Paying Most Sales Employees Purely on Draw and Commission No Longer Lawful In California

Insights
3.13.17

Last month a California appellate court held that an employer violates California law by paying inside sales employees on a draw against commission. In *Vaquero v. Stoneledge Furniture LLC,* the court held that such a pay arrangement does not compensate employees for their mandatory paid rest breaks.

This decision is the latest in a line of cases in which California courts have rejected the approach taken under federal law to determine whether employees are paid at least minimum wage for all hours worked; i.e, divide total hours worked into total earnings for the pay period. Under the federal law approach, if the result of this calculation is at least the minimum wage, the employee's pay is sufficient.

Not so in California. In recent years, California courts in piece-rate cases have held that the piece-rate only compensates the employee for productive piece-work, not for other working time such as training time, meetings, waiting time between jobs and paid rest breaks, when the employee is "on the clock" but not performing piece-work. These courts have held that employees must be compensated separately for such non-productive time.

The *Vaquero* case extended this rationale, in part, to commission-paid inside sales employees. The employees in that case were paid a draw every pay period that amounted to at least minimum wage for all hours worked. Because the draw was recouped from commissions, however, and the commissions were paid only for sales work, the court held that the draw against commissions arrangement did not compensate the employees for their paid rest breaks.

As a result of the *Vaquero* case, employers that pay inside sales employees purely on a draw against commission basis must change their method of paying such employees. One method of doing so is to have employees log the time they spend on paid rest breaks and pay them separately for such time at a rate that is at least minimum wage. While AB 1513, effective January 1, 2016, requires that piece-rate paid employees be paid for rest breaks at an average of their piece-rate earnings for the work week (they may be paid minimum wage or higher for other non-productive time), this law states specifically that it applies only to piece-rate paid employees and the Labor Commissioner has indicated that it does not apply to commission-paid employees. Thus, unless the legislature expands AB 1513 to cover commission-paid employees, such employees need only be paid minimum wage or higher for paid rest breaks.

higher for paid rest breaks.

Another method would be to pay sales employees an hourly rate of at least minimum wage for all hours worked, including paid rest breaks, plus a commission or productivity bonus tied to sales results. The commission would ordinarily need to be at a lesser rate than paid under a draw against commission arrangement since each employee will already be paid at least minimum wage for hours worked. Under such an arrangement, an overtime premium would have to be paid on the commission or bonus, and given the reduced commission amount, it will in most cases be more difficult for the employee to qualify for the “inside sales” exemption from overtime which requires that more than half the employee’s compensation be in the form of commissions.

Outside sales employees, who spend more than half their time away from the office engaged in selling activities, are not affected by the *Vaquero* case because the minimum wage law does not apply to outside salespersons. They may continue to be paid on a draw against commission basis.

Related People

James J. McDonald, Jr.
Partner
949.851.2424
Email