



What Happens If Landmark Appellate Court Decision Is Reviewed By State Supreme Court?

Insights

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Following a line of recent federal and state court cases, California employers are required to compensate employees receiving commissions and piece rates separately for non-productive time and rest periods. In a recent decision, the California Court of Appeal held that employers are permitted to provide a compensation system that provides a minimum base rate of pay for all hours worked exceeding the state's minimum wage, but which allows for increased hourly rate of pay for all hours worked during the pay period when certain work is performed.

Summary Of Decision

The September 18 decision in the *Certified Tires and Service Centers Cases* dealt with a series of situations where service technicians worked under a compensation plan that paid the greater of a guaranteed hourly rate above the minimum wage or a variable hourly rate based on a formula that credited production performed throughout the pay period. The plaintiffs claimed that they were not getting paid for performing the productive work which they handled because, on occasion, they were not able to earn higher wages while performing that work even though they earned the guaranteed hourly rate nonetheless.

The court carefully considered but rejected the plaintiffs' argument. The court held that the workers actually were paid by the hour and were not "activity-based" workers, and thus, Certified Tire was not required to supplement additional wages to make sure the workers made more money than the guaranteed wage which exceeded the minimum wage. The court reasoned that the pay system was more about the wage "ceiling" than the wage "floor" which had formed the basis for prior court decisions requiring separate pay for non-productive time. The court concluded that the employees were directly paid for every hour worked, including rest periods, at an hourly rate that exceeded the applicable minimum wage required by law, and that the employer complied with California's minimum wage and rest period requirements.

What's The Impact Of This Case?

Section 200(a) of the Labor Code defines wages as amounts "fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." This decision, if upheld, stands for the proposition that employers can devise hybrid methods for determining how to directly compensate employees for each hour of work, and that bonus plans can be devised that permit higher hourly rates of pay but which do not directly compensate by piece rate or commission.

In the face of this dispute, the court was careful not to rewrite the compensation plan or demand the reintroduction of a traditional piece rate plan. Rather, the court concluded that it was sufficient that the employees were always paid by the hour and, in fixing the variable hourly rate, were credited with a percentage of revenue generated by sales which was converted to an effective hourly rate based on total hours worked each pay period. Importantly, the court said that the pay system, rather than permitting employees to receive no pay at all when falling below a minimum floor, merely imposed a lawful ceiling on compensation.

What's important about this case is that the appellate court approved a hybrid hourly rate system that paid a guaranteed hourly rate for all hours worked, with the potential of earning a higher hourly rate in a compensation system that recognized revenue generated by the technician in a formula different than a traditional piece rate system. In effect, the court recognized this "other method of calculation" as a fully valid and legal compensation system. In other words, this compensation system, which recognized that the employees' sales revenue could be used in calculating a different hourly rate, directly compensated the technicians and was not deemed tantamount to a piece rate system of compensation. Moreover, the appellate court had no problem with the base hourly rate being the only form of compensation if the technician's overall revenue generated did not result in a higher hourly rate under the formula.

If this decision remains good law and is not taken up on review by the Supreme Court, we can assume that any work performed by employees (such as training) would not be deemed "unpaid" merely because the generation of revenue is not always recognized as a factor that increases wages. This is contrasted by an "activity-based" compensation system where courts held previously that a worker compensated by piece rates was considered unpaid when working off the clock, or when the piece rate is not actually paying for the actual work performed. In this way, the court distinguished the piece rate and commission cases as pure "activity-based" systems which did not directly compensate by the hour.

Other Options

If this decision is vacated upon a granting of review, all is not lost for employers because the case may be distinguished on its facts. There are many different ways to pay employees, including hybrid-pay systems that involve purely hourly rate systems which involve fixed levels of hourly pay rather than variable hourly pay, which may pass muster. Thus, the vacated decision would not necessarily invalidate other methods of compensation that directly compensate employees for both productive and non-productive work, as required by law. This can be accomplished in a variety of ways that have been approved by the courts and California Labor Commissioner, who runs the Division of Labor Standards Enforcement and enforces California wage and hour laws. It should be noted, however, that the enforcement policy of the California Labor Commissioner is not always adopted by the courts but may be accepted even though it is not binding.

Conclusion

The case law is still developing with regard to what it means to compensate different classes of

employees for every hour of work.” Indeed, the California legislature may introduce legislation which regulates compensation for workers other than piece rate employees. In addition, employees should be trained and supervised regarding proper recording of their working time so that all working time is captured. Employers sometimes forget that, even if they have in place a compensation system that is legally compliant in theory, employees still can be underpaid if they work hours which are not recorded.

In summary, employers should await the outcome of the *Certified Tire* petition for review at the state Supreme Court, but regardless of the outcome, audit your compensation plans vigilantly with legal counsel frequently to make sure they contain all necessary elements that directly compensate employees for every hour of work. Taking a proactive approach to compensating employees for “every hour of work” may help you defend against the plethora of wage and hour claims and penalty lawsuits arising under the Private Attorneys General Act (PAGA).

For more information, contact the author at JSkousen@fisherphillips.com or 949.798.2164.

Related People



John K. Skousen
Senior Counsel
214.220.8305
Email

Service Focus

Wage and Hour