

California: Separate Compensation for Rest Breaks and Non-Productive Time Required for Non-Exempt Commissioned Employees

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On February 28, 2017, in ***Vaquero, et al. v. Stoneledge Furniture LLC***, the *California* Court of Appeal, Second Appellate District ruled that *Wage Order 7-2001* (mercantile industry) requires employers to separately compensate non-exempt commissioned employees for rest breaks. It further held that the same analysis applies to “any other compensation system that does not separately account for rest breaks and other nonproductive time.” A link to the opinion can be found [here](#).

The plaintiffs in this case were sales associates at a retail furniture company. They filed a wage and hour class action alleging, in part, that under their former compensation agreement, their employer failed to provide rest periods in violation of Labor Code section 226.7 and Wage Order No. 7-2001.

Under the agreement at issue, sales associates were paid on a draw of \$12.01 per hour that was advanced against future commissions. The agreement did not provide separate compensation for any non-selling time, such as time spent attending meetings or taking rest breaks. Sales associates recorded the time electronically for meals, but they did not clock out for rest breaks.

The court found that a compensation plan that does not compensate employees directly for rest periods would undermine the public policy of encouraging employees to take their rest breaks.

Under the agreement, sales associates who earned commissions above the guaranteed minimum, received the same amount of compensation regardless of whether they took rest breaks. The commission did not separately account for rest breaks, and there was no way to determine the rate of pay, all of which violated California law and the Wage Order.

For those associates who did not exceed the weekly minimum rate, the company advanced monies to compensate employees for hours worked, including rest breaks. However, these advances were eventually clawed back when the associate earned commissions above the guaranteed minimum. Thus, the court found that the advances or draws against future commissions were not compensation for rest periods because they were eventually returned to the employer.

Thus, regardless of whether the associates met the weekly minimum or not, the court found that the

agreement violated Labor Code section 226.7 and Wage Order 7-2001.

Commission-based compensation agreements are still valid in California. However, employers should ensure that employees paid by commissions are separately compensated for rest breaks and other non-productive time.

The Opinion is silent as to how to calculate the rate at which rest breaks must be paid to employees paid on a draw plus commissions plan. Yet, Labor Code section 226.2 may provide some guidance. Although this section applies only to employees compensated by *piece-rate*, it requires employers to separately compensate *piece-rate* employees for rest, recovery and other nonproductive time at a regular hourly rate “no less than the higher of”: (1) the “average hourly rate”; or (2) the applicable minimum wage. An article regarding Labor Code section 226.2 can be found [here](#).

An employer who has non-exempt commissioned employees should talk to an employment attorney to ensure compliance with this new ruling.

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