

#35753 DMS

Patrick S. Kezer
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patrick_kezer@yahoo.com

November 10, 2015

Deputy Steele
Deputy Labor Commissioner
Department of Industrial Relations
Labor Commissioner's Office
50 "D" Street,
Suite 360
Santa Rosa, CA 95404
(707) 576-2181

Deputy Steele,

As you requested, I have resubmitted the pertinent information in regards to this case. Enclosed you will find exhibits "A" through "E":

- A. Bonus Pay In California For Non-Exempt Employees: Make Sure You Do It Right
- B. 2015 4th Quarter Bonus Program
- C. 2015 3rd Quarter Bonus Program
- D. 2014 Quarterly Bonus Program
- E. Law and Analysis

I argue that the Quarterly Bonus Program violates California Labor Code. These wages are earned and they need to be paid twice per month. The sales team works collectively toward the goal. Since the bonus is "earned" and it is predicated on the number of hours each employee works, the number of cases of wine sold, as well as, the number of wine clubs that are sold, these wages need to be paid twice per month. Exhibit A, the legal brief, "Bonus Pay In California For Non-Exempt Employees: Make Sure You Do It Right," clearly defines the difference between an "earned" bonus and a "discretionary" bonus, using California Labor Code as a reference. Our sales team makes an hourly wage plus a second rate of pay (our earned bonus) that is calculated based on the number of hours that we work; therefore, we, essentially are accumulating money on both our base pay and our "earned bonus" pay, every hour of every day that we are present on the job. Yet, only one of our hourly rates of pay are paid to us twice per month, when both are subject to being paid twice per month.qp

Exhibit B, the "2015 4th Quarter Bonus Program" outlines the goals for the quarter showing in 1.
A. the total number of cases that need to be sold and the total of new wine clubs to be sold.

These items are easily calculable and can be weighted and totaled and placed on the employees bi-monthly pay check. I have no problem with the employer setting a quarterly goal; however, being paid quarterly is a violation. All the employer has to do is to calculate the total number of clubs per pay period and the total number of cases sold per pay period—it's not rocket science! Also, on Exhibit B, C, and D, under 1. C. (Bonus upon termination), the employer states, "In the event you terminate, whether voluntary or involuntary, prior to the end of this quarter, then no bonuses, or portion thereof, shall be paid to you upon your termination." This is absolutely false! If our sales team is working toward said goal by selling wine clubs and cases of wine, and our "earned" bonus is predicated on the number of hours each of us works, and that "earned" bonus is to be calculated for a bonus rate of pay and an overtime bonus rate of pay, then those are earned wages and cannot be forfeited after termination, voluntary or not.

Finally, the reason that employers need to pay these wages twice per month is so that they are not considered supplemental wages by the IRS. Supplemental wages are taxed between 45 - 48%. Under Exhibit E, "Law and Analysis," states, "as distinguished from supplemental wages, regular wages are amounts that are paid at a regular hourly, daily, or similar periodic rate . . . for the current payroll period." California has found a loophole in this area of the IRS tax code and that is to force employers to pay all "earned" bonuses, commissions, or piece rates twice monthly, making them regular wages, therefore, placing more money on the employee's paycheck. This is one of the reasons why California is the most progressive labor state.

Sincerely,



Patrick S Kezer, MA

Professional Communication

BONUS PAY IN CALIFORNIA FOR NON-EXEMPT EMPLOYEES: MAKE SURE YOU DO IT RIGHT

EXHIBIT A

BONUS PAY IN CALIFORNIA FOR NON-EXEMPT EMPLOYEES: MAKE SURE YOU DO IT RIGHT

Employee bonuses sound like a great thing if your company can afford it. The bonuses are given for a variety of reasons: motivating employees, showing appreciation, or trying to help boost company morale. By definition a bonus is something "extra" and an employer is not required to pay a bonus to employees. However, bonuses are governed by state and federal wage and hour laws. Specifically, in California employers need to be aware of how bonuses may impact wage-hour calculations and tax implications.

Are Bonuses "Earned"?

An employer may provide an employee bonus which is either "earned" or "unearned." For example an employee may earn a bonus if they work a certain number of hours in a year, bring in a specific amount of new business, or based on the company making a profit. When there is a set criteria an employee has to meet, then the bonus is earned once the criteria is met.

An unearned bonus is not really unearned, but more commonly referred to as a "discretionary" bonus. A discretionary bonus provided to an employee, is just that, something an employer is not obligated to provide and can give to any employee for really no rhyme or reason, generally out of appreciation, loyalty, or good service.

Whether a bonus is discretionary or based on specific criteria, both are considered "wages" under California Labor Code. As such when paying a bonus, employers must make sure the bonus is timely paid (See Labor code Section 204). Typically this means when a bonus is earned it must be paid on the payday that applies to that pay period. Another matter which may complicate paying a bonus is the impact earned bonuses may have on calculating an employee's overtime. (See discussion below) Further, all cash bonuses must be taxed as well as most non-cash bonuses should be taxed based on the value of the bonus.

Bonuses and How it Affects Overtime Calculations

Most people think of overtime rate of pay as taking the employee's hourly rate and then multiply by 1.5. Generally that holds true. However, a closer examination makes this calculation a little more complicated. Employee overtime is calculated based on a "regular rate" of pay. The regular rate of pay includes an employee's base pay (such as hourly rate), plus commissions and most bonuses. Inclusion of commissions and most bonuses in calculating overtime is based on public policy for fear an employer might pay a lower hourly rate and offer higher bonuses.

California Department of Labor Standards and Enforcement explains the method of calculating overtime with an inclusion of a bonus is as follows: "The method of calculating the overtime rate of bonus pay is to divide the amount of the bonus by the number of hours worked (including the overtime hours), to determine the regular hourly rate of bonus pay times the number of overtime hours worked. This amount will be the overtime amount due on the bonus portion of the earned wages, and should be paid in addition to any hourly overtime. So for example, if an employee works five 10 hour days in one week at an hourly rate of \$10 per hour, the employee would earn \$10 per hour for each 8 hour shift worked that day and \$15 per hour for 2 hours of overtime worked each day. At the end of the week, the employee worked 50 hours (40 hours at regular pay and 10 hours of overtime) and earned \$550. Then, because the employee met the criteria to "earn" a bonus, the employee was paid a \$100 bonus for the work completed that week.

The employer must now figure out what the employee earned in overtime on the "earned" bonus. That's when you follow the calculation described above. \$100 divided by 50 hours shows an hourly bonus rate of \$2. Multiply the \$2 by 1.5 to equal an overtime bonus pay rate at \$3. Since the employee worked 10 hours of overtime the bonus overtime pay would equal \$30 (\$3 x 10 hours). Employers need to make sure employees are properly paid for any overtime earned on bonus pay. So in total, the employee is given a bonus of \$2 per hour for 40 hours (\$80) and \$3 per hour for 10 hours (\$30). The actual total of the bonus paid would be \$110. This is a very simplistic example and depending on an employer's specific bonus plan or structure the calculations are subject to change. The bottom line is when paying a bonus, an employer needs to double check to find out how it might impact overtime calculations if applicable.

Discretionary Bonuses

Discretionary bonuses as noted above are not "earned". Why is this important? Because these bonuses are not included in determining an employees regular rate of pay and therefore do not impact overtime calculations. Specifically California labor law defines a discretionary bonus as: "sums paid as gifts at a holiday or other special occasions, such as a reward for good service, which are not measured by or dependent upon hours worked, production or efficiency, are not included for purposes of determining the regular rate of pay."

Whether or not a bonus is "discretionary" is not easy to determine and should be reviewed by an experienced labor law attorney to make sure an employer does not run afoul.

There are some general principles to help determine if a bonus is purely discretionary. Generally discretionary bonuses cannot be measured by or dependent on hours worked, production or efficiency. The bonus cannot be so substantial that employees consider it part of the wages they work for. Holiday gifts are typically considered discretionary and also excluded from regular rate of pay. Suggestion Awards may qualify as a discretionary bonus, but the bonus must be an amount which has no relation to

earnings; the award is a bona fide award for a suggestion, employees are not required to participate, there is no time limit for suggestions, and no prior notice that an employee was working on a suggestion when it announced the program.

Conclusion

California labor laws regarding wage and hour issues for non-exempt employees can muck up an employer's good intentions to provide employees with bonuses. That being said employee bonuses are an important part of our work culture that help boost productivity, keep morale high, and maintain competitiveness. When considering a bonus payment plan, offering employee commissions, handing out end of year bonuses, or giving a discretionary bonus, please be sure to pay careful attention to the wage and hour laws governing bonuses. When in doubt contact an experienced employment law attorney to help navigate you through this area of the law.

For more information about this topic, please contact one of our business or employment attorneys at 619.238.1712

[Back to Articles \(/articles\)](#)

EXHIBIT B

2015 4th QUARTER BONUS PROGRAM

In 2014, Rombauer Vineyards, Inc. ("Company") instituted a new bonus program for the tasting room staff in order to better align the bonus structure with the Company strategic plan and to foster teamwork, one of the Company's core values. This document serves to set forth the process for determining the quarterly bonus, as well as the timing of its payment.

1. Determining Bonus.

A. Goals. For this quarter, there are three goals that shall be collectively met by wine club, web sales, events, and the tasting room staff (DTC). The first DTC goal is to sell 9,248 cases in total of focus red wines and white wines. The second DTC goal is to sell 1,716 cases (inclusive of the total wines sold) of focus red wines. The third DTC goal is to sign up 1,145 new wine club members. In addition, the following parameters apply:

1. Cases are 9L equivalents.
2. Orders must be processed and shipped by close of business Thursday, December 31, 2015.
3. Focus red wines are: Carneros Merlot, Napa Valley Cabernet Sauvignon, Diamond Select Cabernet Sauvignon, Atlas Peak Cabernet Sauvignon, Stice Lane Cabernet Sauvignon and LMDC.
4. The focus red wines will be included in the total wines sales goals.
5. The goal for wine club sign-ups will include new members acquired through the retail room, website and phone.
6. The goals are weighted as follows:
 - a. Total wine sales: 50%
 - b. Red wine focus goal: 25%
 - c. Wine club sign-ups: 25%

B. Calculation of Bonuses. The pool of money that is available for your bonus shall not exceed \$11,011.85. In the event the number of full time tasting room host/hostesses increases or decreases, the overall pool will remain, but the amount available for your quarterly bonus will increase or decrease accordingly. The calculations for this quarterly bonus shall be determined as follows:

1. Determine the regular and overtime quarterly hours worked by each full time tasting room host/hostess (exclusive of paid time off including holidays)=
Employee Hours Worked
2. Add up all of the Employee Hours Worked=Total Hours
3. Divide the Employee Hours Worked by the Total Hours Worked=% of Hours Worked
4. Multiply the % of Hours Worked times \$11,011.85 (or a lesser amount if using the sliding scale detailed below)=Your Bonus

In addition, in the event the goal (s) is/are not met, but some portion of the goal (s) has/have been met, you are eligible for a bonus based on a sliding scale. Finally, any bonus attributable to overtime is "trued up" and is in addition to Your Bonus and is detailed on your pay statement.

C. Bonuses Upon Termination. In the event you terminate, whether voluntary or involuntary, prior to the end of this quarter, then no bonuses, or portion thereof, shall be paid to you upon your termination.

D. Bonus Plan Changes and Adjustments. The Company bonus plan may be subject to change, at the Company's discretion.

2. Timing of Bonus Payment.

The earlier of January 1, 2016 or the date **all goals** are met, the Sales Operations Manager shall use the calculations set forth above to determine your bonus payments. The Sales Operations Manager shall then forward the bonus payment to HR, the Director of Marketing and Consumer Relations, and the Retail Room Manager for review and approval. Once approved, HR shall then forward the bonus payment amount to the Controller for processing.

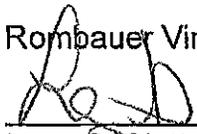
3. At-Will Employment.

This bonus program does not alter your at-will employment status, nor does this bonus program create an employment contract between Company and you. You understand and agree that your relationship with Company is "at-will," which means that your employment is for no definite period and may be terminated by the your or Company any time and for any reason with or without cause or advance notice. You also understand and agree that Company retains the right in its sole discretion to change any of the terms of employment, including, but not limited to, compensation, bonus plans, job duties, and any other terms of employment.

Date: 10/7/2015

Rompauer Vineyards, Inc.

By:


Lynn S. Sletto

Director, Human Resources

Acknowledgement of Receipt

I hereby acknowledge that I was given a copy of this 2105 4th Quarter Bonus Program in its entirety.

Date: 10/8/15

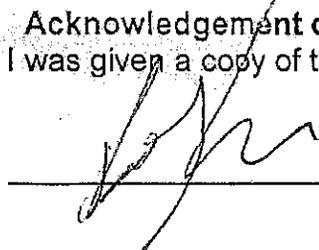


EXHIBIT C

2015 3rd QUARTER BONUS PROGRAM

In 2014, Rombauer Vineyards, Inc. ("Company") instituted a new bonus program for the tasting room staff in order to better align the bonus structure with the Company strategic plan and to foster teamwork, one of the Company's core values. This document serves to set forth the process for determining the quarterly bonus, as well as the timing of its payment.

1. Determining Bonus.

A. Goals. For this quarter, there are three goals that shall be collectively met by wine club, web sales, events, and the tasting room staff (DTC). The first DTC goal is to sell 4,274 cases in total of focus red wines and white wines. The second DTC goal is to sell 832 cases (inclusive of the total wines sold) of focus red wines. The third DTC goal is to sign up 1,500 new wine club members. In addition, the following parameters apply:

1. Cases are 9L equivalents.
2. Sales from the Joy of Wine event will be credited to the Events cost center and will count toward this quarter's goals.
3. Orders must be processed and shipped by close of business Wednesday, September 30.
4. Focus red wines are: Carneros Merlot, Napa Valley Cabernet Sauvignon, Diamond Select Cabernet Sauvignon, Atlas Peak Cabernet Sauvignon, Stice Lane Cabernet Sauvignon and LMDC.
5. The focus red wines will be included in the total wines sales goals.
6. The goal for wine club sign-ups will include new members acquired through the retail room, website and phone.
7. The goals are weighted as follows:
 - a. Total wine sales: 50%
 - b. Red wine focus goal: 25%
 - c. Wine club sign-ups: 25%

B. Calculation of Bonuses. The pool of money that is available for your bonus shall not exceed \$11,011.85. In the event the number of full time tasting room host/hostesses increases or decreases, the overall pool will remain, but the amount available for your quarterly bonus will increase or decrease accordingly. The calculations for this quarterly bonus shall be determined as follows:

1. Determine the regular and overtime quarterly hours worked by each full time tasting room host/hostess (exclusive of paid time off including holidays)=
Employee Hours Worked
2. Add up all of the Employee Hours Worked=Total Hours
3. Divide the Employee Hours Worked by the Total Hours Worked=% of Hours Worked

4. Multiply the % of Hours Worked times \$11,011.85 (or a lesser amount if using the sliding scale detailed below)=Your Bonus

In addition, in the event the goal (s) is/are not met, but some portion of the goal (s) has/have been met, you are eligible for a bonus based on a sliding scale. Finally, any bonus attributable to overtime is "trued up" and is in addition to Your Bonus and is detailed on your pay statement.

C. Bonuses Upon Termination. In the event you terminate, whether voluntary or involuntary, prior to the end of this quarter, then no bonuses, or portion thereof, shall be paid to you upon your termination.

D. Bonus Plan Changes and Adjustments. The Company bonus plan may be subject to change, at the Company's discretion.

2. Timing of Bonus Payment.

The earlier of November 1, 2015 or the date all goals are met, the Sales Operations Manager shall use the calculations set forth above to determine your bonus payments. The Sales Operations Manager shall then forward the bonus payment to HR, the Director of Marketing and Consumer Relations, and the Retail Room Manager for review and approval. Once approved, HR shall then forward the bonus payment amount to the Controller for processing.

3. At-Will Employment.

This bonus program does not alter your at-will employment status, nor does this bonus program create an employment contract between Company and you. You understand and agree that your relationship with Company is "at-will," which means that your employment is for no definite period and may be terminated by the your or Company any time and for any reason with or without cause or advance notice. You also understand and agree that Company retains the right in its sole discretion to change any of the terms of employment, including, but not limited to, compensation, bonus plans, job duties, and any other terms of employment.

Date: 7/22/15

Rombauer Vineyards, Inc.

By: [Signature]

Lynn S. Sletto
Director, Human Resources

Acknowledgement of Receipt

I hereby acknowledge that I was given a copy of this 2105 3rd Quarter Bonus Program in its entirety.

Date: _____

DTC Bonus Program for Q3 2015

Objectives:

- To increase total DTC case sales (9L equivalents) by 15% over Q3 2014.
- To increase case sales (9L equivalents) of focus red wines by 10% over Q3 2014.
- To maintain momentum on wine club signups.
- To foster teamwork among all DTC channels and personnel.

Parameters:

- Program is based on a combined goal for all DTC channels – retail room, wine club, web sales and events.
- Cases are 9L equivalents.
- Sales from the Joy of Wine event will be credited to the Events cost center and will count toward the Q3 DTC goals.
- Orders must be processed and shipped by COB Wednesday, September 30.
- Focus red wines for the Q3 goals will be the slower-moving inventory: Carneros Merlot, Napa Valley Cabernet Sauvignon, Diamond Selection Cabernet Sauvignon, Stice Lane Cabernet Sauvignon, Atlas Peak Cabernet Sauvignon, LMDC
- The focus red wines will be included in the total wines sales goals.
- The goal for wine club signups will include members acquired through the retail room, website and phone.

Goals:

- Total wine sales (all reds and all whites): 4,274 (increase of 557 cases, or 15% over 2014)
- Red wine focus goals: 832 (increase of 76 cases, or 10% over 2014)
- Wine club signups: 1,500

Weighting of goals:

- Total wine sales: 50%
- Red wine focus goals: 25%
- Wine club signups: 25%

3rd Quarter Tasting Room Bonus Plan Re-cap

The 3rd quarter goals were as follows:

- # 1 Total wines sales (all reds and all whites) : 4,274 x 9lit equiv cases
- # 2 Red wine focus goals: All Cabernets, LMDC, and Merlot : 832 x 9lit equiv cases
- # 3 Wine club signups : 1,500

Weighting of goals with matching bonus dollar equivalent of total beginning gross bonus dollars

- #1 Total wine sales : 50% $\$11,011.85 \times .50 = \$ 5,505.93$
- # 2 Red wine focus goals : 25% $\$11,011.85 \times .25 = \$2,752.96$
- # 3 Wine Club signups : 25% $\$11,011.85 \times .25 = \$2,752.96$

DTC achieved 100% of the following goals:

- # 1 Total wine sales = $\$5,505.93 \times 100\% = \mathbf{\$5,505.93}$
- # 3 Wine Club signups = $\$2,752.96 \times 100\% = \mathbf{\$2,752.96}$

DTC achieved 97% of the following goals:

- # 2 Red wine focus goals = $\$ 2,752.96 \times 97\% = \mathbf{\$2,670.37}$

This equates to an overall achievement of 99.25%

Beginning bonus dollars available = $\$11,011.85$

To determine total adjusted bonus dollars add dollar value of achieved goal.

$$\$5,505.93 + \$2,752.96 + \$2,670.37 = \mathbf{\$10,929.26}$$

Third Quarter 2015 Tasting Room
Commission Re-Cap

| | Total Hours | .% of Hours | Gross Commission | | Balance Due |
|----------------|-------------|-------------|------------------|--------|--------------------|
| Patrick Keezer | 488.23 | 25.92% | \$2,833.14 | \$0.00 | \$2,833.14 |
| Susan Page | | 0.00% | \$0.00 | \$0.00 | \$0.00 |
| Christian Diaz | | 0.00% | \$0.00 | \$0.00 | \$0.00 |
| Martha Welshan | | 0.00% | \$0.00 | \$0.00 | \$0.00 |
| | 1883.42 | 100.00% | \$10,929.26 | \$0.00 | \$10,929.26 |

1883.42

Above

Total Pool Dollars

\$10,929.26

NOTE:

5.80 PER HOUR

$$488.23 \overline{) 2,833.14}$$

THIS HOURLY BONUS RATE OF PAY MUST BE CALCULATED FOR OVERTIME, IF THERE IS OVERTIME AND ADDED TO THE BONUS, $5.80 \times 1.5 = 8.70$

ON OUR EARNED BONUS CHECK STUBS I SHOULD SEE

THIS INFORMATION DOES NOT SHOW ON OUR PAY STUBS

- A) THE AMOUNT OF THE BONUS
- B) THE BONUS HOURLY RATE OF PAY
- C) THE OVERTIME BONUS RATE OF PAY, IF ANY, AND
- D) THE TOTAL AMOUNT

EXHIBIT D

2014 QUARTERLY BONUS PROGRAM ELIGIBLE TASTING ROOM STAFF

Rombauer Vineyards, Inc. ("Company") instituted a new bonus program for the tasting room staff in order to better align the bonus structure with the Company strategic plan and to foster teamwork, one of the Company's core values. This document serves to set forth the process for determining bonus' as well as the timing of their payment.

1. Determining Bonus.

A. Goals. The eligible tasting room staff shall have two types of goals per quarter. The first goal is to increase the sales of Cabernet Sauvignon, LMDC and Merlot by 10% over the same quarter from last year. The second goal is to increase wine club sign-ups. The wine club signs ups for each quarter are, at a minimum, as follows: 1st quarter; 680; 2nd quarter: 934; 3rd quarter 1165; 4th quarter 970.

B. Calculation of Bonuses. Each quarter the pool of money that is available for the eligible tasting room team for this discretionary quarterly bonus payment shall not exceed \$11,011.85. In the event the number of full time tasting room staff increases or decreases, the overall pool will remain, but the amount available for your discretionary quarterly bonus will increase or decrease accordingly. The calculations for the quarterly bonus shall be determined as follows:

1. Determine the regular quarterly hours worked by each employee=Employee Hours Worked
2. Total the hours worked by all employees in the quarter=Total Hours Worked
3. Divide the Employee Hours Worked for each employee by the Total Hours Worked=% of Hours Worked
4. Multiply the % of Hours Worked times \$11011.85(or a lesser amount if using the sliding scale detailed below)=Employee's Bonus

In addition, in the event the goal (s) is/are not met, but some portion of the goal (s) has/have been met, you are eligible for a discretionary bonus based on a sliding scale. By way of example, if the team reaches 50% of their goal for wine sales, you are eligible for a bonus of an amount not to exceed \$734.12 (\$1,000 X 50%).

C. Bonuses Upon Termination. No bonuses shall be paid to employees upon their termination, whether voluntary or involuntary.

D. Bonus Plan Changes and Adjustments. The bonus plan may be subject to change, at the Company's discretion.

2. Timing of Bonus Payment.

If the above goals detailed above are met, the Sales Operations Manager shall use the calculations set forth above to determine the bonus payments for each full time

tasting room staff. The Sales Operations Manager shall then forward the bonus payments to HR, the Director of Marketing and Consumer Relations and the Retail Room Manager for review and approval. Once approved, HR shall then forward the bonus payment amounts to the Controller. The Controller shall process bonus payments during the next regularly scheduled payroll.

3. At-Will Employment.

This bonus program does not alter your at-will employment status, nor does this bonus program create an employment contract between Company and you. You understand and agree that your relationship with the Company is "at-will," which means that your employment is for no definite period and may be terminated by you or the Company at any time and for any reason with or without cause or advance notice. You also understand and agree that Company retains the right in its sole discretion to change any of the terms of employment, including, but not limited to, compensation, bonus plans, job duties, and any other terms of employment.

Date: August 5, 2014

Rombauer Vineyards, Inc.

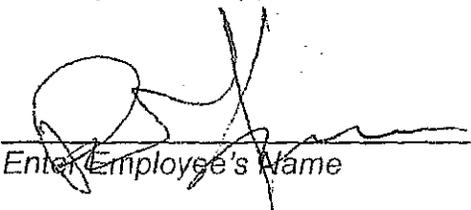
By: _____


Lynn S. Sletto
Director, Human Resources

Acknowledgement of Receipt

I hereby acknowledge that I was given a copy of this 2104 Quarterly Bonus Program in its entirety.

Date: 8/6/14



Enter Employee's Name

LAW AND ANALYSIS

Section 31.3402(g)-1(a) of the regulations, as amended by T.D. 9276, 2006-2 C.B. 423, provides rules for determining whether wages paid to an employee are regular wages or supplemental wages. The amendments to the regulations are effective with respect to wages paid on or after January 1, 2007. Whether wages are classified as regular wages or supplemental wages may have significance in determining the amount of income tax required to be withheld.

Section 31.3402(g)-1(a)(1)(i) of the regulations provides that supplemental wages are all wages paid by an employer that are not regular wages.

Section 31.3402(g)-1(a)(1)(ii) of the regulations provides that, as distinguished from supplemental wages, regular wages are amounts that are paid at a regular hourly, daily, or similar periodic rate (and not an overtime rate) for the current payroll period or at a predetermined fixed determinable amount for the current payroll period.



November 13, 2015

Deputy Commissioner Stelle
Department of Industrial Relations
Division of Labor Standards Enforcement
50 "D" Street, Suite 360
Santa Rosa, CA. 95404

Re: Legal Opinion

Dear Commissioner Steele:

Thank you again for taking time out of your busy schedule to discuss and research payment of bonuses. I am writing to take you up on your very generous offer to deliver this letter and the enclosed materials to your legal department for a legal review of our enclosed quarterly bonus program. I anticipate that Mr. Kezer will also be forwarding his request for a legal review as well.

The specific concerns raised by Mr. Kezer as I understand them are two-fold. First, he believes that payment of a bonus at the conclusion of a quarter when the bonus is based on meeting quarterly goals is not reasonable and should be paid with our bi-weekly payroll. The second issue he raises is that an eligible employee who terminates, whether voluntarily or involuntarily, before the conclusion of the quarter should receive all or a portion of their bonus.

I believe that the enclosed Division of Labor Standards ("DLS") letter dated December 23, 1986 is dispositive of the first concern regarding the timeliness of our quarterly bonus plan. We have established quarterly goals and, at the conclusion of the quarter, the bonus calculations are determined and each eligible employee is paid a bonus. As a result, due to the fact that we pay the bonus as soon as calculated after the conclusion of the quarter, we are meeting our obligations under Labor Code Section 204.

Lastly, I believe that the enclosed excerpt from the Neisendorf case addresses the issue of whether or not employees must still be employed at our company at the conclusion of the quarter in order to be eligible for payment under our bonus plan. In that case, the bonus program required employment as a condition of payment and the court agreed that, since the employee was terminated prior to the bonus payout date, the employer was not obligated to pay the bonus to the terminated employee.

I look forward to your legal opinion regarding these two issues. In the

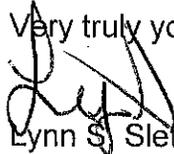
3522 Silverado Trail St. Helena, California 94574

Phone (707) 963-5170 Fax (707) 963-5752 www.rombauer.com

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November 13, 2015

meanwhile, if you have any questions or concerns regarding the enclosed materials, please do not hesitate to contact me at 707.963.5170.

Very truly yours,



Lynn S. Sletto
HR Director/Corporate Counsel

Enclosures (as stated)

2015 4th QUARTER BONUS PROGRAM

In 2014, Rombauer Vineyards, Inc. ("Company") instituted a new bonus program for the tasting room staff in order to better align the bonus structure with the Company strategic plan and to foster teamwork, one of the Company's core values. This document serves to set forth the process for determining the quarterly bonus, as well as the timing of its payment.

1. Determining Bonus.

A. Goals. For this quarter, there are three goals that shall be collectively met by wine club, web sales, events, and the tasting room staff (DTC). The first DTC goal is to sell 9,248 cases in total of focus red wines and white wines. The second DTC goal is to sell 1,716 cases (inclusive of the total wines sold) of focus red wines. The third DTC goal is to sign up 1,145 new wine club members. In addition, the following parameters apply:

1. Cases are 9L equivalents.
2. Orders must be processed and shipped by close of business Thursday, December 31, 2015.
3. Focus red wines are: Carneros Merlot, Napa Valley Cabernet Sauvignon, Diamond Select Cabernet Sauvignon, Atlas Peak Cabernet Sauvignon, Stice Lane Cabernet Sauvignon and LMDC.
4. The focus red wines will be included in the total wines sales goals.
5. The goal for wine club sign-ups will include new members acquired through the retail room, website and phone.
6. The goals are weighted as follows:
 - a. Total wine sales: 50%
 - b. Red wine focus goal: 25%
 - c. Wine club sign-ups: 25%

B. Calculation of Bonuses. The pool of money that is available for your bonus shall not exceed \$11,011.85. In the event the number of full time tasting room host/hostesses increases or decreases, the overall pool will remain, but the amount available for your quarterly bonus will increase or decrease accordingly. The calculations for this quarterly bonus shall be determined as follows:

1. Determine the regular and overtime quarterly hours worked by each full time tasting room host/hostess (exclusive of paid time off including holidays)=
Employee Hours Worked
2. Add up all of the Employee Hours Worked=Total Hours
3. Divide the Employee Hours Worked by the Total Hours Worked=% of Hours Worked
4. Multiply the % of Hours Worked times \$11,011.85 (or a lesser amount if using the sliding scale detailed below)=Your Bonus

In addition, in the event the goal (s) is/are not met, but some portion of the goal (s) has/have been met, you are eligible for a bonus based on a sliding scale. Finally, any bonus attributable to overtime is "trued up" and is in addition to Your Bonus and is detailed on your pay statement.

C. Bonuses Upon Termination. In the event you terminate, whether voluntary or involuntary, prior to the end of this quarter, then no bonuses, or portion thereof, shall be paid to you upon your termination.

D. Bonus Plan Changes and Adjustments. The Company bonus plan may be subject to change, at the Company's discretion.

2. Timing of Bonus Payment.

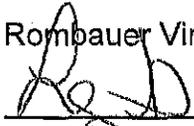
The earlier of January 1, 2016 or the date all goals are met, the Sales Operations Manager shall use the calculations set forth above to determine your bonus payments. The Sales Operations Manager shall then forward the bonus payment to HR, the Director of Marketing and Consumer Relations, and the Retail Room Manager for review and approval. Once approved, HR shall then forward the bonus payment amount to the Controller for processing.

3. At-Will Employment.

This bonus program does not alter your at-will employment status, nor does this bonus program create an employment contract between Company and you. You understand and agree that your relationship with Company is "at-will," which means that your employment is for no definite period and may be terminated by the your or Company any time and for any reason with or without cause or advance notice. You also understand and agree that Company retains the right in its sole discretion to change any of the terms of employment, including, but not limited to, compensation, bonus plans, job duties, and any other terms of employment.

Date: 10/7/2015

Rombauer Vineyards, Inc.

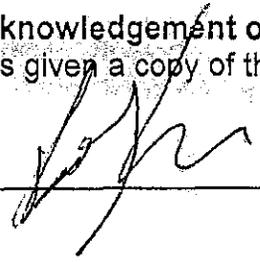
By: 

Lynn S. Sletto
Director, Human Resources

Acknowledgement of Receipt

I hereby acknowledge that I was given a copy of this 2105 4th Quarter Bonus Program in its entirety.

Date: 10/8/15



DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

175 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

(415) 557-3827

ADDRESS REPLY TO:

P.O. BOX 603

San Francisco, CA 94101

IN REPLY REFER TO:

December 23, 1986

Robert W. Tollen, Esq.
Attorney at Law
Bronson, Bronson & McKinnon
555 California Street
San Francisco, CA 94104

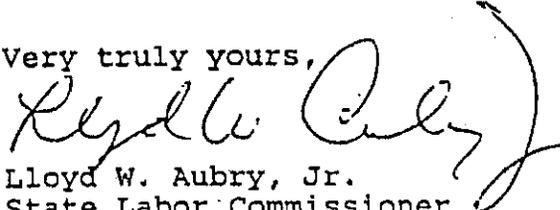
Dear Mr. Tollen:

This is in reply to your letter of November 17, 1986, requesting a review of your client's "Quality Incentive Bonus Plan" and the application of Labor Code Sections 204 and 210 to the plan.

Payment of the bonus on a quarterly basis would not be violative of Sections 204 and 210 provided that the base salary was paid in accordance with those sections. If the policy indicates that the bonus becomes due quarterly, the bonus must be paid within the parameters of Labor Code Section 204. In other words, it must be paid on the next regular payday after it is calculated.

I hope this answers your question; if not, please let me know.

Very truly yours,


Lloyd W. Aubry, Jr.
State Labor Commissioner

LWA:ba

As Neisendorf correctly points out, **HN7** † bonuses are considered “wages” within the meaning of Labor Code section 200. (*Lucian v. All States Trucking Co.* (1981) 116 Cal. App. 3d 972, 975 [171 Cal. Rptr. 262] (*Lucian*); *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal. App. 3d 35, 44 [100 Cal. Rptr. 791].) She claims the public policy of this state, as expressed in the statutes governing wages, obligates LS&Co. to pay her the bonuses despite her manifest ineligibility under the written terms of the bonus plans. Neisendorf contends that the bonus plans’ requirement that she “remain employed until an unspecified, discretionary future payment date” is unenforceable, because the public policy inherent in Labor Code section 200 requires certainty in wage provisions. She argues that the bonus payments were part of her bargained-for compensation for services rendered during fiscal year 2002, and the public policy of this state prohibits an employer from forfeiting such compensation when the employee works for the entire period of profits upon which the bonus was based, but does not work until “an indeterminate date” in fiscal year 2003 when the bonus payments are actually made. Essentially, Neisendorf contends that forfeiture of the bonus payments in this case was akin to illegal withholding or depriving her of wages that she had earned.

HN8 † We find nothing in the public policy of this state concerning wages that transforms Neisendorf’s contingent expectation of receiving bonuses into an entitlement. The cited statutes governing wages, and prohibiting an employer’s unilateral act to cause a forfeiture of wages, are manifestly applicable when wages have been promised as part of the compensation for employment and all conditions agreed to in advance for earning those wages have been satisfied. Likewise, once a bonus has been promised as part of the compensation for service, and the employee fulfills all the agreed-to conditions, the promised bonus is considered wages that must be paid. Consequently, defining bonuses as wages protects an employee’s expectation of promised remuneration and prevents the employer from arguing that the promised bonus was an unenforceable gift or gratuity. (See *DiGiacinto v. [523] Ameriko-Omserv Corp.* (1997) 59 Cal.App.4th 629, 635 [69 Cal. Rptr. 2d 300] (*DiGiacinto*); *Hunter v. Sparling* (1948) 87 Cal. App. 2d 711, 723 [197 P.2d 807].)

In this case, there was no promise made to Neisendorf that she would earn the AIP and Leadership Shares bonuses simply by working for LS&Co. during the fiscal year. LS&Co. expressly tied the payment of an AIP bonus and Leadership Shares bonus to a measurable benchmark. The language of both bonus plans required that she not be terminated for cause before the payout date. 8 †

Neisendorf’s eligibility for bonus payments is properly determined by the bonus plans’ specific terms and general contract principles. **HN10** † California courts have consistently characterized bonus and profit sharing plans as constituting an offer of the stated benefits in exchange for the service of an employee, and upon the employee’s completion of the required services *in accordance with the terms of the plan*, a binding contract is formed under which the employer is obligated to deliver the promised benefits. (See *DiGiacinto, supra*, 59 Cal.App.4th at p. 635; *Newberger v. Rifkind* (1972) 28 Cal. App. 3d 1070, 1076–1077 [104 Cal. Rptr. 663]; *Sabatini v. Hensley* (1958) 161 Cal. App. 2d 172, 175 [326 P.2d 622]; *Frebank Co. v. White* (1957) 152 Cal. App. 2d 522, 525–526 [313 P.2d 633]; *Chinn v. China Nat. Aviation Corp.* (1955) 138 Cal. App. 2d 98, 101 [291 P.2d 91].)

A case illustrating these principles is *Lucian, supra*, 116 Cal. App. 3d 972. In *Lucian*, the written employment plans at issue provided for a bonus that would be calculated and paid in full at the end of the calendar year, but specified that employees who voluntarily left the company before the bonus calculation date would not be entitled to the bonus. (*Id.* at pp. 974–975.) Three employees who departed voluntarily before the end of the year claimed entitlement to the bonus. As the *Lucian* court noted, “a specific bonus plan normally becomes binding as a unilateral contract when the employee begins performance, in the sense that the plan then cannot be revoked by the employer.” (*Id.* at p. 976.) Each plan at issue “had been consistently interpreted and applied to preclude [the] vesting of any benefits unless the [524] participant completed the current calendar year in the service of his employer.” (*Id.* at p. 975.) The *Lucian* court concluded that summary judgment was properly granted in the employer’s favor because “an employee who voluntarily leaves his employment before the bonus calculation date is not entitled to receive it.” (*Ibid.*)

Neisendorf suggests the law is different in a case such as hers, which involves an involuntary termination as opposed to the voluntary departure in *Lucian*. However, a case involving involuntary termination was analyzed

in *Hunter v. Sparling, supra*, 87 Cal. App. 2d 711, using the same contractual framework. "[T]he offer was to pay a bonus to those still in the employ on December 31, 1918. That offer could be accepted only by performing the act requested, namely, remaining in the employ until that date. The employee was fired before that date, so the act required was never performed. The unilateral contract never came into existence." (*Id.* at p. 724.)

Neisendorf was aware of the terms and conditions of the AIP and Leadership Shares bonus plans, and her performance of services for LS&Co. signified acceptance of its terms. 9 ❖ However, the formation of a binding contract, which would obligate LS&Co. to deliver Neisendorf the bonus payments, would occur only upon Neisendorf's completion of the required service as specified under the terms of the plans. Since Neisendorf did not perform the required service, and she was terminated for cause before the bonus payout date, LS&Co. was not obligated to pay her a bonus under the AIP plan and the Leadership Shares Plan for the 2002 fiscal year. 10 ❖