Governor Signs Bill Imposing New Requirements On In-State And Out-of-State Employers Who Pay Commissions

By Keith Paul Bishop on October 12, 2011

Two score and eight years ago, the California legislature enacted AB 836 (Frew), Stats. 1963, ch. 1088. That legislation requires employers who pay their employees for services in California through commissions to provide those employees with a written contract setting forth the manner in which commissions are computed and paid. Labor Code § 2751. Violators face treble damages. Labor Code § 2752. The most interesting feature of these statutes, however, is the fact that they apply only to employers with "no permanent and fixed place of business" in California.

Constitutional Problems

Thirty six years after the AB 836 was enacted, a Nevada corporation with its principal place of business in Texas decided to challenge the constitutionality of the legislation. In *Lett v. Paymentech, Inc.,* 81 F. Supp.2d 992 (N.D. Cal. 1999), U.S. District Court Judge Jenkins found that both Labor Code sections violated the Commerce Clause and the Equal Protection Clause of the U.S. Constitution. Despite this holding, the two statutes remained in the code books for another decade.

The Fix Was Not In

In 2010, the legislature tried to "fix" the statutes by imposing the contract requirements on all commission based contracts for employment services in California. However, then Governor Arnold Schwarzenegger vetoed the bill, SB 1370 (Ducheny). The Governor's veto message cited the absence of any need for the bill:

However, there is no indication that there is a widespread problem of wage disputes resulting from the lack of written commission-based employment contracts in California. Therefore, the manner in which this bill remedies the existing law's constitutional infirmity creates potentially unnecessary new burdens on all businesses employing persons in California. If it becomes apparent that there is an actual problem arising from a lack of written commissioned-based contracts in California, then it would be appropriate to revisit this issue. At this time, however, there is no clear need for this bill.

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The Fix Will Soon Be In

With a new Governor, the legislature took another run at corrective legislation. Last week, Governor Brown signed AB 1396 (Committee on Labor and Employment). The bill was sponsored by the Conference of California Bar Associations.

As a result, Labor Code § 2751 has been amended to apply to all employers (not just employers with no permanent and fixed place of business in California). Written contracts must be entered into by January 1, 2013. The treble damages penalty has also been eliminated.

The Legislature Exits The *Via Negativa*

Prior to amendment, Labor Code § 2751 gives an essentially apophatic definition of "commission". Rather than tell you what a commission is, the statute tells you what a commission is not. Thus, commissions do not include short-term productivity bonuses and 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. As amended, Section 2751 will retain these exclusions but add an intensional definition by incorporating the definition of "commission" in Labor Code § 204.1 ("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."). Soon employers will have some idea what commissions are and not simply what they are not, at least for purposes of § 2751.

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