Sales agency agreements

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Sales agency – or "commercial representation" as it is commonly called in Brazil – plays an important role in the development and expansion of businesses. Sales agents can be individuals or legal entities, and although they are not employees, they act on a non-occasional basis, intermediating sales and forwarding proposals or orders to the companies they represent. In practice, sales agents prospect new customers, but the sale is actually made directly by the supplier or manufacturer to the customer, and the sales agent receives a commission.

The sales agency agreement plays an extremely important role in governing this type of business collaboration. The agreement must indicate the portfolio of products and/or services available to the agent, and clearly establish the parties' rights and duties, along with matters such as the term of the agreement, the territory covered, whether or not the agent has exclusivity, the method for calculating the agent's commission and the circumstances in which the agreement can be terminated, all in accordance with Law 4.886 of December 9, 1965 (the "Commercial Representation Law").

When establishing a sales agency, it is crucial to be aware of the rules that distinguish sales agency from other types of collaborative relationships, such distribution and service agreements.

For those who decide not to be subject to the Commercial Representation Law, we recommend avoiding the payment of commissions to business partners. We often come across contracts entitled "distribution" or "service" agreements, but which, in practice, provide for direct sales by the manufacturer to the customer, with payment of a commission to the service provider. Depending on the specifics of each case, these agreements can fall within the legal definition of sales agency, and so become subject to the provisions of the Commercial Representation Law.

In addition, to avoid the risk of an employment relationship, the agent's independence and the absence of any subordination to the company the agent represents must be rigorously respected, so that the sales agency does not come within the scope of the Consolidation of Labor Laws, and all the rules applicable to employer/employee relationships.

As for commissions, by preference the sales agency agreement will provide that commissions are calculated on the basis of the gross sales price, without deduction of taxes, in order to avoid disputes over the controversial interpretation given to article 32§4 of the Commercial Representation Law.

For sales agency agreements without a defined term, after the agreement has been in force for six months, if either party wishes to terminate the agreement without cause, they must give at least 30 days' notice, or pay an amount equal to one-third of the commissions earned by the agent in the previous three months (article 34 of the Commercial Representation Law). Since the Civil Code of 2002 came into force, however, some argue that the

notice period should be at least 90 days, not 30, as provided for in article 720 of the Code. When possible, therefore, it is better to give 90 days' notice.

Finally, the question of whether sales agents must register with the Regional Council of Commercial Representatives (the profession's self-governing body) is controversial, generating debate and conflicting decisions in the courts. While some take the position that registration is an essential condition to the exercise of the profession, others take the view that the registration requirement can be relaxed.[1]

In short, sales agency agreements require a detailed understanding of the applicable legislation and the case law to ensure fair and balanced contracts, avoid legal uncertainty and protect the rights of both parties.

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NOTE

[1] See, for example, the decision by the Superior Court of Justice in Appeal REsp 1.678.551 – DF, Justice Paulo de Tarso Sanseverino reporting, Third Panel, judged November 6, 2018.

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