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GOVERNMENT

New written requirements for employers

By Mark Payne and Brandon Sylvia

California Assembly Bill 1396 requires employers to put employment contracts in writing if the contemplated compensation involves commission payments. The written contract must set forth the method of computing and paying commissions. The law amends Labor Code Section 2751, and it goes into effect January 1, 2013.

Under this new law, the employer “shall give a signed copy of the contract to every employee who is a party thereto and shall obtain a signed receipt for the contract from each employee.” The law further provides, “In the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party.”

In addition, California Assembly Bill 469, the “Wage Theft Prevention Act of 2011” became effective on January 1, 2012. As part of the bill, Section 2810.5 has been added to the California Labor Code. Section 2810.5 creates two new requirements for state employers. First, employers must provide a “written notice” to most non-exempt employees hired on or after January 1, 2012. The required notice, which may be provided electronically if there is a system allowing the employee to acknowledge receipt of the notice and print out a copy, summarizes certain terms and conditions of employment, including:

The rate and “basis” (e.g., hourly, salaried, piece rate, commission, etc.) of the employee’s pay, including any applicable rates for overtime pay; any allowances claimed by the employer as part of the minimum wage obligation, such as employee meal or lodging allowances; the regular payday designated by the employer on which the employee will be paid; the legal name of the employer entity, including any “doing business as” name the employer uses; the physical address (and mailing address if different) of the employer’s main office or principal place of business; the employer’s telephone number; the name, address and telephone number of the employer’s workers’ compensation insurance carrier; and any other information specified by the California Labor Commissioner.

The Legislature directed the California Division of Labor Standards Enforcement to prepare a template form for employers to use in complying with the above new hire notice requirement. The DLSE published its template form on December 29, 2011. This can be found on the DLSE website at: http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html

The DLSE does not require employers to use its template. But, if an employer chooses to develop its own form, it must include all the information contained on the DLSE template. The template adds some additional requirements not specified by the Legislature, including: A space for information concerning any other business or entity, such as a professional employer organization), employee leasing company or temporary services agency that the employer uses to “hire employees or administer wages or benefits”; a “check box” indicating whether the employer has a verbal or written employment agreement with the employee; a space for the employer’s workers’ compensation policy number; and a section for the employee and employer to sign acknowledging delivery and receipt of the form.

In addition to the new hire notice requirement, Labor Code Section 2810.5 also requires employers to provide a written “change notice” to most employees within seven calendar days after the time of the changes, in the event of any changes “to the information set forth in the notice.” A separate “change notice” is not required if the change will be reflected

on a timely employee paystub (e.g., a change to the employee’s rate of pay) or if the change is provided in some other legally required writing within seven days of the change. Employees excluded from both the “new hire notice” requirement and the “change notice” requirement include exempt employees (i.e., exempt from the payment of overtime wages) and employees covered by collective bargaining agreements in limited circumstances.

The DLSE has also released answers to some “Frequently Asked Questions” concerning the new law and the “new hire” notice, which can be found at <http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html>.

In spite of the original FAQ guidance provided by the DLSE, Section 2810.5 left a number of issues unresolved, including: Whether the “change notice” requirement applies to all existing employees or only to those hired on or after January 1, 2012 who received the “new hire notice”; whether the “change notice” can be communicated through a general posting in a conspicuous place; the meaning of the reference in the DLSE new hire template to either an “oral” or “written employment agreement,” including in the context of at-will employment; under what conditions must an employer disclose use of a temporary services agency or similar firm on the “new hire notice”; and how to disclose the details of complex compensation plans such as certain piece rate or commission plans within the confines of the DLSE “new hire notice” template.

The DLSE published additional FAQ on January 23, 2012, which addressed some of these questions. For example, complex compensation plans must be fully detailed, but may include other documents by specific incorporation. It also explained why the form requires an employer to check a box about whether an employment agreement is “oral” or “written.” The DLSE states that “either a written agreement or oral agreement exists.” It does not acknowledge the possibility that both may exist. The DLSE also states its view that checking the box “has no legal effect on the” presumption of at-will employment. However, employers should consider how checking these boxes may affect their defenses to employment-related claims, including claims based on express and implied contract theories.

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