

LETTING SALESPEOPLE CHOOSE THEIR PAY PLAN? HERE'S WHAT COULD GO WRONG FOR YOUR DEALERSHIP – AND 5 STEPS TO DO IT RIGHT

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Letting Salespeople Choose Their Pay Plan? Here's What Could Go Wrong For Your Dealership – And 5 Steps to Do it Right

Offering your salespeople a choice between two pay plans sounds like a win-win, but it can create legal headaches that outlast the goodwill. Before your dealership rolls out a *Plan A versus Plan B* compensation structure, here's what you need to know.

What Could Two Pay Plans Look Like?

While the specifics will vary by dealership, here's one common way a two-pay plan system could take shape in practice.

- Your dealership offers **Plan A** with a higher base hourly wage and a lower commission rate to offset labor costs: steady, predictable, good for someone still building their stride.
- You also offer **Plan B** to flip that equation, with a lower base hourly rate at or near the minimum wage, but a higher commission rate that can pay off handsomely for a high-volume closer.

You let your salespeople choose which pay plan they would like. This means you will have salespeople working side by side, with the same job title and work on the same

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showroom floor, but potentially earning very different paychecks even if their output is about the same.

The Business Case Makes Sense

The logic is intuitive. Some salespeople, especially newer hires, want the security of a meaningful level of guaranteed base pay in the beginning because they are still in training or need to build a customer base. Others, typically your experienced salespersons, who are the highest producers, will gladly trade a lower hourly base guarantee for a richer commission rate that rewards their output. Offering both can help you recruit a broader range of talent while keeping top performers motivated.

A tiered structure can also serve as a developmental ladder: Plan A as a higher-base starting point for employees still building their pipeline, with Plan B as the performance-oriented option once they've proven themselves and seek higher rewards. In practice, dealers who use this model report that it works, as long as they manage it carefully.

The Equal Pay Concern is Real

Here's the risk that should keep you up at night: two salespeople doing the same job, but making meaningfully different amounts under plans they nominally "chose." That's a fact pattern that invites an Equal Pay Act claim.

Under the federal Equal Pay Act, differences in pay for employees doing substantially equal work must be tied to seniority, merit, production quantity or quality, or some other legitimate factor. A voluntary plan election *could* qualify, but only if the choice is genuinely free, consistently applied, and not producing a discriminatory pattern along protected lines.

State laws raise the stakes further. California's Equal Pay Act, for example, extends the analysis beyond sex to race and ethnicity, and requires that any pay differential be tied to a bona fide, job-related factor. Colorado, Illinois, and New York have enacted similarly broad protections in recent years.

The real danger isn't that Plan A and Plan B pay differently. It's that, over time, employees in protected categories may end up clustered in the lower-earning plan. For example, if your data shows that women are disproportionately in the

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lower-paying option, you could have a problem, regardless of whether the original choice was technically voluntary.

The Motivation Problem is Just as Real

This one is less legal and more human. Dealership floors are not known for compensation privacy. When two people doing the same job can compare paychecks and calculate that they would have made more under the other plan, resentment follows.

A salesperson on Plan B who had a slow month and realizes Plan A would have paid significantly more will be unhappy. They'll do the math on whether they've been set up to lose, and could start looking for the exit to find a new employer. Many auto dealers seek to hire discontented salespersons with a history of high performance in other dealerships by offering temporary pay guarantees over the first 90 days (e.g., \$10,000 per month x 3 months).

You might think that you can solve this problem by prohibiting your workers from talking about their pay. Think again. Besides the fact that such a policy cannot realistically be enforced, it might very well be illegal. States like California, Oregon, Washington, Colorado, Connecticut, and New Jersey (and more) protect workers who discuss or ask each other about wage information and prohibit retaliation for having these discussions. Beyond that, Section 7 of the National Labor Relations Act gives most private-sector employees (unionized or not) the right to engage in concerted activity – which may include discussing wages and working conditions, regardless of state law.

California Adds Another Layer (Of Course)

California dealers face additional complexity, and it's worth understanding why. While the state Labor Commissioner has blessed "greater of" pay plans as long as they are not a subterfuge for avoiding minimum wage and/or overtime requirements, some courts have read this approval very narrowly and approach creative compensation structures with skepticism. Some judges, in fact, have gone as far as to accuse employers of mathematical witchcraft and sorcery when reviewing dual-calculation pay plans – even when the math was clean and employees were earning well above minimum wage.

The California Supreme Court brought some sanity back to the analysis with its 2020 decision in [*Oman v. Delta Air Lines*](#). In that case, a group of flight attendants worked under a complex pay system that paid the highest of four pay calculations based on various factors. Although hours worked were elements in the computations, the airline did not promise to pay by the hour, nor to “pay for certain hours and not others.” It was undisputed that the employees earned more than the minimum wage. But the workers filed a minimum wage lawsuit anyway.

The court ruled for the employer. The main reason? It said that when a pay agreement provides a path for earning compensation above the legal minimum, courts should enforce the contract as written. Stated differently, [“straight-time wages above the minimum wage are a matter of private contract between the employer and employee.”](#)

The key takeaway for dealers is that, if your compensation structure always pays the *higher* of multiple calculations, you’re generally on firmer ground.

Risks Still Remain (Sorry, Employers)

But that *Oman* ruling didn’t eliminate all risk for California dealerships. Wage and hour challenges can be brought as representative actions under California’s Private Attorneys General Act (PAGA) where one unhappy employee can open the door to claims on behalf of the entire workforce. Employees may also file class actions in state or federal court.

Dealerships have faced many PAGA and class action lawsuits involving minimum wage and overtime claims filed by highly paid employees whose incentive agreements allegedly had gaps (triggering minimum wage claims) or whose compensation was not structured properly to satisfy an exemption (triggering overtime claims). That means you need to review any dual-plan structure in California for compliance with the state’s minimum wage laws as well as the state’s conditional overtime exemption for commissioned salespersons. This requires that more than half of an employee’s compensation represent commissions and that the effective hourly rate exceed one-and-a-half times the state minimum wage.

The bottom line in California: creative pay plans are legally defensible, but they require real legal infrastructure to hold

up.

5 Steps Before You Roll Out Different Pay Plans

A few practical steps before you roll anything out:

- **Have your attorney review each plan independently for compliance.** Both plans need to satisfy minimum wage and overtime requirements on their own, not just as a blended outcome.
- **Build objective criteria for plan transitions.** If Plan A is meant to be a steppingstone, document objective benchmarks for moving to Plan B. Subjective, case-by-case decisions about who advances are a discrimination claim in waiting.
- **Track outcomes by protected category.** If employees in protected categories are consistently ending up in the lower-earning plan, address it before someone else does.
- **Ask whether “free choice” is actually free.** If plan transitions are voluntary rather than strictly performance-based, courts and agencies will scrutinize whether certain employees faced pressure (explicit or implicit) to stay in a particular plan. Among other things, your FP counsel can assist in setting up acknowledgments and election forms with sufficient disclosures to help establish the voluntary nature of a choice.
- **Keep good records.** Documentation of pay-plan elections, transition criteria, and any internal plan comparisons will be essential if a claim arises.

Conclusion

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