

2013 California Labor Code and Employee Commission Agreements

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Effective January 1, 2013, new California Labor Code § 2751, will require employers who pay employees by commission to memorialize the commission arrangement in a written contract that:

- Includes the method for calculating the commissions;
- Includes a description of when the commissions will be deemed earned and how they will be paid; and
- Requires the employee to sign a “receipt” retained by the employer.

The commission contract remains in effect, even if the contract has expired by its own terms, until a new commission plan has superseded it or employment terminates.

Out-of-state companies that have no physical facilities in California will be subject to this requirement with respect to any commissioned employees who work in California.

What kinds of payments will be considered commissions under the new law?

“Commission wages are compensation paid to any person for services rendered in the sale of such employer’s property or services and based proportionately upon the amount or value thereof.” Excluded are short term productivity bonuses such as those paid to retail clerks or bonus and profit sharing plans, unless the employer has offered to pay a fixed percentage of sales or profits as compensation but language is imprecise.

“[C]ommissions” do not include “[t]emporary, variable incentive payments that increase, but do not decrease, payment under the written contract.”

Proponents of the new law argued that the exclusion of “temporary, variable incentive payments” allow short term sales incentives to not require a new contract every time partial compensation from commissions is made, many of which are often adjusted based upon the purchasing trends of consumers. Such an exclusion may prevent the need for an employer to provide a new written contract every time the employer provides a short-term bonus or incentive payment to their employees. However, as the law goes into effect on January 1, 2013, it is unclear how courts will interpret the term “Commissions” and applicability of this new exclusion.

Action Items

Employers should review their commission arrangements with employees to ensure that written agreements in compliance with the new law will be in place by January 1, 2013. Even though some bonus plans may not come within the general requirements, it is best to treat all non-discretionary commission and bonus plans as coming within the statute and to confirm the specifics of these arrangements in signed written agreements.