

PREVENTING CLAIMS BROUGHT BY COMMISSIONED EMPLOYEES THAT THEY EITHER WERE NOT PAID OR WERE UNDERPAID

Mr. Richard Fader of Ft. Lee, New Jersey asks: “How can I prevent claims brought by my commissioned employees in California that I either did not pay or underpaid a commission due that employee?”

Well Mr. Fader, it should come as no surprise that there is no shortage of claims brought by commissioned employees claiming that their employer either did not pay or underpaid a commission due the employee. More often than not, neither the employer nor the employee can figure out what, if anything, is in fact owed to the employee. These problems stem from a lack of clarity in defining the commission terms on the front end.

There is a solution: a small expenditure of time and thought up front, including following the suggestions below, will help avoid complicated claims later. California has a statutory remedy for the problem of commission disputes through California Labor Code section 2751. That code section requires that whenever an employer enters into an agreement of employment with an employee for services to be rendered within California and the contemplated method of payment of the employee includes commissions, the agreement shall be in writing and shall set forth the method by which the commissions shall be computed and paid.

California Labor Code section 204.1 says that “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.” Section 2751 notes that “commissions” do not include any of the following: short-term productivity bonuses such as are paid to retail clerks; or temporary, variable incentive payments that increase, but do not decrease, payment under the written agreement; or bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed.

To be enforceable, the employer shall give a signed copy of the agreement to every employee who is a party to that agreement and shall obtain a signed receipt for the agreement from each employee. In the case of a commission agreement that expires and where the parties nevertheless continue to work under the terms of the expired commission agreement, the agreement terms are presumed to remain in full force and effect until the agreement is superseded or employment is terminated by either party.

You can greatly decrease your odds of facing an unpaid or underpaid commission claim (including a lawsuit) by and aggrieved employee if the parties clearly identify their expectations up front. For example, a written commission agreement should always be put in place and should clearly address the following:

- What is the eligibility for commissions: Identify precisely what events trigger a commission. For example, what must the employee do in order to be eligible in the first place – must the employee meet a minimum sales threshold and is there a requirement that the employee must complete a form when bringing in a new client whom the employer must sign in acknowledgement of that new client? How do you define a new client – is it a person or entity whom has never done business with you or your company or may a precise amount of time pass for a former client to be a new client?
- What is the formula for calculating commissions: Be sure to clearly explain exactly how commissions are calculated and avoid complicated formulas or calculation approaches as much as possible.
- What is the timing of the commission payment: When are commissions earned and payable – are they at the end of each normal payroll cycle, or are they paid with a specific time frame after they are actually earned, or are they spread out such as being paid quarterly?
- How are commissions paid after the employee's termination: In California, employees must be paid all earned commissions regardless of whether the employee is still employed by you if they were earned before termination?

By addressing each of these issues up front in a written agreement you will hopefully avoid confusion later down the road. You are much less likely to face the challenging task of attempting to reconcile proper commission payments long after the fact.

The contents of this column are not intended to be a complete summary of the changes resulting from the minimum wage increase. Rather, this list is intended to alert you to the broad impact of the changes in California's minimum wage. Because of the complexity of these changes, it is recommended that all employers consult with experienced labor and employment counsel to ensure that all pay policies and practices are in compliance with the applicable minimum wage laws.