Fact Sheet

Commission Agreements

The Basics about AB 1396

This law applies to employers in and out of California who pay commission to an employee for services rendered in the state. In short, all California employers must ensure that all commission agreements:

- Are in writing by January 1, 2013;
- include a method for calculating and paying the commissions;
- are signed by the employee; and
- are documented with an employee acknowledgement form (receipt of the agreement).

What is a commission?

A "commission" is a payment that varies in proportion to the value or number of units sold. Earned commissions are a form of wages. Once earned, wages cannot be forfeited. The definition of an "earned" commission also affects when a commission must be paid. Earned commissions must be paid with the next regular paycheck. Earned commissions are due with final paychecks just as vacation and paid time off are due to employees who leave the employer with their final pay.

What is NOT a commission?

AB2675 establishes what is NOT a commission. A commission is not a fixed amount of money and must vary based on sales volume. The following types of payments are <u>not</u> considered commissions:

- Short-term productivity bonuses such as are paid to retail clerks.
- Temporary, variable incentive payments that increase, but do not decrease, payment under the written contract.
- 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.

Exempt Versus Non Exempt Employees

Overtime calculations for nonexempt employees must include commission payments because commissions are included in the calculation of the regular rate of pay for overtime. Employers need to ensure that nonexempt employees are receiving at least minimum wage for every hour worked (regardless of whether it's by commission, hourly wage, or draw).

Tips for Commission Agreements

1. Keep it short and sweet. The longer and more confusing the agreement, the harder it will be to enforce.
2. Avoid expiration dates in the agreement. If expiration dates are included, remember the agreement will not be valid unless it is replaced with a new agreement.
3. Copies of the commission agreements and acknowledgments of receipt should be kept in employees' personnel files so they may be inspected or copied if requested at a later date.
4. Consider attaching a job description.
5. Include the following information if applicable:
    a. Employee's name, title and the date the agreement was signed
    b. Name of a company representative and the date the agreement was signed by this person
    c. Base Salary
    d. Quotas and commission rate calculation: Clearly explain when a commission is earned and give examples, such as "commission is earned by an employee when the company has received payment for the product(s) sold".
    e. Timing of commission payout: When commissions are paid out and give examples.
    f. Impact of returns (if applicable)
    g. Recoverable Draw: how advances on commission will be handled
    h. Impact of termination on commissions

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