

DISCLAIMER:

The information provided during the course of this seminar and in the written responses below are for informational purposes only and are not to be construed as legal advice. Attendance at the seminar or use and access of the information provided does not create an attorney-client relationship.

Member Questions:

Health or Safety Questions:

- **Do I have to wear a mask if I have medical conditions such as asthma?**

To determine whether you are obligated to wear a mask, sales reps should consult applicable state, county and local executive orders, regulations and guidance, which may vary by state, and may provide for exceptions to mandatory mask requirements under these circumstances. In the employment context, an employee with a medical condition such as asthma can usually request a reasonable accommodation to an employer's mandatory mask requirement in accordance with the Americans with Disabilities Act. Independent sales representatives are typically not considered employees of manufacturers, so they will not have a right to request a reasonable accommodation to a manufacturer's mask requirement. However, certain state laws extend similar protections to independent contractors.

- **What can you do about un-educated, ridiculous people who can't follow rules?**

Maybe bear in mind what Marilyn Monroe said: "It's better to be absolutely ridiculous than absolutely boring."

PPP, PUA, Tax Questions:

- **How can I make sure my PPP Loan is forgiven?**

In order to have your Payroll Protection Program Loan ("PPP Loan") forgiven, you must apply for forgiveness within ten (10) months of the last day of your covered period of your loan. The last day of your covered period is generally going to be 24 weeks from the date your loan is disbursed (the initial round of PPP was for only 8 weeks, but business that received that loan may opt for a 24 week covered period), but in no case may it be later than December 31, 2020. If you are not sure of your distribution date and the last day of your covered period, contact your lender.

You must apply for forgiveness through the lender that issued your business its PPP loan. The SBA has issued their loan forgiveness application however your lender may not yet have issued theirs. Check in regularly with your lender if they do not yet have an application; it's better to compile your information early than late.

As a reminder, a PPP loan should be forgiven if the proceeds were used over the covered period (either 8 or 24 weeks) for one or more qualified expenses. Of the PPP funds used, at least sixty (60%) must be used for payroll (the remainder may go to rent, mortgage expense, etc.) and you must have the same number of employees at the end of the 2020 as you did on February 15, 2020. There are some exceptions to the employment requirement, namely if you can prove COVID-19 interrupted your business to the point where even with the PPP loans you could not rehire, or you made reasonable attempts to rehire but were unable to find a qualified person.

The best advice we can give is to keep detailed records of your PPP loan disbursements. Ideally you held your PPP funds in a separate operating account and can therefore easily track what the PPP funds were used for and when. If not, work with your bookkeeper or accountant to provide the most accurate records possible.

The record keeping and presentation of the data is of paramount importance because you may only get one chance at loan forgiveness. Your lender has 60 days to review your forgiveness application. If they deny it in full, you have 30 days to appeal to the SBA. If your lender approves your loan for forgiveness, but the SBA denies it in full, you also have 30 days to appeal. However, if your lender approves part of your PPP loan for forgiveness and denies part, and then the SBA approves the forgiven part, you have no appeal rights. Because of the no appeal rights middle-ground option, treat the forgiveness application as your first and only bite of the proverbial apple.

Since you have ten (10) months from the end of your covered period to apply for forgiveness, and you may not receive a right to appeal the decision on forgiveness, it is in your best interest to submit a thorough and well-reviewed forgiveness application.

- **How are taxes handled for PUA for independent contractors?**

PUA (Pandemic Unemployment Assistance) payment is no different than other forms of unemployment, in that it is considered ordinary taxable income. You will receive a Form 1099-G and need to report the amounts on your 2020 1040 tax return.

- **How do I find out when the due date is for applying for forgiveness of PPP? Will the bank that I received it through be sending me something?**

See the answer to the first question. Your due date for PPP loan forgiveness is ten (10) months from the last day of your covered period, which is either 8 or 24 weeks from the date the PPP funds were distributed. Again, speak with your lender if you are unsure of your precise PPP disbursement date. Do not rely on your lender to notify you that it is time for you to apply for loan forgiveness.

Legal Questions

- **How the California law that defines what an independent sales rep is and how that could affect us in the future in other states. I have 12 reps that work for me as independent**

contractors, only 2 of them are set up as an LLC, the rest are not. Should I ask all the reps to become an LLC?

California has a particularly strong sales rep statute, but several states do not. Consideration should first be given to what state's law will apply, and to the relative merits of the various states' rep statutes.

Generally, the employees of a rep firm should make their own decisions about how best to protect themselves and organize.

- **Can reps sue manufacturers that fire reps for no reasons?**

Most rep contracts enable principals to terminate an independent rep for any reason or no reason. As a general matter, what principals cannot do is terminate in bad faith (such as to avoid a commission obligation). In most cases, even if termination is ill-advised, it is contractual. The focus should be on ensuring that all commissions due get paid, including applicable post-termination commissions.

- **Manufacturers hire Reps as independent contractors - yet treat us as though we are their slaves..... and 100% employees of theirs - the answer seems obvious - but do we have any leverage to stand on???? It seems we either acquiesce or get replaced is their attitude. They are willing to pay us 1/4 what we need to survive but want and demand 100% of our time.....it isn't physically or financially possible. I've never been a union supporter really - but I'm starting to see the rationale behind them.**

In many situations, this question summarizes the life of a rep. Look for fairer-minded principals or consider asserting yourself when you have the most leverage – before signing the rep contract.

- **What is the current status of representatives as independent contractors and factories? Do 1099 have legal rights?**

The relationship between independent contractors and manufacturers has legal implications that arise in a variety of different contexts, including (i) tax implications if independent contractors are misclassified as 1099 workers as opposed to W-2 employees, (ii) wage and hour implications if an individual is incorrectly treated as an independent contractor as opposed to an employee, in which case the employee may be subject to protection under federal and state wage and hour laws, minimum wage and overtime requirements, and other protections traditionally afforded only to employees (such as anti-discrimination protections under federal and state laws), (iii) entitlement to unemployment compensation, whether due to misclassification, or expanded unemployment benefits under recent federal legislation extending unemployment benefits to bona-fide independent contractors due to the COVID-19 pandemic.

Whether an independent contractor is properly classified as a contractor versus an employer is determined by looking at the specific criteria and standard set forth by the applicable law. For example, the standards used by the IRS, unemployment agencies and wage and hour laws are not identical; however, many of the central criteria are still used in most instances. Specifically, the most important criteria for satisfying the definition of an independent contractor under most legal tests are the following:

1. The worker is free from control or direction in how the work is performed under the contract of service.
2. The service is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed.
3. The individual is customarily engaged in an independent trade, occupation, profession, or business.

In contrast, an employer-employee relationship may be shown if the employer:

1. Chooses when, where, and how the worker performs services.
2. Provides facilities, equipment, tools and supplies.
3. Directly supervises the services.
4. Sets the hours of work.
5. Requires exclusive services (an individual cannot work for competitors while working for the employer).
6. Sets the rate of pay.
7. Requires attendance at meetings or training sessions.
8. Asks for oral or written reports.
9. Reserves the right to review and approve the work product.
10. Evaluates job performance.
11. Requires prior permission for absences.
12. Has the right to hire and fire.

The mere fact that a contract with manufacturer describes the sales rep as an independent contractor does not resolve the issue, and the Courts or applicable government agency will ordinarily still consider its own factors and criteria to make a determination on its own.

- **What legal rights does a Independent Rep have if Terminated by Factory.**

The starting point when reps get terminated is to consider the terms of the contract with the factory, written or oral. Rights upon termination can be governed by what (if anything) the parties agreed upon in the event of a termination.

We often say that a loose, oral contract can prove better for a rep than a bad written contract, so if no written contract exists, that's not necessarily a bad thing. Depending on the reasons for termination (e.g., if termination was effected solely to avoid a commission obligation), and depending on the factory's willingness to pay post-termination commissions for sales procured by the rep pre-termination, significant relief may be available.

A host of other legal or equitable remedies may be available as well, but no one-size-fits-all approach applies to terminations. They are case-specific, and consultation with experienced legal counsel is recommended.