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"Pay Averaging" Post-*Armenta* – Revisiting the Prohibition Against "Averaging" Commissions and Piece Rates

By Kirby Wilcox, Zach Hutton & Blake Bertagna

Introduction

This article challenges the logic and holdings of decisions from four California federal district courts and three California courts of appeal that have concluded that employers who pay non-exempt employees by commission or by piece rates may not average the wages earned over a day or week to determine compliance with state minimum wage law.[1] Its goal is to encourage California federal and state courts to re-evaluate and modify these "pay averaging" decisions to hold that commissions and piece rates, if reasonably structured, compensate for all work time, including: (1) statutory rest periods; and (2) gaps between activities directly related to sales or earning pieces that are either of reasonable duration or closely related to direct sales or piece rate activities ("gap time").[2]

At the core of the arguments that we advance is a critical distinction between hourly work and commission or piece rate work. Hourly rates of pay compensate employees for the work they perform, without regard to the productivity of that labor. By contrast, commission and piece rates of pay compensate employees for the work they perform only if that labor satisfies defined productivity standards. Given this distinction,

[1] All references to "employees" throughout the remainder of this article are references to non-exempt employees.

[2] Unless otherwise indicated, we use the phrase "gap time" to encompass activity or inactivity under the control of the employer and, therefore, compensable "work time."

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"Pay Averaging" Post-*Armenta* – Revisiting the Prohibition Against "Averaging" Commissions and Piece Rates

By Kirby Wilcox, Zach Hutton & Blake Bertagna

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we believe that the rule against the averaging of hourly pay to determine minimum wage compliance was not intended to apply to the averaging of commission and piece rate pay to determine minimum wage compliance. Indeed, applying hourly pay averaging principles to commission and piece rate pay produces an illogical result. According to the post-*Armenta* pay averaging cases, it is lawful for an employer to pay an employee exclusively minimum wages for all hours worked, but unlawful to pay an employee exclusively commission or piece rate wages, with a minimum wage floor, even though the pay received at the end of the week is identical.

To illustrate the quagmire into which the courts have now ventured, we offer the following hypothetical:

> Three employees work from 8:00 am to 12:00 pm and from 1:00 pm to 5:00 pm on the same day. The meal period from noon to 1:00 pm is duty-free and not under the control of the employer. Each employee also receives a statutory rest period in the middle of each work period. For the day, each employee receives gross wages of $160. Employee #1 is paid hourly at the rate of $20. Employee #2 and Employee #3 earn a piece rate of $20 and each completes eight pieces. However, the manner in which Employee #2 and Employee #3 perform their work differs. Employee #2 works "piece-to-piece," meaning that, other than time for rest periods and the meal period, he or she engages in nothing but piece rate work – with no gap time of any kind. By contrast, Employee #3 works "gap-to-gap" – meaning, that he or she has multiple gaps of 20 minutes or less between the completion of one piece and the start of the next piece. The employer does not provide additional pay for statutory rest periods for any of these three employees, and it does not provide additional pay for the "gap time" for Employee #3.

We do not believe that courts can fairly distinguish between the three employees in this hypothetical. The total time spent under the control of the employer is the same for each. The productivity of Employees #2 and #3 is identical. Yet, according to the "pay averaging" cases, only Employee #1 is paid properly. Employee #2 is "deprived" of pay for statutory rest periods, even though he or she works continuously throughout each of the four-hour work periods in the day, except during the two rest periods, just like Employee #1. Employee #3 is "deprived" of pay for statutory rest periods and for the "gap time" during the second work period, even though the total work time for Employees #1, #2 and #3 is identical. Indeed, the only difference between the two piece rate employees is happenstance. For Employee #2, work is continuously available and he or she performs that work without interruption other than for statutory rest periods. For Employee #3, the work also may be continuously available, or it may be variously available. If the former, then the hypothetical introduces the issue of "employee choice" in how the work is performed. We contend that courts should not base compliance with the California Labor Code and Industrial Welfare Commission ("IWC") Wage Orders upon such choice if the employer provided the opportunity to work continuously. If the latter, then the hypothetical introduces the issue of uncompensated "gap time" and whether a piece rate should pay for gaps in work as long as they are of reasonable duration to account for commonplace breaks in work flow as an employee transitions from one piece rate task to another.[3]

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[3] Because the issue of uncompensated "gap time" has become so "charged" in the discussion of proper compensation for work paid by commission and piece rates, we address it directly later in this article. We pause briefly to comment that gaps between a sale or the completion of a piece and the start of the next sale or piece are commonplace – almost inevitable. Assuming that a commission or piece rate plan fairly accounts for those gaps, courts are ill-equipped to analyze the thousands of different commission and piece rate plans that employers have adopted and decide whether an uncompensated gap should last no longer than one minute or one hour. Employers should have some reasonable latitude. Consider only one example. Assume that an employer pays its truck drivers by the mile for pick-ups and deliveries. It does not pay for waiting time at pick-up and delivery stops unless that time exceeds 30 minutes. Assume further that there is no instance in which the mileage rates, when divided by all driving time and waiting time, result in weekly earnings below the minimum wage. We see no reason why this compensation structure should be struck down on the ground that "mileage" must be pay for driving and, therefore, "mileage" pay does not pay for waiting time. This logic is deeply strained. If an employer defines the mileage rate as covering waiting time of reasonable duration, why would a court hold that "mileage" can have no broader meaning than pay for driving? In wage and hour law, labels are never determinative. If an employer pays by the mile, courts should inquire no further than to determine whether the pay structure compensates employees for all reasonably anticipated work tasks. In this instance, waiting time at pick-up and delivery stops is reasonably anticipated and fairly compensated.

What the "pay averaging" decisions appear to have done is follow the same path that the California Supreme Court criticized in *Harris v. Superior Court*.[4] Part of the holding in the *Harris* decision rejected the semantic gymnastics that had become commonplace in suits involving the administrative/production worker dichotomy. Prior to *Harris*, plaintiffs argued that if an employer's core business was X, then their work produced, not administered, X. In response, defendants argued that their core business was Y, not X, and, therefore, plaintiffs administered, not produced, Y. The same "word game" has emerged in the "pay averaging" cases. Plaintiffs argue that commissions and piece rates cover only activity directly related to sales or to earning a piece. Therefore, any other work time is uncompensated. Defendants argue that commission plans and piece rate plans are pay structures, not dictionary terms, and that the scope of activities compensated by commissions and piece rates also should encompass gap time.

In the final analysis, the "pay averaging" decisions have created untenable public policy. California Labor Code section 200 defines "wages" to include "all amounts for labor performed . . . of every description." For the first time since the Labor Code was enacted in 1937, the courts have concluded that two of those wage types – commissions and piece rates – are not lawful stand-alone means of paying for work. Now, commissions and piece rate wages are lawful only if they also include other forms of pay (such as hourly wages) for work that courts define as outside the types of activity and inactivity that commission and piece rates should be permitted to cover. We do not contend that employers should be able to define the scope of the work encompassed by commission and piece rate pay in their absolute discretion. There is a role for the courts in setting reasonable boundaries. However, those boundaries must account for the enormous variation in commission and piece rate plans from employer to employer and accept that some latitude is warranted both to recognize these realities and to generate fair pay for all work performed. Courts are not substitute human resources departments or collective bargaining agents. It is one thing to establish limits. It is another thing to declare every commission and piece rate plan that pays only commission wages or only piece rate wages to be unlawful. It is time to review the logic of the "pay averaging" decisions more carefully.

[4] 53 Cal. 4th 170 (2011).

Origins of the Issue – *Armenta* and Later Cases

The origins of the bar to "pay averaging," irrespective of the form of the wages involved, began with *Armenta v. Osmose, Inc.*[5] In *Armenta*, the employer paid the plaintiffs an hourly rate to maintain utility poles. However, the employer drew a distinction between "productive" and "nonproductive" time, compensating only the former. "Productive time" included work directly related to pole maintenance. "Nonproductive" time included such tasks as traveling to and from a job site, loading or maintaining vehicles, completing paperwork, or attending safety meetings. When the employees sought minimum wages for work performed during "nonproductive" time, the employer countered that the average of the wages received for "productive" time each week when spread across all hours worked far exceeded the minimum wage. Federal law permits such "pay averaging," and the employer urged a similar ruling. The appellate court, however, disagreed. After considering many arguments, it concluded that California minimum wage law requires compensation for each and every hour of work, and that pay averaging was unlawful. The plaintiffs, therefore, were entitled to additional minimum wages for all "nonproductive" time.[6]

Key to the holding in *Armenta* were three California Labor Code provisions that protect agreed wage rates. In the words of the decision:

> Sections 221, 222, and 223 articulate the principal that all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation. For example, section 221 provides: "It shall be unlawful for any employer to collect or receive from an employee *any part of wages* theretofore paid by said employer to said employee." (Italics added.) Section 222 provides: "It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either willfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee *any part of the wage agreed upon*." (Italics added.) Finally, section 223 provides: "Where any statute or contract requires an employer to maintain the

[5] 135 Cal. App. 4th 314 (2005).

[6] In this article, we do not take issue with the holding in *Armenta*. Our focus is exclusively upon the application of *Armenta* to pay forms other than hourly wages.

> designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract." As the trial court noted, adopting the averaging method advocated by respondents contravenes these code sections and effectively reduces respondents' contractual hourly rate. Federal law provides no analogous provisions to sections 221-223.[7]

As discussed more fully below, Labor Code sections 221, 222, and 223 do not apply to the commission or piece rate context because commission and piece rate plans do not recapture wages already paid or pay less than the commission or piece rate plan provides. They pay exactly what the plans contemplate. Thus, *Armenta* was noteworthy only in one respect – its rejection of the federal "pay averaging" rule. It neither discussed nor intimated that its holding applied outside the context of hourly compensation plans. Starting with four federal district court decisions, however, plaintiffs prevailed in extending the holding in *Armenta* to both piece rate and commission plans.[8]

In *Ontiveros v. Zamora*,[9] the employer paid its non-exempt automotive mechanics piece rates known as "flag rates" for performing defined tasks – such as a brake job or a tune up. The plaintiffs argued that the piece rates failed to compensate them for tasks not directly related to earning piece rates, such as time spent attending meetings and training sessions, setting up their work stations, and rest periods. The employer defended, as had the employer in *Armenta*, by contending that the total compensation received for each workweek exceeded the minimum wage for all hours worked. The district court found the arguments and holding in *Armenta* applicable to piece rate plans and denied the employer's motion for judgment on the pleadings.

In *Cardenas v. McClane Foodservices, Inc.*,[10] the employer paid truck drivers pursuant to a piece rate plan that accounted for miles driven, stops made, and product delivered. The plan did not separately compensate for pre-trip and post-trip inspections, rest periods, or the first 30 minutes of delay time when employees must wait for customers to accept deliveries. The employer argued that its pay system provided all employees with at least the minimum wage when averaged over all hours worked each workweek, but the court, relying on *Armenta*, disagreed and granted summary judgment for plaintiffs.

In *Quezada v. Con-Way Freight, Inc.*,[11] the employer paid truck drivers for miles driven, plus an hourly rate for work performed at its facilities. However, the employer did not separately compensate employees for conducting vehicle inspections, completing paperwork, or the first hour of work. The employer again invoked salary averaging in defense of its practice, but the court joined the others before it and held that *Armenta* required compensation for each and every hour of work in the context of piece rate plans.

In *Balasanyan v. Nordstrom, Inc.*,[12] the employer paid its retail sales workers on a commission basis, but guaranteed that they would receive no less than $10.65 for all hours worked each week. The employer treated up to 30 minutes of stocking time and up to 40 minutes of pre-opening and post-closing time as compensated by its commission plan. The employees contended that commissions do not compensate for other than direct selling tasks and, therefore, they were entitled to minimum wages for each and every hour engaged in stocking activities and in pre-opening and post-closing activities. The employer argued that its guaranteed wage floor distinguished its plan from those found deficient in earlier cases. Despite expressed misgivings about the direction of the law, the court agreed with the plaintiffs and ruled that *Armenta* controlled, that commission wages pay for direct selling activity only, and that the guaranteed wage floor amounted to a form of averaging of the pay for compensated and uncompensated tasks.

Because federal district court decisions are not binding upon California state courts, employers could not be certain whether the state courts would accept the logic and conclusions of these four federal decisions. In 2013, however, two post-*Armenta* California appellate court decisions, both denied review by the California Supreme Court, applied *Armenta* without reservation to piece rate systems. There is, as yet, no post-*Armenta* California appellate court decision regarding commission plans.

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7 *Armenta*, 135 Cal. App. 4th at 323.

8 Throughout the remainder of this article, we refer to the post-*Armenta* "pay averaging" cases that have addressed commission and piece rate plans as the "pay averaging" cases – without repeating the phrase "post-*Armenta.*"

9 No. CIV. S-08-567 LKK/DAD, 2009 U.S. Dist. LEXIS 13073 (E.D. Cal. Feb. 20, 2009).

10 796 F. Supp. 2d 1246 (C.D. Cal. 2011).

11 No. C 09-03670 JW, 2012 U.S. Dist. LEXIS 98639 (N.D. Cal. July 11, 2012).

12 913 F. Supp. 2d 1001 (S.D. Cal. 2012).

In *Gonzalez v. Downtown LA Motors, LP*,[13] the employer paid its non-exempt automotive mechanics piece rates that it labeled "flag hours." Each mechanic had a flat hourly rate that depended upon his or her experience. Repair tasks were assigned a certain number of "flag hours." At the end of each 80-hour work period, the employer multiplied each technician's hourly rate times his or her "flag hours." The employer separately tracked all hours worked and, at the end of each pay period, multiplied those total work hours by the applicable minimum wage. Employees whose flag rate/flag hours fell below the minimum wage for all hours worked received a supplemental payment increasing their wages to the minimum wage. The employer did not pay separately for time spent waiting for vehicles to repair or for other non-repair tasks, which included obtaining parts, cleaning work stations, attending meetings, traveling to other locations to pick up and return cars, reviewing service bulletins, and participating in on-line training. As in the previous cases, the plaintiffs urged that *Armenta* applied, and the employer argued that its piece rates and minimum wage floor were entirely lawful. The appellate court, however, disagreed with the employer, and held that the failure to separately pay for each and every hour of work necessarily resulted in the pay averaging that *Armenta* had found unlawful. It affirmed summary judgment for the class.

In *Bluford v. Safeway Stores, Inc.*,[14] the employer paid its truck drivers piece rates for miles driven, fixed rates for certain tasks (e.g., for pallets delivered or picked up), an hourly rate for a predetermined number of minutes for certain other tasks (e.g., 10 minutes for set-up time at each store), and an hourly rate for delays – but it did not separately pay for rest periods. The employees sued for payment for their rest periods. The employer once again argued that its piece rate system compensated for rest periods. However, the court, citing the Wage Orders and *Armenta*, reached two conclusions. First, "a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law."[15] Second, an employer is "precluded from building compensation into its mileage rates for rest periods."[16] Thus, the appellate court reversed an earlier denial of class certification and directed the trial court to grant plaintiff's motion to certify.

[13] 215 Cal. App. 4th 36 (2013).

[14] 216 Cal. App. 4th 864 (2013).

[15] *Bluford*, 216 Cal. App. 4th at 872.

[16] *Bluford*, 216 Cal. App. 4th at 873.

Analysis of the Issue

We believe that the "pay averaging" cases have not considered – or fully considered – six issues that we believe render their holdings unpersuasive and internally inconsistent.

Issue #1: The "Pay Averaging" Cases Impliedly Hold that Two of the Forms of Wages Identified in California Labor Code Section 200 – Commissions and Piece Rates – Are Unlawful If They Are the Exclusive Source of Compensation.

California Labor Code section 200 defines the term "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."[17] While this definition does not further define "time," "task," "piece" or "commission," it nowhere suggests that "piece" or "commission" rates are unlawful rates unless combined with some other form of wage.

Indeed, support for the independent statute of pure commission and pure piece rate plans exists in the Wage Orders. IWC Wage Order No. 4, section 4(B) provides: "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." *Armenta's* conclusion that an employer violates section 4(B), in the context of hourly pay if it fails to pay at least the minimum wage for each hour of labor as it is performed does not follow for commission and piece rate compensation. All that section 4(B) requires is payment of no less than minimum wages for all hours worked when remuneration is measured by "piece" or by "commission." Because remuneration based exclusively upon commissions or piece rates makes no use of hourly pay whatsoever, the only reasonable interpretation of section 4(B) in the context of commission and piece rate plans is that they yield no less than the minimum wage for all hours worked in the workweek – not that they be supplemented by other forms of pay.

In short, until the "pay averaging" cases, no case had ever intimated or ruled that an employer could not pay for "labor performed" using just *one* of the listed methods. Even *Armenta* does not go that far. As we explain in the next section, *Armenta* held only that

[17] CAL. LAB. CODE § 200(a).

remuneration based upon "time" could not be determined by looking backwards at the end of a week and comparing the pay received to the hours worked. It made no comment on commission and piece rate plans that are *designed* to look backwards to determine the results achieved and the compensation due for those results.

Issue #2: The "Pay Averaging" Cases Fail to Consider that Commission and Piece Rate Wages, on the One Hand, and Hourly Wages, on the Other Hand, Reward Different Forms of Work Behavior, and that Commission and Piece Rate Wages Should Not Be Subject to a Rule Developed Exclusively in the Context of Hourly Pay.

Commission and piece rates, on the one hand, and hourly rates, on the other hand, serve different compensation objectives.

Commission and piece rate plans provide an agreed payment for the accomplishment of an agreed task or transaction. The time it takes to complete a task or transaction is not irrelevant, and those who work slowly may earn reduced wages or suffer performance discipline. However, at their core, such plans do not pay for time – they pay for results.

By contrast, hourly wage plans provide an agreed payment for labor measured exclusively by time. The efficiency with which an employee works for an hourly wage is not irrelevant, and inefficiency may result in discipline. However, at their core, hourly wage plans do not pay for results – they pay for time.

Stated alternatively, hourly rates typically "look forward" and, as described in *Armenta*, are a form of "pay-as-you-work" for labor performed. By comparison, commissions and piece rates "look backward" at the labor performed over a period of time to determine whether that labor has satisfied various productivity standards. As a result, commission and piece rates, by their very nature, average wage payments across unpredictable amounts of time.

In short, the "pay averaging" cases have held that the inherent character of piece rate and commission plans – which is to pay for results, not time expended – is unlawful. None of the "pay averaging" decisions has acknowledged their sweeping declaration that results-oriented wage structures are legally suspect. Indeed, neither the law nor the facts of those cases compelled that conclusion. There were – and are – more reasonable solutions to the alleged abuses that those courts reviewed.

Issue #3: The "Pay Averaging" Cases Require Courts to Become Involved in Parsing "Gap Time" on the Basis of Inherently Subjective and Impractical Criteria.

The "Pay Averaging" Cases Fail to Consider that Some "Gap Time" Is the Result of Purely Subjective Causes and Courts Are Ill-Suited to Evaluate Them.

Commission and piece rate plans also are inherently subject to at least three impediments to productivity: (1) human nature; (2) customer interaction; and (3) failure.[18] The reference to "human nature" introduces the concept that the production of pieces or the consummation of sales could be (a) rapid and continuous or (b) slow and separated by gaps in time, due to the personalities of the commission and piece rate workers themselves. The reference to "customer interaction" introduces the concept that a customer could slow the production of a piece or the closing of a sale by making changes in an order, interrupting the flow of work, or delaying decisions needed to complete a piece or sale.[19] The reference to "failure" introduces the concept that some pieces are rejected as below quality standards and that some sales fall through before completion or are reversed due to customer returns, customer default, or for other reasons.

By declaring unlawful all pay plans that compensate exclusively by commission or piece rates, the "pay averaging" cases have side-stepped the need to address these issues. However, if, as we believe, there is no sound public policy basis for the total eradication of such long-standing compensation arrangements, then it follows that "human nature," "customer interaction," and "failure" are features of commission and piece rate plans that are unavoidable and territory in which courts should venture sparingly.

A corollary of this third point is the adage in wage and hour law that an employee may not impose upon an employer a "cost option" if a "no-cost option" is

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[18] This list of three impediments to productivity is by no means exhaustive. Also important are weather; time of day; time of year; employee knowledge, skill and ability; and many other factors. None of these – or those listed in the text – are matters in which courts should involve themselves to determine the compensability of work time.

[19] The reasons for the "customer interaction" are limitless. Perhaps the piece rate employee is a car mechanic and the customer has left a wallet in the glove compartment of the car up on a jack that is in the middle of a tune-up. Perhaps a customer wants to inspect one of a series of cabinets that an employee is making for piece rate wages. There is no way for courts to parse this variety.

available. For example, if an employer provides laundered uniforms for free, an employee cannot dry clean his or her uniform and pass the extra expense to the employer. Similarly, an employee who works "gap to gap" but has the ability to work "piece to piece" should not be permitted to seek extra compensation for those gaps. But, a court cannot possibly distinguish the efficient worker from the inefficient worker. Yet, the solution should not be to throw out the entire pay structure. The solution should be to make sure that the uncompensated gaps are reasonable in light of the nature of the work.

The "Pay Averaging" Cases Fail to Consider that Some "Gap Time" Is Closely and Reasonably Related to Earning Commissions or Pieces.

Taken to its extreme, failure to pay for gap time could permit an employer to, for example, pay piece rates to an employee for the first four hours of a shift, but no piece rates for the second four hours of the shift if there is insufficient work. Conceptually, such gaps should be of no consequence, if the compensation for the week yields at least the minimum wage for all hours worked. However, we accept that courts will want to control gap time. Yet, we do not believe that such controls are best addressed by declaring every gap of any duration compensable as the "pay averaging" cases hold.

If a piece rate worker in a retail store is in the midst of a sale to a customer who says on three separate occasions, "Give me five minutes to think about this some more," is that transaction one seamless sale or a sale with three gaps? To us, the solution is to review piece rate and commission plans to determine if there is some reasonable relationship between the gap and the activity required to earn a piece or commission rate, but, in so doing, to give deference to the employer's compensation plan. Thus, if a trucker is paid by the mile or the delivery, it is not unusual to include within the compensation bargain a provision that "waiting time" of thirty minutes or less at a pick up site is encompassed within the piece rate. If the weekly wages earned always meet or exceed the minimum wage, we see no public policy basis to deem such "waiting time" unlawfully uncompensated by the piece rate. Courts should not be in the business of designing the intricacies of employer pay systems.

The "Pay Averaging" Cases Fail to Consider that Some "Gap Time" Is De Minimis.

Separate and apart from issues of subjectivity and the close and reasonable relationship of "gap time" to earning commissions and pieces is the issue of *de minimis* time. That is, even if "gap time" is not reasonably related to earning a commission or making a piece, it may nonetheless be noncompensable if it is administratively infeasible to capture and involves small amounts of time.

Administratively Infeasible to Capture.

If we return to the example in the previous paragraph regarding the customer who needed three periods of five minutes to consider a purchase, the "pay averaging" cases do not address the impractical consequences of their holdings. Consider just three of the many ways that employees capture time: at time clocks, computer terminals, and cash registers. None of these are instantly accessible. According to the "pay averaging" cases, the employee in the example would need to capture every gap between every activity directly related to a sale. Apart from the years of litigation it would take to decide what activities constitute those directly related to every form of sale in California is the simple fact that "it can't be done." For most employers, there literally is no mechanism to record the gaps for which the "pay averaging" cases require extra compensation. Such practical realities were never considered, but cannot be ignored.

However, in the context of donning and doffing clothes and equipment, the United States Supreme Court recently encountered a related issue in *Sandifer v. U.S. Steel Corporation.*[20] There, steelworkers argued that the donning and doffing of 12 items of clothing was compensable time under the Fair Labor Standards Act[21] ("FLSA").[22] The Court determined that nine of the items were "clothing," but three were not.[23] This naturally prompted the question "whether the time devoted to the putting on and off of these [three] items must be deducted from the noncompensable time."[24] The Court expressed concern that "separating the minutes spent clothes-changing" would convert trial judges into "time-study professionals."[25] Accordingly, rather than require lower courts to determine precisely which portions of the time spent donning and doffing time is devoted to clothing and nonclothing items, the Court concluded that the better approach was to determine "whether the period at

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20 134 S. Ct. 870 (2014).

21 29 U.S.C. § 201 et seq.

22 *Sandifer*, 134 S. Ct. at 879.

23 *Sandifer*, 134 S. Ct. at 880.

24 *Sandifer*, 134 S. Ct. at 880.

25 *Sandifer*, 134 S. Ct. at 880.

issue can, *on the whole*, be fairly characterized as 'time spent in changing clothes or washing.' "[26]

The "pay averaging" cases pose the same concerns. They require trial court judges to become "time study professionals" charged with evaluating the minutes engaged in alleged uncompensated "gap time" spread across every workweek encompassed within the liability period of each case to determine which of those minutes are directly related to making sales or pieces, and which are not. Under the FLSA, no unfairness flows from treating compensable and noncompensable time that is administratively difficult to separate as entirely one or the other when viewed "on the whole." There is no reason not to adopt a similar rule under California wage and hour law.

Small Increments of Time.

Along with the issue of feasibility is the issue of time quantity. Again returning to the example of the customer who needs three gaps of five minutes to consider a purchase, what are the implications if those gaps are three minutes or one minute or thirty seconds? The "pay averaging" cases make no mention of this issue directly and offer no guidance from which to infer an answer. Forcing employers to endure years of trial court and appellate litigation to determine how trivial a unit of "gap time" must be to fall within – not outside – a commission or piece rate is totally unnecessary. A thoughtful review of the over-zealous holdings of the "pay averaging" cases, in our view, would result in acknowledgement that some "gap time" is logically and properly part of the compensation bargain for commission and piece rate plans, avoiding the need for courts to completely eradicate pure commission and piece rate wage structures.

Issue #4: By Declaring that Commission and Piece Rate Compensation Plans Pay Only for Work Directly Related to "Sales" or to the "Piece," the "Pay Averaging" Cases Have Defined Their Way to Their Conclusions in a Manner Inconsistent with California Supreme Court Precedent.

In our view, what the "pay averaging" cases have done is convert two complex compensation models – commission plans and piece rate plans – into two words, "commission" and "piece," and to treat each model as if it were the one word. The "pay averaging" cases have literally re-defined the historical meaning of commission and piece rate plans and declared anything other than a re-defined plan to be illegal.

Commission plans have always contemplated pay for sales. However, sales, depending upon their type, can require the development of leads, the creation of marketing strategies, customer outreach, sales presentations, price negotiations, and much more. Yet, in the view of the "pay averaging" cases, commissions can pay only for direct sales activities. Thus, once a court decides that an entire compensation system is nothing other than one of its components, it is not difficult to reach the conclusion that the compensation plan fails to pay for its remaining elements.

Similarly, piece rate plans have always contemplated pay for producing pieces. However, the production of a piece can take thousands of forms across industry – and no handful of illustrations could possibly capture their variety. Yet, again in the view of the "pay averaging" cases, piece rates can pay only for activity that the courts deem to be directly related to the production of that piece. By definition, all else is uncompensated.

This form of argument – "define-your-way-to-your-conclusion" – was expressly rejected in *Harris v. Superior Court*.[27] There, the issue was the scope of the administrative exemption from overtime – and how to draw the line between uncovered "production" work and covered "administrative" work. The court criticized any attempt to resolve this dichotomy by resorting to semantic gymnastics and defining the nature of the employer's business so that the work of a plaintiff could be characterized as "production." In the view of the court, the only consequence would be a rejoinder from the employer saying that the nature of its business was such that the work of the plaintiff could be characterized as "administrative." This forced trial judges and intermediate appellate courts to perform a task for which they are not properly equipped – to decide the true nature of the employer's business to place production and administrative work on either side of that line.[28]

Yet, that is just what the "pay averaging" cases have done. Trial judges have ventured onto the thin ice of deciding what is – and what is not – within the scope of making a sale or making a piece. But, those lines are inherently in the eyes of the trial judge and provide no guidance for the employer community. Is the development of pitch materials directly related to a sale? How about the research that preceded the creation of

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[26] *Sandifer*, 134 S. Ct. at 881 (quoting 29 U.S.C. § 203(o)).

[27] 53 Cal. 4th 170 (2011).

[28] *Harris*, 53 Cal. 4th at 189 (noting courts "strain[ed]" to define the operations of a modern business in the context of the dichotomy).

those materials? How about the identification of the lead that preceded that research? Turning the ignition in a truck in which the driver is paid by the mile is clearly related to the "piece" of driving the first mile. How about the ten-minute safety check that precedes entry into the cab? How about the quick review of the delivery board before conducting the safety check? Assuming that these pre-driving activities are compensable, why is it that it is completely unlawful to design a piece rate to encompass such work?

Issue #5: Only By Limiting Commission and Piece Rate Plans to Activities Directly Related to Earning a Commission or Piece Can the "Pay Averaging" Cases Find Violations of Labor Code Sections 221-223.

In the same way that the "pay averaging" cases have improperly defined their way to their holdings, they have improperly held that pure commission and piece rate plans violate Labor Code sections 221 through 223. That is, any such conclusion is dependent upon the prior conclusion that commission and piece rate plans pay only one of the elements of their respective compensation systems – "sales" or "pieces." Accepting, for the purposes of this article, that *Armenta* properly found section 221 through 223 violations in its evaluation of hourly rate compensation arrangements that "looked forward" but paid only for *some* work, it does not follow that the same applies to a commission or piece rate compensation arrangement that "looks backwards" by its nature. No pay is withheld or taken back in such arrangements, unless a court has limited what commission or piece rate can compensate. This logic is totally circular.

Issue #6: By Declaring "Minimum Floor Guarantees" Unlawful, the "Pay Averaging" Cases Have Created a Catch-22 – An Employer Cannot Pay Commission or Piece Rate Wages Alone, Nor Can an Employer Pay Hourly Wages with Commission or Piece Rate Wages If the Only Purpose for the Hourly Wages Is to Provide a Protective Wage Floor.

The "pay averaging" cases struck down not only all pure commission and piece rate plans, but also all "minimum floor guarantees," which promise a wage for every hour at no less than a stated rate. In effect, a "minimum floor guarantee" is akin to a non-recoverable draw. It is not regular and recurring, but it serves the same purpose as a draw, by ensuring no less than a stated sum for work performed. Yet, according to the "pay averaging" cases, "minimum floor guarantees" are just another form of compensation averaging. Again, the "pay averaging" cases define their way to their conclusions. If all forms of averaging are unlawful, even within incentive pay systems that inherently look backward, then, of course, "minimum floor guarantees" are just another form of averaging the compensation earned. However, from our perspective, this turns the purpose for draws, weekly pay guarantees, and other forms of wage protection on their heads. That is, according to the "pay averaging" cases, it would be lawful to pay a sales employee an hourly wage of $20 for all work performed, plus commissions to the extent that they exceed the hourly wage. However, according to those cases, it would be unlawful to pay commissions for all work performed, plus an hourly sum to bring the total earnings per week up to at least $20 per hour.

A Recommended Alternative

The alternative that we offer is very straight forward. Commission and piece rate plans should be interpreted to pay for all time reasonably – not just directly – related to earning a commission or piece rate. This includes both "gap time" and statutory break time. Indeed, "gap time" would become a subordinate inquiry, inasmuch as it currently is a creature of the "pay averaging" cases which deem uncompensated time to exist between activities not *directly* related to earning commissions or pieces. As long as the activity and the time devoted to it by an employee has a rational nexus to the goal of earning a commission or piece, the courts should inquire no further. "Gap time" would then apply only to the residual time under the control of the employer.

We accept that courts could misinterpret our alternative and place every aspect of a commission or piece rate plan under a microscope. However, that is the opposite of our objective. As long as there is some credible evidence reasonably linking a task and its associated time to earning a commission or a piece, the inquiry should stop. Courts should not create "the only form of acceptable commission plan" or "the only form of acceptable piece rate plan" – as if such compensation vehicles could be idealized and codified. There are thousands of variations on these compensation structures, and a one-size-fits-all standard would ignore industrial realities. In the final analysis, it is reasonable to make sure that such structures pay for all time worked. However, it is not reasonable to re-define commission and piece rate plans as encompassing only pay directly related to earning a commission or piece, invalidating pure commission and piece rate pay schemes that have existed for decades.

Conclusion

The bottom line is that it is not at all difficult to structure hypotheticals in which the employee who earns piece rates or commissions is equally productive each day and earns the same wages each day as an employee compensated for the same tasks by the hour. The only difference is that the courts seem to be concerned that because piece rate and commission plans can produce highly variable pay, they need to be declared invalid in their entirety – unless undergirded by a fixed hourly wage or a fixed weekly base for up to 40 hours of work. Whether this is motivated by perceived employer wage abuse, by a latent belief that the minimum wage is too low, or by some other reason, the "pay averaging" cases have gone too far.

In effect, they are producing and will continue to produce the precise opposite of what some of the judges intended. Low wages now are lawful (when tied to low hourly rates) and high wages are unlawful (when tied to significant piece and commission rates, but include no compensation for statutory breaks or "gap time"). Stated alternatively, it is now better for employers to increase the wages of the least productive (by compensating their statutory breaks and "gap time") and to decrease the wages of the most productive (by reducing their piece and commission rates both to account for the additional cost of their break and "gap time," and the additional cost of the break and "gap time" of their less efficient co-workers). We have no doubt that the "pay averaging" cases intended to address what they perceived as schemes to underpay the employees in question, but they threw the baby out with the bath water and severely limited the creativity necessary to distribute pay according to productivity that we believe is lawful under the Labor Code. It is time to re-think the application of *Armenta* outside the context of pure hourly pay.

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