

Labor and Employment Alert

January 11, 2013

New Requirements for California Employees Paid by Commission

Effective January 1, 2013, Labor Code section 2751 requires that all California employees paid by commission must be provided a signed written contract stating how the commissions will be calculated and paid.

Previously, Section 2751 applied only to employers with no permanent and fixed place of business in the state. The revised Section 2751 extends its requirements to all employers in California, and covers any employee who is compensated at least in part by commissions for services rendered within California.

The written contract must set forth the method by which commissions will be computed and paid. In addition to providing the employee with a signed copy of the contract, the employer must also obtain a signed receipt of the contract from the employee. The statute does not specify when the contract must be provided. However, the best approach would be to provide it immediately at the time of hire of any commissioned employee (or at the time an employee begins a commissioned position). Likewise, a signed contract should be provided now to any existing employees who were already being paid by commission as of January 1, 2013, even if an unsigned commission policy was previously provided.

Section 2751 defines “commissions” as compensation for the sale of property or services that is proportional to the amount or value of the property or services sold. It further specifies that commissions do not include bonus and profit-sharing plans, or “short-term productivity bonuses such as are paid to retail clerks.” Although the statute does not elaborate, a “short-term productivity bonus” likely includes any temporary incentive offered by an employer to increase sales (e.g., a one-time bonus for reaching a sales quota during the holiday shopping season).

In addition to extending the written contract requirement to all California employers, there are two other substantive changes to the prior law. First, when a contract expires but the parties continue to work under the terms of the expired contract, the contract terms are now presumed effective until the contract is superseded or employment is terminated. Second, Labor Code Section 2752, which provided for triple damages for violations of Section 2751, has been repealed.

Section 2751 does not specify a remedy, and it is unclear how an employee would establish actual damages for a violation. However, employees could bring claims under the California Labor Code Private Attorneys General Act (“PAGA”), which allows an employee to seek civil penalties for violations of the Labor Code. Potential PAGA penalties are \$100 for each aggrieved employee per pay period for the initial violation, and \$200 for each aggrieved employee per pay period for each subsequent violation. It is not clear whether a failure to provide a commissioned employee with a contract pursuant to Section 2751 would be considered a single violation occurring during only a single pay period (e.g., the pay period

during which the employee was first hired and should have been provided with the contract), or if it would be considered an ongoing violation for each pay period that a commissioned employee works without a written contract.

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