

When Reps Are Fired, Part I: Post-Termination Options

By Steven Mitchell Sack

Until recently, reps had few options to assert when they were fired. This was due to a legal principle known as the "employment at will" doctrine, which was generally applied throughout the U.S.

Under this rule of law, those who hired reps (and employees) at will were free to fire them at any time, with or without cause, and without notice (unless stated in an agreement). However, there has been a gradual erosion of the "employment-at-will" doctrine in some areas.

Exceptions to the rule

Some states have enacted public policy exceptions which make it illegal to fire workers who attend jury duty or military service, and some courts have ruled that statements in company manuals, handbooks and applications constitute implied contracts.

A few states now also recognize the obligation of companies to deal in fairness and good faith with long-time workers. This means, for example, that they are prohibited from firing reps or employees in retaliation when an individual tattles on abuses of authority (i.e. whistle-blowing) or for denying individuals an economic benefit.

To note, one salesperson with forty years of service claimed that he was fired so his company could avoid paying the commissions that he was due on a \$5 million sale. A Massachusetts court found his claims to be true and awarded him substantial money.

Similarly, another sales employee was fired after working for fourteen years without a written contract or job security. A court ruled that the company fired him merely to deprive him of the vesting of valuable pension rights that he would have earned in his fifteenth year of service, awarding the employee \$75,000 in damages.

Typically, the duty of employers to act in good faith and deal fairly extends only to cases where the employee or sales rep has worked for many years, or where a person is plainly fired right before he/she is supposed to receive a large financial benefit. However, many states still do not recognize this legal cause of action.

In those that do, reps are advised to consider utilizing the power of such laws. In one recent case, the Montana Supreme Court reasoned that the covenant of good faith and fair dealing is a duty imposed by law. The court upheld a \$50,000 jury award of punitive damages, more than 25 times the compensatory damage award, because the employer promised to write a favorable letter of recommendation in exchange for an employee's resignation. Despite such promises, the employer delivered a letter of recommendation stating only the complainant's dates of employment. Additionally, the employer returned only a copy of the letter of resignation, despite the employee's request for the original. These actions, the court found, justified the jury's finding of "fraud, oppression or malice."

How it affects reps

However, not all long-time reps are entitled to such protection, particularly if the dismissal is for a good reason (i.e. poor sales). In such a case, the fact that you have worked for the firm for a substantial time, or are eligible for a substantial benefit, may not make the firing illegal.

When representing rep clients who have been fired, lawyers often try to rely on this "good faith and fair dealing" theory to recover greater benefits and damages. Often, when blanket contracts or long-term commitments have been consummated and the rep is fired shortly thereafter, this argument is

helpful in recovering additional commissions for a period of time after termination. If you are fired after building a territory, do not automatically accept that "there is nothing that can be done."

Recognize that although the law varies throughout the U.S. and that each case warrants special attention based upon its particular facts and circumstances, this legal cause of action, and others may be used to recover additional money on your behalf.

The quantum merit theory

This is another theory (also known as unjust enrichment) that may be helpful for reps who believe that they have been fired unfairly. Some juries are awarding large amounts of money to salespeople as compensation for residual commissions when they are terminated unfairly, or when companies convert large, established accounts into house accounts without the rep's approval, forcing them to resign.

In addition, some reps may be able to use this theory to recover money if they perform services for a short term and are suddenly fired, or if they no longer represent a company but are requested to do additional work for which they should be paid, but aren't.

In one recent case, a salesperson was awarded money for residual sales. In the expectation that he would be offered "a piece of the business," he performed services for a newly-formed principal

To recover compensation using the unjust enrichment theory, you must be able to prove the following four elements in court:

1. You did something and/or expended money that benefitted your principal.
2. You did this expecting to be paid for your services.
3. You were able to perform these tasks and did not volunteer your services, and
4. It would be unfair to have the principal retain the value of these services and not pay for them.

by designing a product and locating purchasers. He was offered a smaller percentage of the stock than he would have liked, and didn't accept this as compensation. He sued the company to recover residual commissions for the reasonable value of his services. The court's ruling (under an unjust enrichment theory) that the rep was entitled to a commission rate of five percent of all sales from the design for a period of two years amounted to a substantial sum of money.

In essence, the theory of unjust enrichment sometimes corrects abuses that are inherent in the principal-rep relationship. Reps are recovering commissions and other monetary damages under this theory without relying on the contract that was entered into between the parties, and sometimes can obtain a remedy even if no contract existed.

In a recent case, a rep was terminated suddenly after a twenty-year working relationship. During this time, the rep increased sales in his territory from

a small sum to the point where the rep was earning in excess of \$200,000 in commission annually — more than the principal's president!

The firm requested compensation for its continuous, loyal, and future-profitable service. However, the company defended its right to terminate the rep at will since there was nothing in writing prohibiting this. A lawsuit was filed by the rep in Federal Court in Detroit, based in part on the theory of unjust enrichment.

The manufacturer was headquartered in New Jersey, perhaps making the expense of traveling and the need to hire counsel in another state favor the rep. After several months of legal maneuvering and negotiating, the rep was able to gain a settlement of \$91,445.

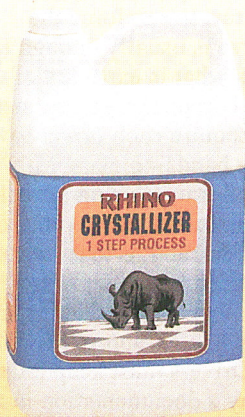
Using this theory is certainly not foolproof. However, salespeople are gaining additional legal protection from case decisions, legislation and other growing trends. Some states are

allowing reps to recover ongoing residual commissions based on the tort of abusive discharge and the implied covenant of good faith and fair dealing owed to long-term sales reps.

If you reside or maintain a principal office in a state that recognizes these laws, you are increasing the chances of obtaining post-severance compensation merely by threatening to file a lawsuit against a former company. Such a settlement might include, for example, being paid on re-orders for a specified period of time, or recovering commissions from ongoing blanket orders that were previously given by your customers.

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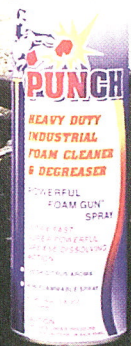
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