

# Employee may not be outside salesperson even if sales work mostly is performed off employer's premises

By Dan Eaton

January 16, 2023 | 6:00 AM PT

Under California regulations, an employee who (1) “customarily and regularly works more than half the working time away from the employer’s place of business” engaged in (2) “selling tangible or intangible items or obtaining orders or contracts” for his or her employer is exempt from overtime, minimum wage, reporting time, and meal-and-rest break requirements.

In *Espinoza v. Warehouse Demo Services, Inc.*, the California Court of Appeal recently ruled an employee is not considered an outside salesperson when the employer sets the employee’s hours and exact work location, even where the employee works on property the employer neither leases nor owns.

## Background

Georgina Espinoza worked as a demonstrator for Warehouse Demo Services at three South Bay Costco locations in Northern California during her employment. Warehouse Demo is Costco’s exclusive in-house product demonstration company, and Costco is the only place Warehouse Demo conducts its demonstration business. Warehouse Demo does not lease any space from Costco, but maintains an office in each Costco at which it provides demonstrations.



(San Diego Union-Tribune)

The office is used by Warehouse Demo managers to do paperwork and is used to clean and store Warehouse Demo equipment. Warehouse Demo employees clock in and out on a tablet at the office. Onsite Warehouse Demo supervisors assist demonstrators to ensure high quality demos.

Espinoza worked a regular shift of six hours, four days a week. When she arrived at her Costco location, Espinoza clocked in at the office, reviewed her assignment to see what she would be demonstrating that day, got her supplies and equipment, set up her cart, proceeded to the floor near the product, and performed her demonstrations for the day.

Espinoza could leave her area to take a break only when another demonstrator came to relieve her. At the end of her shift, she returned her cart and supplies to the office and clocked out.

Espinoza filed a class-action lawsuit, alleging Warehouse Demo failed to pay her overtime, failed to provide her with meal and rest breaks, and violated other California wage laws.

The trial court summarily dismissed Espinoza’s claims, concluding Espinoza was an outside salesperson because she (1) performed her demonstrations at a Costco that Warehouse Demo did not maintain, own, or control and (2) was engaged in sales. The court of appeal reversed.

## Analysis

The court of appeal concluded Warehouse Demo's control over where, when, and how Espinoza worked as a demonstrator at her assigned Costco meant Espinoza was not spending more than half her time away from Warehouse Demo's place of business. The court called Warehouse Demo's Costco operations "the perfect example of when an employer can (and does) control its employees' hours and working conditions on property it does not own or lease."

Although Warehouse Demo was headquartered elsewhere, company employees only conducted product demonstrations in their assigned Costco warehouses. Warehouse Demo also maintained office space at each location. "For all intents and purposes, [Warehouse Demo] operated out of and treated all these different Costco warehouses as their satellite branches or offices."

Moreover, "unlike the typical traveling salesperson who sets his or her own hours and decides when and where to work," Espinoza had a set schedule, clocked in and out, was only assigned to work at one Costco at a time, and worked at only one designated area in that Costco during her six-hour shift.

The outside salesperson exemption was created "because it was difficult for employers to monitor and control the hours of employees who regularly traveled or were on the road." Warehouse Demo, by contrast, exercised substantial control over employees who worked at fixed Costco locations.

## Takeaway

The rule that emerges from the Espinoza case is for purposes of the outside salesperson exemption, "the pertinent inquiry as to whether an employee works away from the employer's place of business is not whether the employer owns or controls the worksite, but the extent to which the employer maintains control or supervision over the employee's hours and working conditions." The more the employer controls where and when a sales employee performs his or her duties, the less likely the employer will be able to classify the employee as an outside salesperson.

**Dan Eaton** is a partner with the San Diego law firm of Seltzer Caplan McMahon Vitek where his practice focuses on defending and advising employers. He also is an instructor at the San Diego State University Fowler College of Business where he teaches classes in business ethics and employment law. He may be reached at [eaton@scmv.com](mailto:eaton@scmv.com). His Twitter handle is [@DanEatonlaw](https://twitter.com/DanEatonlaw).