

## Publications

### **Labor and Employment Alert: In California, Commissioned Salespersons Must Get Separately Paid Rest Breaks**

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Adam J. Rocco

Michael C. Griffaton

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California law requires that most employees receive paid rest breaks for every four hours worked or major fraction thereof. Previously, the California Court of Appeals held that employees who are paid on a piece-rate basis must be separately compensated for rest breaks and other non-productive time. Now, another Court of Appeals has extended this requirement to employees who are paid on a commission basis.

In *Vaquero v. Stoneledge Furniture*, the plaintiffs were commissioned sales employees who were paid on a draw of \$12.01 per hour advanced against their future commissions. The commission agreement explained: "The amount of the draw will be deducted from future Advanced Commissions, but an employee will always receive at least \$12.01 per hour for every hour worked." Stoneledge authorized and permitted sales associates to take rest breaks of at least 10 consecutive minutes for every four hours worked or major fraction thereof (as California law required). However, the commission agreement did not provide separate compensation for any non-selling time, such as time spent in meetings, on certain types of training, and during rest breaks. The plaintiffs filed a wage-hour class action alleging that they were not provided with paid rest breaks.

Stoneledge argued that its commission agreement accounted for and paid for rest breaks the same as all other work time, so the employees received at least \$12 per hour even if they made no sales at all. The trial court agreed, finding "there was no possibility that the employees' rest period time would not be captured in the total amount paid each pay period" under Stoneledge's compensation system. As a result, the commission plan paid the employees at or above a rate which expressly encompassed all the time present in the workplace and all the time worked, including rest breaks. The Court of Appeals disagreed and reversed the trial court's decision.

The Court of Appeals explained that the plain language of the wage order requires employers to count "rest period time" as "hours worked for which there shall be no deduction from wages." California courts

have interpreted this language to require employers to separately compensate employees for rest breaks where the employer uses an “activity based compensation system” that does not directly compensate for rest breaks. For example, piece-rate compensation plans do not directly account for rest breaks during which employees cannot earn wages and so rest breaks must be separately compensated.

Here, the Court found that the wage order applies equally to commissioned employees, to employees paid by piece rate, and to any other compensation system that does not separately account for rest breaks and other nonproductive time. “Nothing about commission compensation plans justifies treating commissioned employees differently from other employees.” Given this, the Court held that the wage order “requires employers to separately compensate employees for rest periods if an employer’s compensation plan does not already include a minimum hourly wage for such time.”

Turning to Stoneledge’s commission plan, the Court found that it did not separately account for paid rest breaks. For sales employees whose commissions did not exceed the minimum rate in a given week, Stoneledge deducted from future paychecks wages advanced to compensate employees for hours worked, including rest breaks. Thus, the advances or draws against future commissions were not compensation for rest breaks because they were not compensation at all. “At best they were interest-free loans.” “Thus, when Stoneledge paid an employee only a commission that commission did not account for rest periods. When Stoneledge compensated an employee on an hourly basis (including for rest periods), the company took back that compensation in later pay periods. In neither situation was the employee separately compensated for rest periods.”

The Court dismissed the concern that its decision will “lead to hordes of lazy sales associates.” The Court explained that Stoneledge’s commission agreement provided that a sales employee who failed to meet minimum sales expectations 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.” Probably in response to the litigation, Stoneledge implemented a new commission agreement that pays sales employees a base hourly wage of \$10 “for all hours worked” (which would cover the rest breaks) as well as various types of incentive payments based on a percentage of sales. Under the new agreement, no portion of a sales employee’s base pay is deducted from or credited against incentive payments.

Employers must ensure that their commission (and piece-rate) pay plans provide separate compensation for rest breaks and other non-productive time. As California employers know, noncompliance with the state’s wage-hour laws can be expensive. Contact your Vorys lawyer if you have questions about how to ensure that your pay plans comply with California’s wage-hour law.