

May 2013

## Reporter

**Employment Law***by Randall S. Leff, Esq.***California Court Holds That Piece Rate Employees Are Entitled To Hourly Pay For Waiting Time**

Like many other auto dealerships and other employers throughout the state, Downtown LA Motors, LP (“DLAM”), a Mercedes Benz dealership, compensates its service technicians on a piece rate basis. Under their system, technicians are paid a flat rate ranging from \$17 to \$32 depending on the technician’s experience for each “flag hour” a technician works. Flag hours are assigned by Mercedes Benz to every task that a technician performs on a Mercedes Benz automobile and are intended to correspond to the actual amount of time a technician would need to perform the task. All DLAM technicians are paid on this basis irrespective of how long it takes to complete a task. The technicians accrue “flag hours” only when working on a repair order. Plaintiffs worked 8-hour shifts and during their shifts were required to perform various non-repair tasks while waiting for cars to be repaired. They accrued no flag

hours for performing these non-repair tasks.

In addition to tracking a technician’s flag hours, DLAM also keeps track of all the time a technician spends at the worksite regardless of whether the technician is working on a repair order. At the end of each pay period, DLAM calculates how much each technician would earn if paid an amount equal to his total recorded hours “on the clock” multiplied by the applicable minimum wage. DLAM refers to this amount as the “minimum wage floor”. If a technician’s flat rate/flag hour pay falls short of the minimum wage floor, DLAM supplements the technician’s pay in the amount of the shortfall. Despite this floor, in *Gonzalez v. Downtown LA Motors, LP*, an unpublished decision, the California Second Appellate District Court of Appeal has held that DLAM’s system is invalid and DLAM is liable for more than \$1.5

**Upcoming 2013 Seminars at ECJ****Tuesday, May 21, 2013 - 9:30 a.m.-11:30 a.m.**

Conducting an Internal Investigation

*by Kelly O. Scott, Esq.***Wednesday, May 22, 2013 - 9:30 a.m.-11:30 p.m.**

Sexual Harassment Prevention Training

*by Kelly O. Scott, Esq.*Please contact Brandi Franzman at [bfranzman@ecjlaw.com](mailto:bfranzman@ecjlaw.com) for registration information.

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million in unpaid “waiting time” and \$237,840 in penalties.

The technicians contended that there frequently was not enough work to do and they had to remain at the dealership when this happened. They did not flag any hours when waiting for repair jobs but were expected to perform various non-repair tasks. They filed a class action lawsuit claiming that DLAM violated the California law by not paying them a minimum wage during the waiting time. The trial court ruled in favor of the technicians, holding that California law required the DLAM to pay the technicians for their waiting time between repair orders. The Appellate Court upheld the trial court’s ruling citing Wage Order No. 4, as follows: “Every employer shall pay to each employee, on the established pay day for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.” “Hours worked” is defined in Subdivision 2(k) of the Wage Order as “the time during which an employee is subject to the control of an employer and includes all the time employee is suffered or permitted work, whether or not required to do so.”

DLAM argued that compliance with the Wage Order was achieved by supplementing a technician’s piece rate wages in an amount necessary to cover any shortfall between those wages and the “minimum wage floor”, the amount that the technician would have earned if paid an hourly minimum wage for all hours “on the clock” including waiting time, during a pay period. The technicians countered by citing *Armenta v. Osmose, Inc.*, a prior Court of Appeal case that had held that a collective bargaining agreement that paid wages substantially higher than the applicable minimum wage violated the California minimum wage law because it did not compensate employees separately for travel time and for time spent on daily paperwork. The Court of Appeal found the reasoning in *Armenta* to be persuasive and affirmed the trial court’s judgment.

California minimum wage law is susceptible to two divergent interpretations as discussed in the *Armenta* case: (1) that the obligations to pay minimum wages attaches to each and every separate hour worked during the payroll period, and the payment must be made for all such hours on the established pay day, or (2) that the obligation to pay minimum wage for the total number of hours worked in the pay period is determined backwards from the date that the payment is made without consideration of any hour or part of the hours in isolation. Federal courts have adopted the latter interpretation and held that an employer complies with federal minimum wage requirements so long as each worker is paid no less than the sum the worker would have been paid during the pay period had the employer paid the minimum wage multiplied by the total hours worked including waiting and travel time. The California Court of Appeal in *Armenta* rejected federal authorities and held that California law required an employer to pay all employee hours at either the statutory or agreed rate and prohibited an employer from using any part of that rate as a credit against its minimum wage obligation. The court concluded that allowing the employer to average compensation over their total hours worked contravenes California law by effectively reducing the employees’ contractual rate of compensation.

Although this decision is unpublished and therefore not binding, it indicates that the courts are likely to extend the reasoning from the *Armenta* decision to traditional employer/employee relationships. This could have widespread implications not only to automobile dealers and repair shops, but to other industries where piece work is common, such as the apparel and the healthcare sectors. Accordingly, any employer utilizing a piece work method of pay would be well advised to consider mitigating the risks posed by this decision by modifying the compensation structure to eliminate unpaid waiting or travel time.

*If you have any questions regarding this bulletin, please contact Randall S. Leff, Esq. at (310) 281-6336 or rleff@ecjlaw.com or Kelly O. Scott, Esq., Editor of this publication and Head of ECJ’s Employment Law Department, at (310) 281-6348 or kscott@ecjlaw.com. If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or bfranzman@ecjlaw.com.*