



Employees Paid On Commission Must Be Compensated Separately for Rest Breaks

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Employees paid on a commission basis must now be *separately* compensated for legally required rest periods. California employers should pay close attention to this new rule coming from the Court of Appeal in Vaquero v. Stoneledge Furniture LLC, No. B269657, 2017 WL 770635, (Cal. Ct. App. Feb. 28, 2017). Employers who pay commissions should examine their agreements and make any alterations necessary to bring their agreements in line with the Court's holding.

In the case, the employer kept track of the hours worked by the sales associates (counting rest periods as hours worked) but paid the associates on a commission basis. Id. at 2. If an employee failed to earn a specified minimum hourly amount in commissions, the employer would still pay the employee the minimum amount but would “draw” the difference from future commissions. Id. at 3. The agreement ensured that the employee would always receive a minimum specified amount for every hour worked, in this case \$12.01. Id. If a sales associate earned commissions that exceeded the minimum amount, the commissions would first be applied to any previous draw with the remainder going to the employee. Id. The commission agreement did not provide separate compensation for any non-selling time, such as rest periods. Id.

Two former sales associates filed a class action against the furniture company claiming that, among other things, the company failed to compensate employees for rest breaks. Id. at 4. The trial court granted summary judgment for the employer because the employer always paid the employee at least \$12.01 per hour and rest breaks were included in the hours worked. Id. at 5. However, the Court of Appeals disagreed, concluding that the employer's plan did not properly compensate employees for rest periods. Id. at 25.

The Court's decision is based on Wage Order No. 7, which requires employers to count rest period time as hours worked “for which there shall be no deduction from wages.” Id. at 11. The Court looked to the landmark case of Bluford v. Safeway Stores, 216 Cal.App.4th 864 (2013), which held that the wage order required employers to separately compensate piece-rate employees for rest periods where the compensation plan did not directly compensate for those periods. Id. at 872.

The Vaquero court agreed with Bluford and extended the rationale to employees paid on commission because the language of the wage order clearly applies to employees paid on commission, and “[m]oreover, nothing about commission compensation plans justifies treating commissioned employees differently from other employees.” Vaquero, WL 770635, at 15. Piece-rate plans and the Stoneledge commission plan are “analytically indistinguishable” according to the court because they do not allow employees to earn money during rest periods. Id. at 16.

The Court explained that the problem with Stoneledge's plan is that it “did not include any component that directly compensated sales associates for rest periods.” Id. at 21. Sales associates



who were paid by commission were paid the same regardless of whether they took rest breaks. For associates who did not make the minimum in commissions, “the company clawed back (by deducting from future paychecks) wages advanced to compensate employees for hours worked, including rest periods. The advances or draws against future commissions were not compensation for rest periods because they were not compensation at all. At best they were interest-free loans.” Id. at 23. “[T]aking back money paid to the employee effectively reduces either rest period compensation or the contractual commission rate, both of which violate California law.” Id. The Court clarified that its conclusion does not cast doubt on the legality of commission-based compensation. Rather, such plans “must separately account and pay for rest periods to comply with California law.” Id. at 25.

Employer Advice

Employers paying commissioned employees now join the piece-rate employers hit hard by wage and hour class actions for failing to segregate and pay separately for required rest breaks. If this trend continues, we could see this rationale extended to miscellaneous non-productive time (NPT) such as travel or meeting attendance. Employers should examine their commission agreements and seek advice on how to properly segregate and pay for NPT rest periods. See Cal. Labor Code § 226.2 (West). In addition, employers would be wise to make sure that their commission agreements are in writing and signed by the employee, as required by law. Cal. Lab. Code § 2751 (West).