



# California Court Rules Commission-Paid Employees Are Entitled To Separate Rest Period Pay

Insights

3.01.17

A California appellate court ruled yesterday that workers paid on a commission basis must be separately compensated for legally required rest periods (*Vaquero v. Stoneledge Furniture LLC*). When combined with [a state Supreme Court ruling late last year](#) requiring employers to provide workers with duty-free rest breaks, this one-two punch of court decisions will force many California employers to alter their pay practices or face potentially devastating financial consequences.

## Background: Open Question Regarding Rest Periods

Under the Wage Orders promulgated by the Industrial Welfare Commission, California employers have long been required to provide non-exempt employees working at least 3.5 hours in a workday with a paid 10-minute duty-free rest period for each four hours of work or major fraction thereof. Rest period time must be counted as hours worked “for which there shall be no deduction from wages.”

For employees paid by piece rate, California courts have interpreted this to mean that piece-rate employees must be paid separately for non-productive time, including rest periods. In 2013’s *Bluford v. Safeway Stores, Inc.*, the California Court of Appeals case concluded that a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law.

When the California legislature passed AB1513 and created Labor Code section 226.2, effective January 1, 2016, it established a special rate of pay to be provided to piece-rate employees on rest and recovery periods: the applicable minimum wage or the average productive rate, whichever is greater. These amounts were in addition to compensation for “other non-productive time” at only the applicable minimum wage.

However, the statute did not expressly “limit or alter” previous court decisions, including the *Bluford* ruling. Until now, the law was unsettled as to other forms of incentive pay, and no California appellate court had specifically ruled commission-paid employees were to be compensated separately for rest period time or other non-productive time. Yesterday’s decision changed all of that.

## Commission Salesmen Not Compensated For Rest Periods

In *Vaquero*, the plaintiffs were commission-paid salespersons at Stoneledge Furniture who earned commissions based on a “percentage of sales” or a guaranteed draw against those commissions bringing pay to at least \$12.01 for each hour worked in the pay period. The draw was designed to compensate them to satisfy California’s commission-sales exemption, which requires that employees be principally engaged in sales, earn more than 50 percent of their total compensation in commissions, and receive an average hourly rate from total compensation that *exceeds* 1.5 times the applicable minimum wage (then \$10.00 per hour). Any draws paid were recouped from future commissions.

Importantly, the commission agreement did not compensate the salespersons separately for any “non-selling time, such as time spent in meetings, on certain types of training, and during rest periods.” Nonetheless, the time the employees spent taking rest periods was recorded and accounted for, but the source of all earnings of the salespersons was limited to the draws and commissions provided for in the agreement. In determining whether an employee received at least \$12.01 per hour, the employer averaged all hours worked, including time spent on rest breaks, to calculate the amount to be paid for commissions (or draws against those commissions).

### **California Court Of Appeals Alters Rest Period Compensation Structure**

The plaintiffs challenged this method of pay, but the trial court rejected their claim and ruled the commission agreement adequately compensated them for all hours worked, including rest periods. On appeal, however, the appellate court reversed this ruling. In a February 28, 2017 decision, the appeals court decided that because the draw was recouped from future commissions, it could not constitute a separate payment for rest periods. As the court said, this is because it was “not compensation at all. At best they were interest-free loans.”

According to the court, the commissions earned for productive selling time similarly did not account for non-selling time spent on rest periods. The court reasoned the commission would be the same regardless of whether rest periods were taken. For these reasons, the court concluded neither a draw nor a commission payment constituted compensation for rest periods.

Rather, the court found that the time spent on rest periods was, in effect, deducted unlawfully because it was unpaid time regardless of how much money was earned for commissions. Such unproductive time, in other words, had to be compensated separately and could not be included or averaged with commissions paid for productive time to satisfy the applicable minimum wage requirements. In reaching this conclusion, the court rejected the employer’s argument that commission-paid employees were not similarly situated with piece-rate employees. “Nothing about commission compensation plans,” the court said, “justifies treating commissioned employees differently from other employees.”

### **Tips For Employers**

Following the recent landmark California Supreme Court decision requiring rest periods be duty free (*Augustus v. ABM Security Services, Inc.*), this decision provides another hurdle for California employers to navigate. Although yesterday’s decision concluded rest periods and other non-

employers to navigate. Although yesterday's decision concluded rest periods and other non-productive (selling) time must be separately compensated from sources other than commissions (i.e., pay for productive time), it did not specify the method by which such employees should be paid separately for such time. The good news is there are a variety of legally permissible compensation methods that employers can use to comply with the new legal standard.

After the Stoneledge salesmen challenged their employer's compensation plan, the employer reportedly revised the compensation agreement to provide a base hourly rate at the minimum wage for all hours worked plus incentives based on a percentage of sales. This revised pay plan was not challenged by the plaintiffs. This plan could provide a roadmap to compliance.

Further, it is important to note that the appellate court decision does not reject all forms of commission-based pay plans. "Instead," the court said, "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 hordes of lazy sales associates." The court observed the Stoneledge commission agreement warned sales associates failing to meet minimum sales expectations they were subject to disciplinary measures up to and including termination. Thus, the court concluded, California employers have sufficient methods available to them to ensure an employee's productivity does not suffer as a result of complying with California law by paying a minimum wage for rest periods.

You should consult with your legal counsel to determine whether your commission compensation plans adequately compensate your salespersons for non-selling time and properly disclose the method of calculation on their pay statements, Wage Theft Protection Act Notices, and written pay plans. If you have a hybrid pay plan, you should also make sure that you are correctly defining, accounting for, and compensating for selling versus non-selling time including rest periods and other non-productive time. Taking effective action to audit current commission pay agreements and related practices could help you avoid expensive litigation and potential liability.

If you have any questions about this decision or how it may affect your organization, please contact your Fisher Phillips attorney, or one of the attorneys in any of our California offices:

Irvine: 949.851.2424

Los Angeles: 213.330.4500

Sacramento: 916.210.0400

San Diego: 858.597.9600

San Francisco: 415.490.9000

---

*This Legal Alert provides information about a specific new court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

## ***Related People***



**John K. Skousen**  
Partner  
214.220.8305  
Email

***Service Focus***

Wage and Hour