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Decision Provides Greater Flexibility In Scheduling Meetings

By John K. Skousen (Irvine)

Employers in California have been perplexed by various state regulations that have confusing and inconsistent provisions. One regulation addresses the "reporting-time" premium which requires employers to pay a minimum amount of hourly wages when employees report to work. Different standards apply depending on whether an employee reports for the first or second time within a single calendar work day.

The Wage Orders generally provide that an employee who reports to work as required, but who is furnished less than half the usual or scheduled day's work, shall be paid for at least half the usual or scheduled work, but in no event less than two hours nor more than four hours pay, at the employee's regular rate.

Employees required to report a second time in any one workday, and who are furnished less than two hours of work on that second reporting, shall be paid at least two hours at the regular rate.

Trying To Figure It Out

Reporting-time pay acts as a guarantee or supplement to hours actually worked up to the reporting time entitlement. A common scenario is this: an employee who usually works eight hours on the night shift is called in for a pre-scheduled one-hour training meeting at 8:00 am. on a day when the employee is not scheduled to work his regular shift. The meeting lasts 45 minutes. The employee later goes to the California Labor Commissioner and demands 3.25 hours of reporting time pay for four hours of total pay for the meeting because 1) the employee was only provided with 45 minutes; 2) the employee's normal shift is eight hours; 3) this was the first reporting; and 4) four hours is half of the employee's regularly-scheduled shift.

The deputy Labor Commissioner either agrees with the employee and awards an additional 3.25 hours or applies the minimum two-hour rule and awards only 1.25 additional hours on the basis that the meeting occurred on a day when the 8 hour shift was not scheduled. The employer would contest either ruling because the only applicable "schedule" on the day in question is the one-hour meeting, and the employee was paid for more than half of the scheduled time.

Court Ruling Brings Some Clarity

A recent decision from the Second Appellate District has clarified the law, resulting in a commonsense interpretation of the plain wording of the regulation. *Aleman v. Air Touch Cellular.* In *Aleman*, two employees sought reporting time pay under similar facts. The employees were scheduled to attend a 1.5 hour meeting, but were paid for only 1 hour. The appeals court affirmed the trial court's ruling that no reporting time was due, stating that the minimum two-hour reporting-time pay requirement applies only if the employee is furnished work for less than half the scheduled time, which clearly was not the case if the employee was paid for one hour after being scheduled to work 1.5 hours. By so ruling, the court rejected the Labor Commissioner's internal guidelines as non-binding on the courts.

The court further made clear that if an employee was called to work for a meeting of indeterminate length on a day other than a regularly scheduled day, the minimum two-hour reporting-time pay would be triggered if the employee was paid for less than two hours on that day.

Finally, the court reasoned that any time an employee reports to work a second time in a work day, a different trigger applies: the minimum two-hour reporting-time pay requirement would apply on the second reporting without regard to how much time was scheduled. Importantly, the court further ruled that parties who prevailed on a reporting-time claim are entitled to be reimbursed for their reasonable costs and attorneys' fees.

One employee in *Aleman* further alleged that he was not paid a "split-shift premium" when he was required to report to work on two separate occasions in one day. A "split shift" occurs when an employee works two shifts that are separated by a period of time that is greater than a bona fide meal period. The Wage Order, section 4, provides that, when an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday (unless the employee resides at the place of employment).

The employee essentially argued that, when an employee works a split shift, he or she is entitled to one hour's pay regardless of the hourly rate paid to the employee. The court rejected the employee's claim, making clear that no additional compensation was owed if the employee worked a split shift, as in that case, and "was paid a total amount greater than the minimum wage for all hours worked plus one additional hour."

Summing It Up

The *Aleman* decision is good news for employers because it affirms the fact that they can schedule meetings in advance of a scheduled work shift or on a day not regularly scheduled for work without suffering exposure for reporting-time pay as long as the length of the meeting is noticed in advance and the employee is paid for at least half of that scheduled time.

One caveat: Meetings scheduled after an employee's shift or on a second reporting will still be subject to the minimum two-hour reporting time requirement. You can also avoid split-shift premium exposure by simply applying the mathematical formula provided by *Aleman* and making sure the split-shift premium requirements have been satisfied.

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Commissioned-Salesperson Ruling Is Big Win For Employers

By John K. Skousen (Irvine)

Employers who have commission-sales employees working under two California Wage Orders recently received good news from a California appellate court which essentially clarified and strengthened the commission-sales exemption contained in Section 3D of Wage Orders 4-2001 (certain listed occupations) and 7-2001 (mercantile). *Muldrow et al v. Surrex Solutions Corporation.*

The decision was handed down August 29, 2012. In it, the Fourth Appellate District affirmed the trial court's judgment, and held that commissioned salespersons working for the employer (Surrex) were exempt from overtime under Section 3D, rejecting a variety of creative arguments raised by plaintiff counsel.

Under Section 3D, California employers are not required to pay overtime wages to employees "whose earnings exceed one and one-half (1 1/2) times the minimum wage if more than half of that employee's compensation represents commissions." The Labor Code defines commission wages as "compensation paid to any person for services rendered in the sale of such employer's property or services, and [which are] based proportionately upon the amount or value thereof." The meaning of the various components of this definition of "commissions" has been litigated for many years.

The Facts Behind The Ruling

In *Muldrow*, the employees were employment recruiters of Surrex who obtained job orders from clients and sought to recruit candidates to fill the positions. The job of the employment recruiters included persuading the job candidate and the client that the placement of the candidate as an employee with the client was a "good fit." Only if the candidate was successfully placed with, and retained by, the client would Surrex obtain revenue from the client from which its sales force (employment recruiters) were then compensated.

The plaintiff employees first argued that they were not employed principally in selling a product or service, citing *Keyes Motors, Inc. v. Division of Labor Standards Enforcement*. In support, they referred to a variety of tasks that they considered to be outside the zone of "selling" such as "searching on the computer, searching for candidates on the website, cold calling, interviewing candidates, inputting data, and submitting resumes."

The trial court flatly rejected this argument, concluding that the whole point of these activities was to satisfy conditions required for achieving "sales" through placing candidates with the client, and the appeals court agreed. The court further noted that the "essence of a commission… is a payment based on sales that is decoupled from actual time worked."

The employment recruiters were paid either a percentage of the client placement fee for "direct placement," or if the candidate was hired only as a consultant, they received a percentage of "adjusted gross profit." Adjusted profit was a net amount reached after subtracting a variety of "cost-related factors." The plaintiff employees argued that their commissions were not sufficiently related to the "price" of the sale.

The court rejected this argument as a misreading of prior case law and the clear language of the statute that defines "commissions" as including a percentage of the "value" of the sale, which the court indicated could be fixed after considering the employer's allocated costs. Nor did the court consider the profit formula to be "too complex," as the plaintiffs contended, for the employees to understand it. In reaching its conclusion, the court settled in favor of Surrex a number of hyper-technical arguments raised by plaintiff counsel as they misinterpreted prior case law.

Finally, the employees argued that the compensation plan was not "bona fide" in part because regular draws were paid over a long period of time and that they were only paid additional amounts when cumulative commissions were found to exceed the cumulative draws at various times of reconciliation. The court rejected this argument, noting that the guaranteed draws were regularly reconciled against commissions and that the evidence established that over a period of years the total commissions were "far in excess" of their regular draws.

Putting It In Perspective

The good news for employers is that this case finally puts to rest a number of arguments commonly raised by plaintiff attorneys regarding whether incentives paid by compensation plans qualify as "commissions" within the meaning of the Section 3D exemption. Among other things, it is now clear that a variety of activities outside the point of actual sale often characterized as clerical can qualify as "sales related" sufficient to satisfy the exemption test. Many employers have profit-based formulas for calculating commissions, and this case emphasizes that these methods for paying commissions are legal, enforceable, and fully compliant with the relevant regulations.

This case provides valuable guidelines for drafting commission plans, but each commission agreement should be evaluated individually to assure that each of the elements of the commission plan are laid out clearly and unambiguously. Consult your legal counsel to make sure your agreements are air tight in accordance with these legal standards.

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