



California Wage/Hour Update

Court Clarifies Meaning Of "Commissions"

By John Skousen

(California Wage/Hour Update No. 3, July 2011)

California Industrial Welfare Commission (IWC) Wage Orders exempt from California's overtime-compensation requirement "any employee whose earnings exceed one and one-half (1 ½) times the minimum wage if more than half of that employee's compensation represents commissions." State courts have looked to the Labor Code section that addresses automobile dealers, in defining "commissions," as: "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.*" (Italics added.)

Seeking to determine whether the exemption applies in specific cases, much litigation has occurred regarding what constitutes a wage paid in proportion to the "amount or value" of a product or service sold. Some cases focused on "value," holding that this meant a percentage of the *sales price*. But the law, until recently, has remained unsettled on the issue of whether a payment based upon the "*amount*" or number of items sold, rather than the percentage of the sales price, could qualify as a "commission." To complicate the matter, the California Labor Commissioner's enforcement guidelines treated any method of payment other than "*percentage of a sale*" as a non-commission. This issue was settled finally by an appellate court decision, which flatly rejected the Labor Commissioner's internal guidelines as a misreading of the law. *Areso v. CarMax, Inc.*

In *Areso*, Car Max paid its automobile salespersons a fixed payment of \$150 per vehicle sold, regardless of the price of the vehicle. Due to fear of litigation, the employer later came up with a fluctuating percentage formula, providing for approximately the same amount per vehicle sold. Leena Areso, an auto salesperson, sued, contending that she

was not being paid a "commission" as defined by the law. The trial court disagreed and ruled in favor of CarMax; the appellate court affirmed.

Rejecting the employee's argument that a uniform payment per vehicle sold would violate the law's "proportionality" test, the court held that "[p]aying salespeople a uniform fee for each vehicle [sold] is proportionate – a one to one proportion. The compensation will rise and fall in direct proportion to the number of vehicles sold."

The issue in CarMax was straightforward. But due to the complexity of compensation pay plans, you should consult with legal counsel to assure that your employees' incentive compensation for sales, as structured and paid out over time, qualifies as a "commission" within the meaning of California's exemption from overtime, and that all other requirements for the exemption have been satisfied.

For more information contact the author at jskousen@laborlawyers.com or 949-851-2424.