Cooley

August 12, 2014

The California Supreme Court recently released an important decision regarding California's "commissioned salesperson" exemption. To qualify for this exemption to California's overtime laws, an employee must: (1) earn at least one and a half times the minimum wage; and (2) earn more than half of her compensation from commissions. In *Peabody v. Time Warner Cable, Inc.*, the Court clarified that an employer must pay the required minimum earnings each pay period, and may not attribute commissions paid in one biweekly pay period to other pay periods in order to satisfy the earnings requirements of the exemption.

Susan Peabody was a salesperson for Time Warner. She regularly worked more than 40 hours per week, but was not paid any overtime wages. She only received commission payments every other pay period. After Peabody stopped working for Time Warner, she sued, alleging various wage and hour violations. Peabody claimed that she did not qualify for the commissioned salesperson exemption, as she had been classified by Time Warner, because her paychecks for non-commission pay periods were well below one and a half times the California minimum wage. Time Warner, on the other hand, argued that while Peabody's paychecks were issued on a biweekly basis, it was using "monthly pay periods" when paying commissions. As a result, commission payments could be attributed to whichever biweekly pay period they were "earned" in, even though they were only paid every other pay period. Attributing Peabody's commission wages in this way would satisfy the exemption's minimum earnings prong.

In its decision, the Court gave short shrift to Time Warner's compensation scheme, concluding that "[a]n employer may not attribute wages paid in one pay period to a prior pay period to cure a shortfall." In other words, an employee must qualify for the commissioned employee exemption *in every workweek of a pay period* to fall within the scope of the exemption. The Court reasoned that such a requirement mitigates the burden imposed by exempting employees from receiving overtime.

Importantly, the Court also reiterated that commissions are included within the Labor Code's definition of "wages" under Labor Code section 204, which requires employers to pay wages on a timely, semimonthly basis. Thus, employers must pay out any "earned" commissions within the same semimonthly parameters that they use to pay out any other wages. That said, the Court recognized that many commission plans calculate amounts owed on a monthly (or less frequent) basis and noted that commissions only need to be paid out once they were "earned" by an employee. The Court noted that California law on this subject is different from federal law, which allows employers to defer paying commissions "so long as the employee is paid the minimum wage in each pay period."

Employers will need to carefully consider employee compensation decisions if they wish to use the commissioned employee exemption post-*Peabody*. It also makes sense to re-examine any existing sales commission plans; employers must be prompt about paying out commissions and may not be able to defer the payment of commissions to later pay periods if those commissions have already been earned under the terms of an existing plan.

Our attorneys have deep counseling and litigation experience on these issues. To discuss these issues further or pose questions about this *Alert,* please contact one of the attorneys listed above.

not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our legal notices.

Key Contacts

Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.