

WAGE AND HOUR LAW**What do I have to say to get you into this car?**

by Garrett Jensen

*You amble down to your local car dealer only to be hassled by a salesman hoping to receive a big commission after you purchase the newest model with all the fixings from him. Not the highlight of your day, right? CarMax sought to avoid that situation by instituting a different type of commission plan. Despite its good intentions, did its plan run afoul of California overtime law? Read on to find out.*

**What constitutes a commission?**

California Wage Order No. 7 covers businesses, including CarMax, operated for the wholesale or retail purchase, sale, or distribution of goods or commodities. The order provides that if an employee earns more than one-and-a-half times the minimum wage and receives at least half of her wages in “commissions,” she is ineligible for overtime pay.

Further, California Labor Code Section 204.1 provides that commission wages paid to any person employed by a company licensed by the California Department of Motor Vehicles as a vehicle dealer are due and payable once during each calendar month on a day designated in advance by the employer as the regular payday.

“Commission wages” are compensation paid to any person for services rendered in the sale of the employer’s property or services and are based proportionately on the amount or value of the property or services sold. The statute was intended to give automobile dealers the right to pay employees commission wages on a monthly, rather than a biweekly, basis. The interpretation of the second half of the statute defining commission wages as “based proportionately upon the amount or value” was the issue before the court in the *CarMax* case.

**My recommendation? The most expensive car on the lot**

To avoid an incentive for its sales staff to push higher-priced vehicles and maximize their own commissions, CarMax instituted two commission plans: (1) the national pay plan and (2) the California pay plan. Under the national pay plan, sales consultants received a uniform payment of \$150 for the sale of a vehicle. The California pay plan, implemented beginning in 2005 for CarMax’s California sales consultants, paid sales staff under a formula yielding the same uniform payment per vehicle, approximately \$154. In essence, the identical reward was provided for sales consultants regardless of the price of the vehicle sold.

**Where’s my overtime?**

Leena Areso began working for CarMax on June 23, 2004, as an hourly sales consultant trainee who was eligible for overtime. On July 19, CarMax promoted her to sales consultant, a position classified as an exempt commissioned salesperson. As a sales consultant, she received payments based on the products and services she sold. She was guaranteed a minimum base pay, but she was not paid overtime.

Areso ceased working for CarMax on June 7, 2005, and on July 10, 2008, she became a named plaintiff in a class-action lawsuit against the car dealer. The suit alleged, among other things, worker misclassification and failure to pay overtime. Her theory was that CarMax’s commission plan didn’t qualify as “commission wages” under Labor Code Section 204.1, which requires commissions to be “based proportionately on the amount or value” of the sale of the employer’s property or services.

**Compliance with the statute? Yes!**

In determining whether the payments to Areso under the national plan or the California plan constituted commission wages “based proportionately on the amount or value” of CarMax’s property or services sold, the court looked to the two-part test adopted in a 1987 case (*Keyes Motors v. Division of Fair Labor Standards Enforcement*) and endorsed in 1999 by the California Supreme Court in *Ramirez v. Yosemite Water Co.* To qualify for the commissioned salesperson exemption, (1) the employee must be involved principally in selling a product or service (not making a product or rendering a service) and (2) the amount of her compensation must be based proportionately on the amount or value of the product or service sold.

Areso argued that a 2006 case, *Harris v. Investor’s Business Daily, Inc.*, warranted against finding that CarMax’s plans were based proportionately on the value of the goods sold. The *Harris* case dealt with telemarketers who sold magazine subscriptions. Employees received a certain number of points for each type of subscription sold, but the earned point values weren’t tied to the price of the subscription sold. In that case, the court determined that the commission exemption didn’t apply because the amount of compensation wasn’t a percentage of the price of the product or service sold. Areso likened CarMax’s commission plans to the magazine point subscriptions (*i.e.*, CarMax had deliberately not made the commissions a percentage of the price of the vehicles sold).

However, the court found that CarMax’s uniform payment for each vehicle sold constituted commission compensation even though the commission wages weren’t based proportionately on the value of the property or services sold by the employee. In doing so, the court focused on the word “amount” in the statute and determined that CarMax’s payment of a flat dollar figure

for each vehicle sold satisfied the statutory requirement because its commission payments are made based on the “amount” or number of vehicles sold. Further, paying a uniform fee for each vehicle is “proportionate” because it is a one-to-one proportion, meaning “compensation will rise and fall in direct proportion to the number of vehicles sold.” *Areso v. CarMax, Inc.* (California Court of Appeal, Second Appellate District, 5/20/11).

### ***Bottom line***

This case is a favorable development for employers that classify their sales employees as exempt

commissioned salespeople and compensate them with commission plans that may include a “flat fee” component. Because this case was the first to construe the term “amount” as set forth in Labor Code Section 204.1, it remains to be seen whether other courts will follow the same reasoning. The best way to avoid liability is to know and comply with California’s wage and hour laws, including the requirements for exempting employees from overtime under the commissioned salesperson exemption.

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