

Employees Paid on Commission Are Entitled to Separate Compensation for Rest Periods

Vaquero v. Stoneledge Furniture LLC, 2017 Cal.App. LEXIS 165 (February 28, 2017)

In a case of first impression, the state court of appeal held that employees paid on commission are entitled to separate compensation for rest periods mandated by state law, and that employers who track hours worked violate this requirement by paying employees a guaranteed minimum hourly rate as an advance on commissions earned in later pay periods.

Plaintiffs, former employees of a retail furniture company, filed a class action alleging the employer's commission pay plan did not comply with California law. The pay plan at issue paid sales associates on a commission basis, but if a sales associate failed to earn "minimum pay" of at least \$12.01 per hour in commissions in any pay period the employer paid the associate a "draw" against future commissions such that employees always received at least \$12.01 per hour for every hour worked. The commission plan did not provide any separate compensation for non-selling time such as time spent in meetings and during rest periods. While associates clocked in and out using a timeclock, they did not clock out for rest breaks. The trial court granted the employer's motion for summary judgment, finding the pay plan captured the rest-break time in the total amount paid each pay period and thus the employer was not required to pay its commissioned employees separately for rest periods.

The court of appeal reversed. The court looked to both Labor Code section 226.7 and Wage Order No. 7, both of which require meal and rest breaks. Subdivision 4 of Wage Order No. 7 requires employers to pay employees the minimum wage for all hours worked and applies equally to commissioned employees, employees paid by piece rate, or any other compensation system that does not separately account for rest breaks and other nonproductive time. Because rest periods are on the clock they are considered part of "hours worked."

While the employer in *Vaquero* treated break time the same as other work time (*i.e.*, it was on-the-clock), its commission formula did not include any component that directly compensated its sales associates for rest periods. Sales associates who earned a commission instead of the guaranteed minimum received the same amount of compensation regardless of whether they took rest breaks because there was no payment for this nonproductive time. Sales associates whose commissions did not exceed the minimum rate in a given week were paid \$12.01 per hour which compensated for all hours worked (including rest periods); however, it was later clawed back (by deducting from future paychecks when associates earned greater commissions) and was thus deemed by the court to not be compensation at all, but rather "interest-free loans." Thus, the employees were not separately compensated for rest periods under either scenario.

While the court noted that its conclusion "does not cast doubt on the legality of commission-based compensation[.]" employers who pay on a commission system must separately account for and pay for non-productive time, including rest breaks. Employers may recall that this has been the law in California for piece-rate compensation since January 1, 2016, when Section 226.2 of the California Labor Code took effect through the passage of AB 1513. Notably, that legislation created a limited safe harbor for employers who used a piece-rate system to provide back-pay to employees and cut off liability for civil and statutory penalties. It remains to be seen whether the legislature will provide a similar safe harbor in the aftermath of *Vaquero*. Nonetheless, employers, in consultation with their legal counsel, should consider the possibility of providing back-pay if their commission-based pay practices do not separately compensate employees for rest periods or other "non-productive time," *i.e.* time that is not spent directly related to selling the product or service at issue.