

WRITTEN COMMISSION CONTRACTS ARE REQUIRED

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In response to *Lett v. Paymentech, Inc.* (N.D. Cal., 1999) 81 F.Supp.2d 992, the legislature enacted AB 1396 which amends Labor Code § 2751. Specifically, AB 1396 requires that whenever an employer enters into a contract of employment with an employee for services to be rendered within California and the method of payment involves commissions, the contract must be in writing and must set forth the method by which commissions shall be computed and paid. The employer must provide a copy of the contract to each employee and must also keep a copy which has been signed by the employee. In the event the contract expires and the parties continue to work under the terms of the expired contract, the contract terms will be presumed to remain in effect until the contract is superseded or employment is terminated by either party. The term “commissions” is defined to have the same meaning as set forth in Labor Code § 204.1 and does not include short term productivity bonuses, such as paid to retail clerks, nor 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. AB 1396 repeals a related provision that made any employer who violated the requirements of Labor Code § 2751 liable in a civil action for triple damages.

All employers must comply with the new law by January 1, 2013. While Labor Code § 2751, as amended, is relatively straightforward, the nuances of drafting a commission contract are more complicated. Indeed, the timing of the payment of commissions as well as the definition of how commissions are “earned” can have far reaching implications for the employer. Accordingly, employers are well advised to contact counsel for the drafting of a commission contract.