421 (Utah 1983) (finding two-year agreement reasonable time restriction).
- *Elec. Distributors, Inc. v. SFR, Inc.*, 166 F.3d 1074, 1085 (10th Cir. 1999) (finding Utah agreement for the sale of a business which imposed a seven-year time restriction on competition reasonable).

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Common Law Requirements

"The reasonableness of the restraints in a restrictive covenant is determined on a case-by-case basis, taking into account the particular facts and circumstances surrounding the case and the subject covenant." "Of primary importance in the determination of reasonableness are the **location and nature of the employer's clientele**."

System Concepts, 669 P.2d at 427 (emphasis added).

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Reasonable Area Restrictions in Sales?

- *System Concepts v. Dixon*, 669 P. 2d 421 (Utah 1983) (finding two-year agreement that did not state a specific geographic region but was "impliedly limited to the area in which [employer] sought to market" and limited National Sales Director's ability to compete with specific competitors reasonable);
- *Elec. Distributors, Inc. v. SFR, Inc.,* 166 F.3d 1074, 1085 (10th Cir. 1999) (finding Utah agreement imposing state-wide area restriction reasonable where employer had customers throughout the state);
- *Cont'l Grp., Inc. v. Kinsley,* 422 F. Supp. 838, 843 (D. Conn. 1976) (finding regional non-compete covering the United States, Canada, Western Europe, and Japan because the former employer's product was being developed in each of those areas reasonable);

(continued)…

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Reasonable Area Restrictions in Sales?

- *Universal Engraving, Inc. v. Duarte,* 519 F. Supp. 2d 1140 (D. Kan. 2007) (applying Kansas law) (finding worldwide limitation on competition in covenant not to compete reasonable where subject of the covenant was involved in customer relations and performed services worldwide, but finding five year time restriction overbroad);
- *Estee Lauder Companies Inc. v. Batra,* 430 F. Supp. 2d 158 (S.D. N.Y. 2006) (applying New York law) (finding worldwide geographic limitation of noncompete provision contained within employment contract with cosmetic manufacturer was reasonable where employee had worldwide responsibility for two company brands).

Common Law Requirements

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Who Should Sign a Non-Compete

- Key Employees who rendered special, unique, or extraordinary services;
- High ranking employees;
- Employees who are privy to trade secrets;
- VP of Sales;
- Sales people who have gained extraordinary level of industry-specific training or knowledge;
- Sales people who interact with key customers.

Independent Contractors and Non-Competes

Post-Employment Restrictions Act applicable to **Employees.**

- *See* Utah Code Ann. § 34-51-102 (defining restrictive covenants).

Theoretically, not applicable to Independent Contractors; but still subject to the **employment test.**

- Generally considered employee UNLESS:
  - Individual "customarily engaged in an independently established trade, occupation, profession, or business;" and
  - Amount of control or direction employer exerts over the means of performance of the services (in fact and under contract). Utah Code Ann. § 35A-4-204;

See Petro-Hunt, LLC v. Dep't of Workforce Servs., Div. of Adjudication, 2008 UT App 391, ¶ ¶ 20-31, 197 P.3d 107 (determining landman was an employee rather than an independent contractor where landman had confidentiality and non-compete agreements with client company, did not provide work for any other clients, did not have a separate place of business, performed work duties in a company office during normal working hours).

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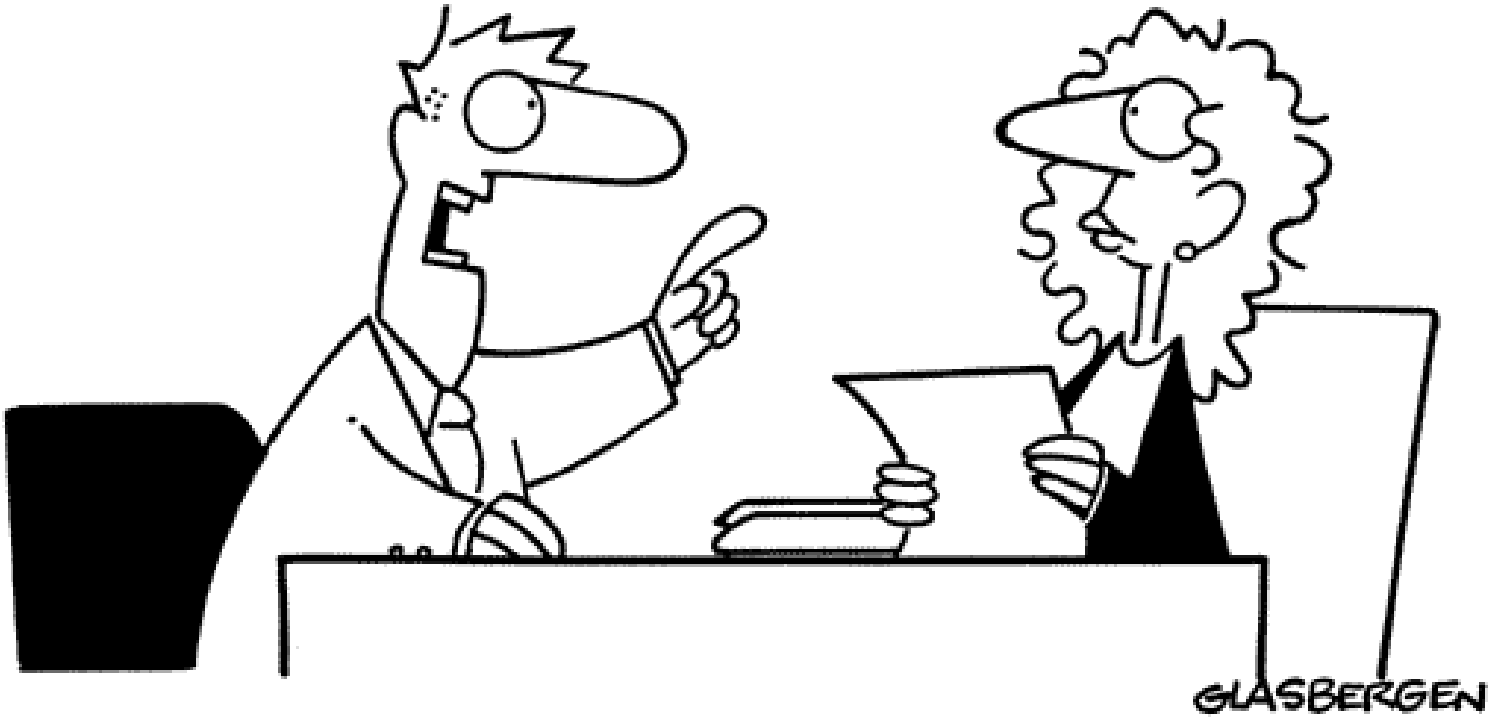

"If you hire me to be your new salesman, you'll get a complete money-back guarantee! And if you act now, you'll also receive a set of amazing ginsu knives — a $99 value — absolutely free! But wait, there's more!"

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Sales Representative Commission Payment Act

Utah Code Ann. §§ 34-44-101 through 302

Overview

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Sales Representative Commission Payment Act

- "Sales Representative" is a person who enters a business relationship with a principal to "solicit orders" for products or services, and is compensated "in whole or in part, by commission." Utah Code Ann. § 34-44-102(5)(a).
- **Only** applies to non-employees. Utah Code Ann. § 34-44-102(5)(b).
- Business relationship must be written and explain how commissions are computed and paid;
- Allows liability up to **three times unpaid commission, attorney fees, and costs**;
- Acceptance of partial commission payment does not release additional commission claims.

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Sales Representative Commission Payment Act

Commission Payment Schedule After Agreement Termination

- Within **30 days of termination** if due on the day of termination; and
- Within **14 days** of the day commission is due if due after termination.

Source: Utah Code Ann. § 34-44-202.

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Sales Representative Commission Payment Act

- Not applicable to employees;
- Not applicable to employees classified as a "Direct Seller" for income tax purposes;
- IRS guidelines for determining employee status are inapplicable to the SRCPA.

Source: Utah Code Ann. § 34-44-301; *Foster v. McNeff,* No. 130400710, 2014 WL 12498018, at *4 (D. Utah Oct. 10, 2014); Memorandum Decision and Order at 10, *Martinez-Trumm v. Citywide Home Loans,* No. 2:18CV103DAK (D. Utah Jun. 19, 2018).

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Best Practices

- Revise non-competes moving forward to comply with the one-year time period;
- Seek negotiated post-severance agreements where possible and beneficial;
- Ensure geographic restraints are reasonable;
- Review employee job descriptions to determine whether they are sufficiently unique to warrant a non-compete;
- Consider employee development plans that invest in training for special job-related skills;
- Review the employment status of sales employees, commission plans, and pay schedules.

Questions?

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Thank You!

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