Give Me a (Paid) Break: Compensating Piece Rate and Commissioned Employees for Rest Breaks and Non-Productive Work Time

All non-exempt employees are required to be paid separately for rest breaks and other non-productive work time. This may come as a surprise to businesses that employ commissioned or piece rate employees, who may have assumed (incorrectly) that the commission or piece rate compensation earned by their employees – often very high amounts – is sufficient to cover the pay to which those employees are entitled for rest breaks or other non-productive work hours.

Entitlement to Rest Breaks

In California, non-exempt employees are entitled to one 10-minute paid rest break for every 4 hours (or major fraction thereof) of work. The rest breaks should fall in the middle of an employee’s shift insofar as practicable. On December 22, 2016, the California Supreme Court held that employers under most Wage Orders must relieve employees of all duties and relinquish any control over how employees spend their break time. See Hanson Bridgett Article About Rest Periods.

Providing and paying a regular hourly employee for the rest break is simple: the employee is paid his or her hourly rate of pay for all time worked plus rest break time. But where employers have employees who receive piece rate compensation (work paid for according to the number of units turned out) or commissions (wages based on a percentage of sales of the employer’s services or products), the obligation becomes a bit more complicated.

Piece-Rate Employees

Under Labor Code Section 226.2, which went into effect on January 1, 2016, employers are required to compensate piece-rate employees for rest, recovery, and other nonproductive time separately from piece rate compensation. For rest or recovery breaks, piece rate employees must receive the higher of (1) an average hourly rate determined by dividing the total compensation for the workweek (exclusive of compensation for rest and recovery periods and any premium compensation for overtime) by the total hours worked during the workweek (exclusive of rest and recovery periods), or (2) the applicable minimum wage. The appropriate compensation for rest or
recovery periods must be calculated each week to ensure accuracy. For other nonproductive work time (e.g., meetings), the statute requires employees to be compensated at an hourly rate of at least minimum wage.

**Commissioned Employees – The *Vaquero* Case**

The California Court of Appeal in *Vaquero v. Stoneledge Furniture LLC*, Case No. B269657, recently held that like piece-rate employees, commissioned employees also must be compensated separately for rest periods. In *Vaquero*, two former furniture sales associates filed a class action, claiming that their former employer’s commission plan deprived them of paid rest breaks. Under the commission plan, sales associates received wages in one of two ways each pay period: their earned commissions or a guaranteed minimum wage, whichever was greater in the pay period. The guaranteed minimum wage was provided by adding the sales associate’s earned commissions for the pay period, plus a draw against future earned commissions.

The court held that the employer’s commission plan did not compensate employees for rest periods. Sales associates who received only commissions in a pay period did not receive separate compensation for rest periods, and employees who received the guaranteed minimum wage for hours worked, including rest periods, were required to pay back that compensation in a later pay period as a deduction from later-earned commissions.

While the court held that separate compensation for rest periods is required if the compensation plan "does not already include a minimum hourly wage for such time," the court did not address what that minimum hourly wage should be, or whether it is proper to pay non-exempt employees a salary that compensates them for rest periods and other non-productive work time. What is clear, however, is that employers need to make sure that these commissioned employees are logging their time spent in these activities and that they are being paid separately for that time, at a rate that is at least minimum wage. The only exception to this would be outside sales employees who spend at least 50% of their time away from the employer engaged in sales, who are generally exempt from the wage orders and minimum wage requirements.

**Employer Takeaway**

Employers must carefully evaluate how they are paying non-exempt employees who do not receive a traditional regular hourly wage. The amounts paid through the payment of piece-rate or commission compensation, no matter how great, are not sufficient to cover paid rest breaks or other non-productive time. Rather, employers need to pay these non-exempt employees separately for rest breaks and other non-productive work time. And in the case of commissioned employees, a guaranteed minimum hourly rate as a draw against future commissions will not work to satisfy this requirement.

Please contact Sandy Rappaport, Jennifer Foldvary, or your Hanson Bridgett Labor & Employment attorney for further guidance on best practices for your business.

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