



Extra Pay For A Courtesy Inspection?

By John Donovan (Atlanta)

A dealership recently received a demand letter from an attorney for a former technician. In the letter, the attorney threatened to sue the dealership because it had failed to pay the technician extra money to conduct “courtesy inspections.” Even though the technician had earned well in excess of the minimum wage and was exempt from overtime, the attorney insisted that the dealership was legally obligated to pay the technician for the extra work performed.

The attorney also claimed that the 0.5 FRH that the dealership had previously paid technicians for conducting these inspections was not enough time to do a proper inspection and complete the dealership-required paperwork. Therefore, the tech was entitled to an additional 0.75 FRH for each inspection performed. The attorney demanded more than \$50,000 to settle the case or he would proceed with a class-action lawsuit.

This kind of demand is unusual, but not entirely unexpected. The economy continues to hurt American workers, and dealership employees seem to have suffered more than most. As a result, many dealership employees are more inclined to pursue a claim against their former – or even current – employer than would be the case in better times. The poor economy has also affected plaintiffs’ lawyers. Their business has suffered, too, and they have used their spare time to conjure up new legal theories and claims that we have not seen before.

A Novel “Contract” Claim

It’s interesting to note that this demand is not based on wage-hour law, which involves the payment of minimum wage and overtime. A skilled technician is exempt from overtime under the federal law and under most state laws. Therefore, a dealership need only ensure that the technician has turned enough “flat rate hours” to cover the applicable state or federal minimum wage for each clock hour worked in the week. A technician can be required to attend meetings, take training on the computer, perform courtesy repairs and perform other work for no additional compensation so long as their flagged hours cover all of the clock hours worked at minimum wage.

Recognizing this, the attorney is basing his claim on contract law. The “contract” is the understanding between the technician and the dealership as to exactly how he would be paid for his services. This “contract” is normally spelled out in the employee’s written pay plan. Unfortunately, most dealerships do not bother with a formal pay plan for technicians because they believe that everyone understands how technicians are paid and all they really need to know is their flat rate.

Over the past several years, plaintiffs’ attorneys across the country have filed lawsuits over poorly-worded sales pay plans and have been quite successful in convincing juries that their clients have been taken advantage of by their dealership employers. As a result, dealerships have grown to understand the importance of carefully drafting their sales pay plans to ensure that they spell out exactly how commissions are calculated, what is included and what is not, how bonuses are earned, etc. This demand letter tells us that it is now time to focus the same attention on technicians’ pay plans.



Protecting Your Dealership

While there is no magic bullet that will protect a dealership from every disgruntled technician or every aggressive plaintiff’s attorney, a dealership can take steps to protect itself from contract claims like this by carefully drafting the contract – that is, the employee’s pay plan. But there is much more to technicians’ pay plans than simply telling them what their flat rate will be.

A technician’s pay plan normally involves payment on a “flat rate” basis. While this system is well understood by dealership personnel, it can be confusing to a juror who is only familiar with hourly wages and salaries. Therefore, the pay plan should explain in layman’s terms how the “flat rate” system works, and how the weekly compensation is calculated. A well-drafted technician pay plan should also clearly explain:

- the effective date of the pay plan;
- the employee’s basic flat rate;
- what manual or manuals are used to determine the number of FRH for a job;
- how training or school pay will be calculated;
- the day of the week the dealership cuts off commissions and the day of the week commissions are paid; and
- the fact that the technician is exempt from overtime and therefore receives no extra pay for hours worked in excess of 40.

You may pay differing “flat rates” for warranty, internal, customer pay work, and hours flagged in excess of 40. If that is the case, these differing rates should be spelled out. Many dealerships also use menu pricing. If your dealership does, the pay plan should make provisions for deviating from a strict “flat rate” system and explain how the technician will be paid for performing specific kinds of work.

Wage payment and breach of contract problems can arise when a dealership fails to pay the technician everything it had agreed to pay. Therefore if you are going to make any kind of deduction from a technician’s flat rate earnings, explain the deduction in the pay plan.

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Comebacks are a common problem that should be addressed in the pay plan. When a customer brings a vehicle back and the technician is found to have failed to properly repair the vehicle, the dealership typically requires the technician to perform the repair correctly without paying the technician any additional compensation. In some cases the vehicle is assigned to a second technician who is paid for the repair while the first technician is charged back the same amount. The technician may argue that the comeback is not his fault or that the customer's actions further damaged the vehicle.

Wage payment problems can also arise in situations where the technician damages a vehicle or an expensive part while performing a repair and the repair or replacement part is charged to the technician. If the amount of money at issue is significant, there is a likelihood that a lawsuit could follow. Therefore, technician pay plans should include an explanation of how comebacks and damaged parts will be handled.

If your dealership provides any sort of "guarantee," explain what conditions must be met in order to qualify for the guarantee and how the guarantee will be calculated. If you provide a 35-hour guarantee, make it clear that the technician must be present at work and ready to work all five days. And also make it clear that if the shop is slow, the dealership reserves the right to assign the technician to perform other duties to fill out a 40-hour work week in order to qualify for the 35-hour guarantee.

A few technicians have refused to do "courtesy inspections" unless they are paid extra to perform them. Because the courtesy inspection gives the technician the opportunity to sell additional work, most dealerships do not pay extra for such work. But it's probably a good idea to mention in the pay plan that the technician may be required to perform additional mechanical and other duties for which additional compensation may not always be paid.

If the dealership pays a tool allowance or pays to replace damaged tools that policy should be clearly explained. Similarly, if the dealership provides a "damaged parts" allowance, explain that, too.

What To Leave Out

The pay plan should normally be limited to compensation only. You should not include vacation or holidays or other matters. These matters should be covered in your Employee Handbook and need not be repeated in the pay plan. The more non-pay issues which are addressed in a pay plan, the more the pay plan begins to look like an employment contract. The one exception to this rule is the requirement that the technician maintain a valid driver's license at all times. The pay plan should state that maintenance of a valid driver's license is a condition of employment and that loss or suspension of the license is grounds for termination.

It is important that technicians receive and sign a copy of the pay plan when they are first hired and any time the plan is revised in any significant way. That way there will be proof that the technicians were aware of all of the terms as well as the potential deductions and agreed to them. If you make changes to any pay plan, do it only prospectively, and require your technicians to sign a new pay plan.

Finally, dealerships should be aware that the federal wage hour law and most state wage hour laws draw a distinction between a "skilled" technician and an unskilled employee such as a lube technician, PRI technician, or detail technician. The skilled technician is normally exempt from overtime, while the unskilled technician is not. Therefore, you will need to prepare a different pay plan for unskilled technicians.

If you would like a sample template for a technician pay plan which addresses the concerns outlined above, give us a call.

For more information contact the author at jdonovan@laborlawyers.com or 404.231.1400.

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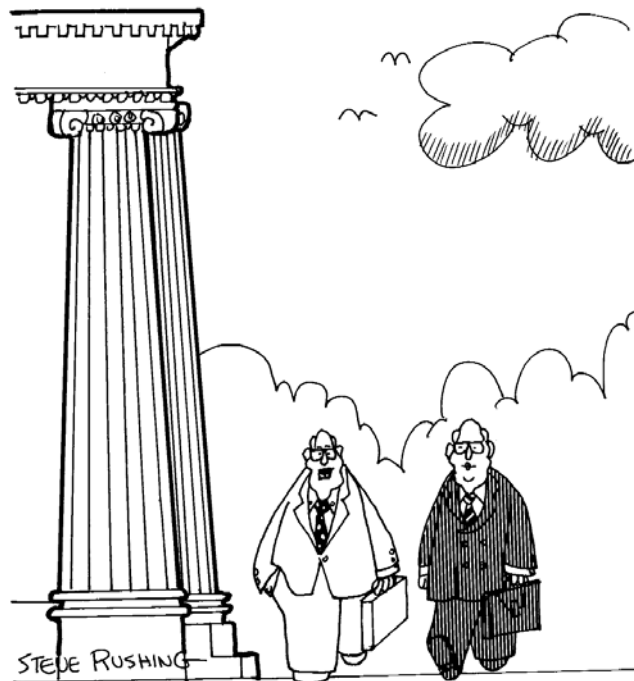
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