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February 11, 2015

All New Jersey Licensed Wholesalers
and the United Food & Commercial Workers International Union

Re: Solicitor Compensation

The Division of Alcoholic Beverage Control (“ABC”) has been advised of a practice that may be occurring that requires wholesalers to pay commissions to solicitors on sales accounts for which solicitors do not perform substantially all of the duties of a “bona fide” solicitor as set forth in N.J.A.C. 13:2-16.3(e). Purportedly, the practice emanates from a provision in at least one Collective Bargaining Agreement (“CBA”) negotiated by the solicitors’ union, the United Food & Commercial Workers International Union (“UFCW”).¹ Some solicitor CBAs will expire shortly and I expect that compensation will be part of the upcoming negotiations. Accordingly, this Advisory Opinion is intended to explain ABC’s interpretation of certain relevant regulations and to assist wholesalers and the UFCW when they consider their existing CBAs and negotiate future contracts.

By way of background, in 2007, ABC commenced two related investigations to ascertain the nature and extent of certain trade practices in the alcoholic beverage industry in New Jersey. The evidence demonstrated that wholesalers had used solicitor commissions as a mechanism by which to create financial incentives for large retailers to purchase more products from the wholesaler employing the relative solicitor and to freeze out competing wholesalers. The violative practices were based on relative, non-*bona fide* solicitors. These practices restricted free competition, discriminated in favor of large wholesalers and threatened trade stability.²

¹ ABC has not conducted an investigation to ascertain whether the purported practice is, in fact, occurring. For the purposes of this Advisory Opinion only, ABC assumes that the information represented to it is true.

² The history of the investigations and the amendments resulting from those investigations (some of which are discussed below) is set forth at A.B.C. Bull. 2485, Item 5 (October 1, 2014), http://www.nj.gov/oag/abc/downloads/abc_bulletin_2485.pdf.



Consequently, ABC amended the regulations governing solicitors, N.J.A.C. 13:2-16.1, et seq. The amendments repealed the grandfather status of relative solicitors (N.J.A.C. 13:2-16.11) and added new provisions that defined the duties of a *bona fide* solicitor, and permitted commissions payments only to *bona fide* solicitors. Pertinent hereto are the following regulations:

N.J.A.C. 13:2-16.3 Eligibility for permit

(a) Solicitor's permits may be issued only to bona fide solicitors of Class A (N.J.S.A. 33:1-10) or Class B (N.J.S.A. 33:1-11) licensees ...

(e) For purposes of this section, "bona fide solicitor" means **a solicitor who performs substantial duties and responsibilities for each retail account assigned to the solicitor.** These duties and responsibilities include, but are not limited to, physically calling on accounts and covering routes, taking orders for the purchase of alcoholic beverages, preparing and presenting professional sales presentations to retailers, attending company and supplier sponsored meetings, utilizing information provided by the company to keep up-to-date on company brands and competitive brand pricing, assisting retailers with on-premise promotions and attending such events, maintaining and using tasting notes, and installing supplied point of sale material.

(f) The filing of an initial application for a solicitor's permit shall constitute a representation by both the solicitor and the employing wholesaler **that the applicant is expected to substantially perform the duties referenced in (e) above,** during the term of the permit.

(g) The filing of a renewal application for a solicitor's permit shall constitute a representation by both the solicitor and the employing wholesaler **that the applicant substantially performed the duties referenced in (e) above, ...**

(j) **The filing of an application for a solicitor's permit for a person who did not substantially perform the duties referenced in (e) above, ... shall constitute a violation by the applicant and/or the employing wholesaler.** [Emphasis added.]

N.J.A.C. 13:2-16.14 Responsibilities of employer

(b) No wholesaler shall pay compensation, whether by commission or otherwise, to a solicitor **unless the solicitor substantially**

performed the duties referenced in N.J.A.C. 13:2-16.3(e) throughout the period and for each account for which the compensation is paid. [Emphasis added.]

N.J.A.C. 13:2-24.2 Discrimination in services, facilities or equipment

(c) No solicitor shall receive compensation, whether by commission or otherwise, **unless the solicitor performed the duties referenced in N.J.A.C. 13:2-16.3(e) throughout the period and for each account for which the compensation is paid.** [Emphasis added.]

Thus, the above-cited regulations expressly prohibit no-show solicitors. The comments related to the topic of no-show solicitors received during the notice and comment period were addressed in Comment 7 as follows:

... One commenter ... explained that some solicitors may not perform all of the duties enumerated in the proposal, but are nonetheless actual bona fide solicitors. ... A third commenter asserted that the definition of “bona fide solicitor” may conflict with the requirements contained in collective bargaining agreements negotiated with solicitors. This commenter suggested that the Division add language to the proposal stating that the rule is not intended to supersede labor contracts.

RESPONSE: The proposed regulations require a “bona fide solicitor” to “perform substantial duties and responsibilities for each retail account assigned to the solicitor.” ... The regulation continues by stating, “These duties and responsibilities include, but are not limited to, . . .” followed by a non-exhaustive list of services that a solicitor might perform for retail accounts. The commenter suggests that the regulation may be interpreted to exclude from the status of bona fide solicitors any solicitor who does not perform each and every one of the enumerated services for each and every retail account. The Division does not believe that the proposed regulation is properly interpreted in this manner, because both N.J.A.C. 13:2-16.3(f) (in the future tense, for initial solicitor permit applicants) and (g) (in the past tense, for existing solicitor permit holders) make clear that applicants for solicitor’s permits “substantially perform[s] the duties referenced in (e) above ...” In other words, a **bona fide solicitor need not perform each and every one of the listed services. Instead, the inquiry is whether under the totality of the circumstances the solicitor can be properly viewed as having substantially**

performed these services. In this context, “substantially” means “being of considerable ... degree, value, amount or extent.” ...

Contrary to the concerns raised by the third commenter, that is, that the services listed in N.J.A.C. 13:2-16.3(e) may conflict with the requirements contained in the collective bargaining agreement, the Division notes that these requirements were primarily derived from that agreement. Thus, the proposed amendments are not intended to supersede the existing collective bargaining agreement. However, the Division notes that the collective bargaining agreement was written so that the contract terms are superseded in the event of a conflict with the laws of the jurisdiction (in this case New Jersey), or rules of any administrative agency (in this case, the Division). [42 N.J.R. 1735, Comment 7 (August 2, 2010)(emphasis added; citations omitted)].³

Thus, anything less than a *bona fide* solicitor shall not be paid commissions. I emphasize that a *bona fide* solicitor need not perform each and every one of the listed services for each sale upon which he or she receives commissions. Rather, the regulations and the comments make clear that a solicitor need only substantially perform these services “for each account” for which the solicitor receives commissions. See, N.J.A.C. 13:2-16.14 and -24.2. I am mindful that some retailers do not want, and may not allow, solicitors to provide all of the services listed in N.J.A.C. 13:2-16.3. However, nothing before me now requires that I determine the impact of this constraint as to the status of any particular solicitor. Should it become necessary in the future, I will base such determinations on the totality of the circumstances of each individual case.

To the extent that existing CBAs may contain language that could be construed as requiring payment of commissions to solicitors who do not meet the foregoing, “[p]arties in New Jersey are ... presumed to have contracted with reference to the existing law.” Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C., 365 N.J. Super. 241, 248 (App. Div. 2003). Moreover, “courts will not enforce an illegal contract and ... no party can recover in any action where it is necessary for him to prove an illegal contract in order to make out his case.” Stella v. Dean Witter Reynolds, Inc., 241 N.J. Super. 55, 73 (App. Div.), certif. denied, 122 N.J. 419 (1990). Nonetheless, I make no determinations here as to the interpretation or enforceability of any contractual provisions which could be construed to require payment of commissions to a solicitor that does not meet the definition previously set forth.

³ I note that two letters written by Vincent Fyfe, President, UFCW Local No. 2-D and one letter written by Richard J. Whalen, International Vice President, Director, UFCW Region 1 focused on elimination of the grandfather provision and did not address either the elimination of no-show solicitors or the definition of a “*bona fide* solicitor.”

Instead, I simply emphasize that payment of such commissions are contrary to the above-referenced regulations. As such, ABC could institute disciplinary action against any solicitor receiving payment and any wholesaler making such a payment. Pursuant to N.J.S.A. 33:1-70, each payment may be considered a separate chargeable offense and the presumptive penalty for each violation is a 15-day suspension. N.J.A.C. 13:2-19.11(i).

Some current CBAs may have been negotiated before the above-quoted regulations became operational on October 1, 2010. However, in a highly regulated industry such as this, there are no legitimate “contractual expectation[s]’ that a naturally fluid regulatory scheme, ‘subject to change at any time,’ will remain in an unalterably fixed state.” James v. New Jersey Mfrs. Ins. Co., 216 N.J. 552, 569 (2014). Thus, even pre-existing CBAs offer no defense for regulatory violations.

I am cognizant that strict enforcement of the regulations to existing contracts at this time might disturb the relationship between wholesalers and their suppliers. Harmony between organized labor and employers has benefitted this industry over the years. Accordingly, I will take no further action at this time against any wholesaler or solicitor for compliance with existing CBA provisions similar to those described above provided the wholesaler submits the following to the Enforcement Bureau: a copy of its CBA, the names of all solicitors that receive commissions for accounts wherein the solicitors do not perform in accordance with the Regulation, the accounts on which those commissions were paid and the annual amount of those commissions for each account during the past three calendar years. This determination is limited to the issues discussed above for the term of existing contracts provided to the Enforcement Bureau. Neither existing contracts nor the contract provisions discussed here may be extended beyond the expiration date in those contracts without exposing the parties to appropriate regulatory action. I also reserve the right for ABC to institute disciplinary action for violations of other aspects of the Alcoholic Beverage Control Act or the regulations promulgated pursuant thereto.

Finally, just as the law changes over time, so too must contracts. Regardless of past practices, future contracts must conform to all applicable rules and regulations. ABC has neither the intent nor the desire to become a party to collective bargaining negotiations. Going forward, therefore, the parties should negotiate contract terms that comply with existing law and provide a mechanism for renegotiation of any term that becomes non-compliant due to a change in law.

Very truly yours,



Michael I. Halfacre
Director