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New Law Requires Employee Commission Agreements To Be in Writing

by Edson McClellan, Partner, Rutan & Tucker LLP

The new year will usher in a handful of California laws affecting employees, including a new law affecting commissioned employees. Effective January 1, 2013, whenever an employer enters into a contract of employment with an employee for services to be rendered within California and the method of payment involves commissions, the contract must be in writing and must describe the method by which commissions are to be computed and paid. The new law is memorialized in AB 1396, which amends California Labor Code section 2751.

Commission Agreements

The new law legislates what employers should already be doing as a matter of sound business. Employers should not rely on oral commission agreements, nor should employers create commission agreements that fail to describe how commissions are computed and paid. Written commission agreements substantially reduce the opportunity for disputes that otherwise exists when commission agreements are oral and the parties may have different understandings of the terms. Oral commission agreements are also problematic because they may be applied inconsistently as between different sales people or even with respect to a particular sales person.

The new law requires that the employer provide a signed copy of the contract to every employee who is a party to it, and the employer must obtain a signed receipt for the contract from each such employee. It would be wise for employers to keep the signed contract or receipt in the employee's personnel file. If commissioned employees are subject to a commission plan, employers should remember to have the affected employees sign an acknowledgement that they agree to the terms of the plan.

Definition of "Commission" Wages

For purposes of the new law, "commission" wages are defined as compensation paid to any person for services rendered in the sale of an employer's property or services and based proportionately on the amount or value thereof. "Commissions" do not include short-term productivity bonuses, nor do they include bonus or profit-sharing plans, unless the employer pays a fixed percentage of sales or profits as compensation. If an employer is in doubt whether the compensation paid to an employee meets the definition of a "commission," it is prudent to have a basic written agreement with the employee that describes how that compensation is calculated and paid.

Consequences of Violation

AB 1396 does not itself provide any remedies for its violation. This is in contrast to a similar California law governing commission agreements for independent wholesale sales representatives (Civil Code section 1738.10, et seq.), which provides for treble damages and attorneys' fees to aggrieved independent contractors. Although AB 1396 does not itself prescribe any remedies for its

breach, employees can seek to enforce the law under the Private Attorney Generals Act, which provides for penalties and attorneys' fees to a prevailing employee. Employees who are not paid commissions owed can also still pursue claims for unpaid wages, as they could without the new law.

Points to Address

Although not required by AB 1396, a good commission agreement should address more than just how commissions are calculated and paid. The agreement should also address how commissions are earned (e.g., by procuring a sale), when they are earned (e.g., when the employer receives payment from the customer), what commissions are paid following the termination of employment, and whether the employee's commission is subject to a "chargeback" for returned goods or other reasons. In addressing how commissions are calculated and paid, it is often wise to include in the commission agreement a few examples of how the commission would be calculated under different scenarios, to better ensure that the parties have the same understanding of how the terms operate.

Conclusion

Employers with employees paid on a commission basis should ensure before the new year that all such employees have signed a commission agreement that complies with AB 1396. In going through this process, employers should double-check that the written

commission agreements accurately capture the terms that the employer intends to apply to the employees. Employers should also review the commission agreements to ensure that they cover the essential terms that all good commission agreements should cover, such as those noted above.

Although AB 1396 may be a short-term hassle for employers, in the long run the new law should reduce commission disputes by providing more certainty regarding the terms of commission agreements. Therefore, AB 1396 could prove to be a benefit for employers and employees alike.

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