

Introducing ... ERA's New Rep Sales Agreement



At the ERA Board meeting, held at the 47th Management and Marketing Conference in Austin, Texas, the board reviewed the new ERA Sales Rep Agreement, prepared by Gerald M. Newman and Adam J. Glazer of Schoenberg, Finkel, Newman & Rosenberg, LLC, legal counsel to ERA.

According to Newman, the new agreement supersedes guidelines first drafted more than 20 years ago. It is more of a “model agreement” rather than guidelines, and it is not intended for the parties to merely fill in the names of the principal and the representative, sign the agreement and do business.

“The intention is that the new model agreement be reviewed in detail by the parties together with their attorneys, and then modified so that the terms fit their particular situation. No rep agreement is ‘one-size fits all,’ ” Newman explains.

Key agreement updates

Some of the more significant changes in the new agreement compared with the earlier guidelines include strict limitation on house accounts. “We have too often seen unfair provisions that enable principals to unilaterally add house accounts after the agreement is signed,” Newman says.

Another key change in the new agreement is an optional provision for payment of a stipend for pioneering work.

“In most cases, a contract should reflect the additional risk and effort undertaken by the rep who creates demand in a virgin territory or for a new product,” notes Glazer.

The new agreement also includes an expansion of the definition of “order” to include “planned orders,” “blanket orders” and “follow-on orders.” According to Newman, commissions are traditionally due on all orders, and this change is designed to limit the availability of technical arguments or loopholes in the agreement that a principal searching for a way to avoid its payment obligations might seek to exploit.

Requirements of OEM and POS reports with monthly commission payments also have been updated. “It is basic that reps should be furnished with a reasonable accounting of commissionable sales to reconcile the payments received,” Glazer

comments. “The information covered in OEM and POS reports is already utilized by principals, so sharing it with the rep creates no significant extra work and is only fair.”

Another update in the agreement includes a structured provision for split commissions. This change better organizes and explains how “splits” should be paid. What remains the most important consideration in split commissions is that the principal pays out the entire commission to the affected reps and does not retain any portion for itself, Newman adds.

The next key changes in the new agreement are mutual indemnification and hold harmless clauses. “Many principals want to see indemnification or hold harmless clauses in rep agreements, and this is understandable,” Glazer explains. “The use of such clauses, however, must be fully mutual.”

The clarification of post-termination commission rights also has been revised, Newman points out. Manufacturers cannot avoid commission obligations by terminating reps after they have done their jobs. “Other contract terms ought not fall by the wayside if such an opportunistic termination is attempted,” Newman explains. “Reps should remain eligible for commissions on orders that come in post-termination based upon the rep’s pre-termination efforts.”

Yet another key revision is the elimination of arbitration provision and substitution of litigation in a jurisdiction to be selected by the parties. Although often held out to be faster and cheaper than litigation, too often arbitration is neither.

“We strongly recommend resolving disputes over rep contracts via the court system, where, unlike in arbitration, recognized rules of evidence apply, the discovery process enables us to accumulate the evidence we need, and appellate review is available, if necessary,” Glazer adds.

Finally, the new agreement assesses attorneys’ fees and costs to the prevailing party. “This relatively standard provision should help incentivize manufacturers to avoid expensive legal fights over unpaid commissions,” Newman notes.

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Negotiation tips

Based on the amount of time and resources the rep expects to devote to developing new business for a principal, attempts to limit or exclude post-termination commissions should be resisted during negotiations, Glazer advises.

"Many rep agreements are silent about post-termination rights and obligations, and this may be preferred to language setting an unfair cut-off date," Glazer says. "For the right products or relationships, reps may even be positioned to seek life-of-the-part or life-of-the-program commissions."

Another important provision involves the notice period that must be given before a termination can be effective. "We generally recommend at least a 60 to 90-day notice period in order to allow an orderly wind-down and to give the rep a better chance to get paid on pending orders," Newman adds.

Lastly, Newman and Glazer point out that this agreement is meant to serve for informational purposes only and should not be used without consulting a lawyer. ■

ERA MEMBERS: Find the new agreement on ERA's website on the Contract Guidelines page. This article was written by Neda Simeonova, assistant editor of The Representor.

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