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15760 Ventura Blvd., 16th Floor, Encino, CA 91436 • (818) 907-4000

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Get Out Your Crystal Ball & Rearview Mirror – You’ll Need Both to Comply with California’s Wage & Hour Laws

By [Erin K. Tenner](#), Partner, Gray·Duffy, LLP

California businesses have been under assault for years for not staying up to speed with the rapid pace of change around wage and hour law. It seems like every week there is a new case further defining some aspect of wage and hour law. A bigger problem still, is the myriad of laws that are vague and ambiguous resulting in interpretation by courts that become retroactive precedent for how the law should be construed and applied.

Case in point, the decision in *Gonzalez v. Downtown LA Motors* which interpreted California law to require that technicians be paid an hourly wage for each hour worked in addition to any piece rate pay they may earn, otherwise all hours are not compensated. While federal statutes had been clear about permitting averaging of pay to make sure at least minimum wage was paid for all hours worked, California’s minimum wage laws stated that minimum wage must be paid for all hours worked, but was silent on how that was to be determined. It seemed reasonable to many to presume that the federal rule for making that determination should apply, which allowed dividing all pay by all hours worked to make sure minimum wage was paid for all hours. But then came *Armenta v. Osmose, Inc.* in 2005 stating that driving time and time doing paperwork had to be separately compensated and *Gonzalez v. Downtown LA Motors*, which essentially said that you cannot determine whether an employee was paid at least minimum wage for every hour worked by dividing all pay by all hours worked if the employee is paid on a piece rate.

The example given in that case was two employees who both complete a job that pays for four hours on a piece rate. One employee takes four hours to complete the job and the other takes 8 hours to complete the job. The argument that won in *Gonzalez* was that the employee who worked for 8 hours and was paid on a piece rate was only paid for 4 hours. A similar argument could be made if an employee took only 3 hours to complete a 4-hour piece rate job, but worked four hours. If the employee was paid only the piece rate, they were not paid for the extra hour. The issue is further complicated by the fact that the actual time the piece rate work takes to complete is not tracked per piece of work – only the factory standard hours per piece are tracked. Even if all hours worked are recorded, it is impossible to know how much time was spent on any given piece of work.

California statutes make clear that if an hourly rate that is at least minimum wage is paid for every hour worked then piece rate work can be paid in addition, however, rest and recovery time, which is the ten-minute rest breaks employees are entitled to take every four hours, must be paid at the “regular rate” and must be stated on the pay check stub separately listing the hours and rate. Often, employers make the mistake of thinking the regular rate is the hourly rate paid for all hours worked, but that may or may not be accurate. How the “regular rate” is calculated depends on the circumstances, but generally needs to take all pay, including bonuses, into consideration. Overtime is also to be calculated based on the “regular rate” but whether it is due and how it is calculated again depends on the circumstances.

While most plaintiff’s attorneys have moved on, now suing under the more recent *Vaquero v. Ashley Furniture* case which determined that sales people who are paid on commission also needed to be paid an hourly wage, some are still assuming that dealers who use flag time to determine bonuses are still paying a piece rate. I would argue they are not paying on a piece rate, since dealers generally only determine bonuses by reference to piece rate and no part of the pay equals a piece rate. Even if they are determined to be paying on a piece rate, the law allows for piece rate pay as long as the employee is paid hourly plus a piece rate. This argument is supported by *Certified Tire & Service Centers* wage and hour cases, a California Court of Appeals case decided September 18, 2018 and recently published. It clearly eliminates the arguments raised in *Downtown LA Motors* as long as an hourly rate is paid for all hours worked, if the statute was not enough for plaintiffs’ attorneys. Yet, it is still advisable to separately pay for rest and recovery time at the regular rate since a plaintiff’s attorney can argue that paying a bonus based on a flag rate is a piece rate, until that issue is settled by case law.

The issue in both technician pay and commission pay plans is that the law requires that the “regular rate” (that complicated and case by case calculation) be paid to any employee who earns commission or who is paid on a piece rate for all ten-minute rest breaks employees are entitled to take. The only way a calculation to determine regular rate will not have to be done is if the employee is paid only one rate for all hours worked and no bonuses other than discretionary bonuses. If the rest breaks are not separately itemized by the total amount of rest break time taken and the total pay for rest breaks on the pay check, it is a violation of the law for which an employee can sue for PAGA penalties, civil penalties, and/or unpaid wages. Lawyers typically file these claims as PAGA only actions, seeking just PAGA penalties, so they cannot be removed to arbitration, entitling the unwitting plaintiffs to only 25% of the penalties and no other damages.

What can you do to make sure you are in compliance? Make sure rest and recovery pay shows up on the paycheck for all your commissioned employees and for all technicians. Technically, commissioned employees are not covered by the statute that requires rest and recovery time to be separately itemized, but chances are it will be required in the near future.

If you are using the CNCDA calculators for pay, make sure your payroll employees are entering all pay elements into the calculators and not taking short cuts by doing some calculations outside the calculator because they don’t understand how the

calculator works. Also making sure they understand the different kinds of bonuses and where they are to be entered on the calculator is imperative. If you are not using the CNCDA calculator, you can obtain them for free if you are member of CNCDA by contacting CNCDA. Many attorneys also have their own calculators they have prepared for clients. Simplifying your pay plans can go a long way to staying in compliance by reducing errors.

In the meantime, buying wage and hour insurance is a good idea. It is not part of EPLI coverage, which typically has an exclusion for wage and hour, however, it can be purchased. It does not typically cover the wages, but it will cover the legal fees up to \$100,000 after the first \$50,000 which will likely be needed unless the case is settled before the claim is filed. Make sure your employees who receive mail know who to direct certified mail to and make sure that person knows what to do if they receive a letter from an attorney addressed to the Labor and Workforce Development Agency (LWDA). The only way to prevent a lawsuit from being filed is to pay whatever amount is allegedly due to the plaintiff (unless clearly wrong) and prove to the LWDA you have done this within 30 days of the postmark on the letter. Doing this without admitting liability (which can be used against you and increase penalties) is tricky, so legal advice is imperative. Acting quickly could save you hundreds of thousands of dollars.

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(818) 907-4071
etenner@grayduffy.com