

CALIFORNIA EMPLOYEES PAID ONLY BY COMMISSION MUST BE PAID SEPARATELY FOR REST BREAKS

Mr. Richard Fader of Ft. Lee, New Jersey asks: “Is it true that California employees paid only by commission must be separately paid for their rest breaks?” The California Court of Appeal made clear Mr. Fader that the California wage order requiring employers to count “rest period time” as “hours worked for which there shall be no deduction from wages” requires employers to separately compensate commission only employees for rest periods.

On February 28, 2017, in the case styled Vaquero v. Stoneledge Furniture LLC (2017) 214 Cal.Rptr.3d 661, 9 Cal.App.5th 98, the California Court of Appeal ruled that employees paid only by commission are entitled to separate compensation for rest periods mandated by California law even though their employer keep track of their hours worked, including rest periods, by paying employees a guaranteed minimum hourly rate as an advance on commissions earned in later pay periods but not separately paying them for rest periods.

Stoneledge (better known as Ashley Furniture HomeStores) had a policy of paying its commission only furniture sales employees a guaranteed minimum hourly rate as a draw against commissions. The draw was then deducted from later earned commissions, and the employee was always paid at least the minimum wage for all hours worked. Two former sales associates filed a lawsuit against Stoneledge claiming that the company’s failure to separately compensate them for rest breaks amounted to an illegal deduction from wages, violating the California Labor Code and California Industrial Welfare Commission Wage Orders.

The Vaquero court found that nothing about commission compensation plans justifies treating commissioned employees differently from other employees. The purpose of a rest period is to rest, not to work. The court held that employees paid on commission are also covered by the Wage Order requirement that “rest period time shall be counted as hours worked for which there shall be no deduction from wages.” The need to separately compensate employees for rest periods “applies equally to commissioned employees . . . or any other compensation system that does not separately account for rest breaks and other non-productive time.”

The Vaquero court explained that “Our conclusion does not cast doubt on the legality of commission-based compensation. Instead, we hold only that such compensation plans must separately account and pay for rest periods to comply with California law. Nor will our decision lead to hoards [their typo, not mine] of lazy sales associates. The commission agreement in effect . . . provided that a sales associate who failed to meet minimum sales expectations (which generated commissions well above the guaranteed minimum) was subject to disciplinary measures up to and including termination. Thus, employers like Stoneledge have methods to ensure that an employee’s productivity does not suffer as a result of complying with California law by paying a minimum wage for rest periods.”

Mr. Fader, if your business operations in California employ commission only employees, you should consider the following measures to reduce your risk of liability to those employees:

- If you currently do not have one, create a written plan or agreement for all of your commission only employees.
- Separately pay at least the current minimum wage for the rest breaks taken by all commission only employees.
- Update your written plan or agreement for all of your commission only employees to provide that you will pay them at least the current minimum wage for their rest breaks.
- If you provide for such a draw upon future commissions earned, do not inadvertently deduct rest break pay using a draw.
- Update your written plan or agreement for all of your commission only employees to provide that you will not deduct rest break pay using a draw, if you provide for such a draw upon future commissions earned.
- Make your rest break compensation a separate line item in the pay check stub for all commission only employees, specifically identifying the rest period time pay as a separate line item in the pay check stub.

The contents of this column are not intended to be a complete summary of the legal issues discussed in this column. Rather, this column is intended to alert you to the broad impact of changes in the law or the means in which to comply with the law to reduce the risk of liability and claims. Because of the complexity of the law, it is recommended that all employers consult with experienced labor and employment counsel to ensure that all policies and practices are compliant with applicable state and federal law. Please feel free to reach out to the author at jroth@TheRothLawFirm.com with any questions or comments.