

## Labor and Employment Alert

November 21, 2017

### California Commissioned Salespersons May Be Entitled to Separate Compensation for Wide Range of Activities in Addition to Rest Breaks

Commissioned salespersons are employed in a variety of industries. While “outside salespeople” are generally exempt from minimum wage and meal and rest break requirements, so-called “inside” salespeople working at a retail store or office are not.<sup>1</sup> Nevertheless, many “inside” sales employees have traditionally been paid solely with commissions. However, a California Court of Appeal decision earlier this year requires that California employers separately compensate commissioned salespersons for rest breaks, and a recent district court decision in a related case could require that they also begin separately compensating them for a host of other tasks, such as attending sales meetings and restocking merchandise.

#### *Vaquero v. Stoneledge Furniture, LLC*

In February 2017, the California Court of Appeal held in *Vaquero v. Stoneledge Furniture, LLC* (“*Vaquero I*”) that commissioned salespeople were entitled to separate compensation for time spent taking paid rest breaks mandated by California law.

The plaintiffs in *Vaquero I* were sales associates who worked at Stoneledge Furniture, a subsidiary of Ashley Furniture HomeStores. Under their compensation plan, if sales associates failed to earn a minimum of \$12.01 per hour in commissions in a pay period, then they would receive a “draw” against future commissions so that they always received at least \$12.01 per hour (including for rest break time) each pay period. The draw was recouped from future commissions to the extent the that future commissions exceeded the draw. The trial court granted summary judgment to the employer, ruling that the commission plan paid the sales workers a guaranteed minimum for all hours worked, including their rest periods. The Court of Appeal reversed.

Relying largely on precedent addressing piece-rate compensation plans, the Court of Appeal found that commissions cannot compensate employees for their rest break time because they are precluded from earning commissions during that time and that commissioned sales employees must instead receive separate compensation for their rest breaks. In other words, commissions cannot be averaged across all hours worked in order for the employer to meet its obligation to pay at least minimum wage for paid rest breaks. Further, the court rejected the company’s argument that the draws received by associates

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<sup>1</sup> Commissioned salespersons are workers (1) whose earnings exceed one-and-a-half times the minimum wage, and (2) who earn more than half their income in the form of commissions. See, e.g., Cal. Code Regs., tit. 8 § 11040(3)(D). Commissioned salespersons are distinct from “outside salespersons,” who (1) spend more than half their work time away from the employer’s place of business and (2) earn commissions from sales of products, services or use of facilities. *Id.* at § 11070(2)(J). This article does not address outside salespersons, who are typically classified as exempt.

compensated them for rest breaks because the draws were recouped from future commissions. Under the court's reasoning, the recoupment meant that the draws were essentially just "interest free loans" rather than actual compensation.

*Vaquero v. Ashley Furniture Industries, Inc.*

While *Vaquero I* has been pending in California state court, the same plaintiff has been pursuing a separate action in the Central District of California, titled *Vaquero v. Ashley Furniture Industries, Inc.* ("*Vaquero II*"), seeking separate compensation for other "non-sales" activities besides rest breaks. In September 2017, in denying the parties' cross-motions for summary judgment, the district court articulated a new standard for determining whether activities must be separately compensated, with potentially sweeping and burdensome consequences for California employers utilizing "inside" commissioned salespeople.

For purposes of summary judgment, the parties and the court assumed that averaging wages across hours worked for commissioned employees is unlawful under California law. Instead, the company argued that activities including attending sales meetings, participating in product training, wrapping items, assembling and disassembling furniture, carrying purchased items to customers' cars, performing zone recovery duties and training other associates were "essential to the sales process," and thus properly paid by commissions. The court rejected this argument, finding that it improperly relied on federal law, which exempts sales work that is incidental to, or indirectly related to, sales. Instead, the court found that only "work directly involved in selling items or obtaining orders or contracts," including "essential prerequisites necessary to accomplishing the sale," can be compensated by commissions.<sup>2</sup>

Specifically, the court concluded that, "if an employer requires a commission-based employee to perform any activity that is not directly involved in selling an item and the performance of that non-sales activity precludes the employee from simultaneously performing activities directly involved in selling, then the employer must compensate that non-selling time separately from commissions." Conversely, under this test, an activity does not require separate compensation if it (i) is not mandatory or (ii) does not preclude the simultaneous earning of commission, even if it is not directly involved in selling.

The court ultimately denied both parties' motions for summary judgment because neither party had presented sufficient evidence to determine whether the activities at issue were mandatory or precluded the simultaneous earning of commissions. Thus, the court did not reach a decision on which specific activities actually need or need not be separately compensated. Shortly after the court's decision, the parties in *Vaquero I* and *Vaquero II* reached a global settlement resolving both actions, and the federal case was dismissed on November 1, 2017. Therefore, no further decision will be forthcoming in this case. Instead, employers are left struggling to determine the implications of the district court's denial of summary judgment in *Vaquero II*.

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<sup>2</sup> The 9th Circuit affirmed the district court's class certification decision where it held that California law prohibits averaging of wages to meet minimum wage requirements and compensation through commission for work "not directly involved in selling." *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016).

## Implications for Employers

The California Supreme Court denied review of the Court of Appeal's decision in *Vaquero I*. Therefore, the need for California employers to separately compensate commissioned salespersons for mandatory rest breaks is now established and binding. In contrast, *Vaquero II* represents the view of only one federal district court and is not binding on California courts. Nevertheless, it provides valuable insight into how other courts, which may find its reasoning persuasive, could treat non-selling time for purposes of compensating commissioned salespeople. Below, we address several key questions that employers with "inside" commissioned salespeople should consider in light of the two *Vaquero* decisions.

***Which tasks must be separately compensated?*** *Vaquero II* did not decide which specific activities would require separate compensation, and it failed to provide concrete guidance on what it means for activities to be "directly involved in selling." Thus, in many ways, the district court raised more questions than it answered. Although the court stated that some of the tasks at issue were "clearly not directly involved in selling items," it did not specify which ones. It is likely, though, that the court was referring to tasks such as sales meetings and product training, which are related to selling generally, but not any specific sales attempt or customer interaction. Similarly, the court did not explain what types of non-sales activities allow for the "simultaneous earning of commissions." However, such activities might include tasks done on a sales floor in between helping customers (e.g., stocking, recovery, cleaning) during which employees remain available to attend to any customers who may come in. It is less clear for employees engaged in telephone sales. For example, is a telephone salesperson able to simultaneously earn commissions during sales meetings if he or she remains available to accept return calls from potential customers?

***Does the amount of time spent on non-sales activities affect whether sales associates must be separately compensated?*** Some non-sales activities may take only a few minutes at a time. However, it is unlikely that employers will be able to avoid separately compensating non-sales tasks simply because they involve small amounts of time. California law already requires separate compensation for rest breaks, which are only 10 minutes long. California law also requires separate compensation for paid recovery periods (i.e., "cooldown" rest periods for employees working outdoors to prevent heat illness) for employees paid by piece-rate (e.g., agricultural workers picking crops), which can be as short as five minutes.<sup>3</sup> Notably, both *Vaquero* decisions relied heavily on authority addressing piece-rate workers and found them to be analogous to commissioned employees for purposes of their analysis. Further, even if a task takes only a few minutes at a time, if the task is repeated throughout the day, the cumulative time spent on the task could be significant.

***Does non-selling time need to be separately tracked and recorded?*** *Vaquero I* and *Vaquero II* did not specifically address time and record keeping. However, the need to provide separate compensation for rest breaks and other non-selling activities creates a de facto requirement that such time be separately

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<sup>3</sup> By statute, piece-rate workers must be compensated separately for rest and recovery periods and "other nonproductive time." See Cal. Lab. Code § 226.2.

tracked and recorded in a company's time-keeping system, and reported on wage statements. This could impose a substantial administrative burden on employers.

***What should employers do?*** Given that *Vaquero II* did not actually decide which activities need to be separately compensated, it is difficult to provide many specific recommendations for employers. However, below are several steps that employers can consider to help reduce their potential liability as the law continues to develop in this area:

- At a minimum, employers should begin separately compensating commissioned salespeople for rest breaks. This compensation cannot be recouped from commissions.
- Employers should assess which activities their commissioned salespeople perform that are arguably not "directly involved in selling," and whether those activities can be limited. Of greatest concern should be those activities that take salespeople off the sales floor or off the telephone (for telephone sales) such that they are unavailable to potential customers. This could include sales meetings, product training, or certain off-site events. Employers may want to provide separate compensation for such activities, which will not be recouped from commissions. Alternatively, if possible, employers could consider making these activities voluntary.
- Employers should account for rest breaks and any other non-selling time that is separately compensated as a separate line item on wage statements.
- In light of the complexities and uncertainties in this area of law, we recommend consulting with California employment counsel in implementing any policy changes.

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