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The Employment Law Newsletter

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Cases To Watch

- Kim v. Reins Intl. California, Inc.
- Stewart v. San Luis Ambulance, Inc.
- Stoetzel v. State of CA

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Attention All Barber Shops & Beauty Salons: You Will Want to Read This! By Ryan J. Carlson

Most of our newsletters are aimed at an audience of employees rather than employers. This volume is a little different, as it aims to inform employers of licensed barbers and stylists about a drastic new change to California law that only applies to their line of business. California recently enacted Labor Code §204.11 (Senate Bill 490), a new statute that tremendously impacts barbershops and beauty salons who pay – *or think they pay* – their licensed employees' wages in the form of commissions. Understanding the implications of this new law is incredibly important and violating it can be incredibly costly. We are fortunate enough to have been working with several shop owners across California to bring them up to speed on how to comply with §204.11's requirements. If, after reading this, you feel as though your shop may be affected by §204.11, we would be happy to do the same for you.

Before delving into a discussion on the law itself, it is helpful to know the difference between "commission" wages and "piece rate" wages and how minimum wage laws affect the payment thereof. Both are a form of incentive-based pay, meaning they are based on one's production at work rather than an hourly rate or set salary figure. Theoretically, the more work one does, the more wages s/he earns – hence, the name "incentive-based." How each form of incentive-based pay is earned, however, is slightly different.

By definition, a commission is "compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof." To put it simply, commissions are wages paid for *selling* a good or service. Think of a car salesman who earned 5% on the *sale* of the car you just bought, or your real estate agent who earned 1% on *sale* of the house she just sold you. The more cars or houses sold, the higher the salesperson's wages.

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While the legislature has not clearly defined piece rate wages like it did with commissions, piece rate wages are generally defined as fixed wages paid on the *production* of a good or service. Unlike commissions, which are earned from *selling* a good or service, piece rate wages are earned by directly *producing* that good or service. Our favorite example is the crafty men and women who used to stitch baseballs back in the day; for each baseball they stitched, they earned roughly \$0.25. More modern examples include assembly line workers who earn a predetermined amount per item they turn out on the factory floor, or mechanics who earn their wages based on the number of “flag” hours accrued during a pay period.

Regardless of whether one earns commissions or piece rate wages, one thing remains the same in California: he or she must always be paid at least the minimum wage *for every hour worked*. However, employees who are paid only incentive-based wages are technically not able to earn wages when they are not actively engaged in selling or producing the goods/services they are hired to sell/produce. This means that even “non-productive” time – for example, time spent under the control of the employer waiting for a customer to walk in or car to fix, or time spent performing opening or closing duties, or time spent attending mandatory staff meetings – must be compensated with at least the minimum wage because nothing is being sold/produced which would enable the employee to earn their incentive-based wages *during those hours worked*. Moreover, employers cannot average earned wages across a work day, work week or pay period in order to satisfy their minimum wage requirements. This is so, again, because employees must be compensated *for every hour worked*. While this may sound confusing and overly burdensome for employers, it is California’s way of looking out for its employees’ wages.

So how does this all come into play in the barbershop and beauty salon industry? Under many barbershop/beauty salon business models, barbers and stylists are paid a percentage of the services they sell and/or perform throughout their shift. However, the California legislature felt it was very hard to differentiate between the *provision* of a service or product and the *sale* of a service or product specifically in the barbering and cosmetology context. (Think about it: while a barber is cutting hair, he may be selling his future services – i.e. building his book; or, while/after a stylist colors a client’s hair, she may also sell a hair product for which she earns a cut – pun intended.) As a result of this confusion and overlap, there were serious doubts as to whether barbers and stylists were truly being compensated with at least the minimum wage *for every hour worked*, including their non-productive time.

As a way of ensuring they were, California enacted Labor Code §204.11, which became effective January 1, 2018. In laymen’s terms it states that licensed barbers and stylists who are compensated with incentive-based wages must also be paid a base hourly rate of at least 2x minimum wage *in addition to* their incentive-based wages in order for those incentive-based wages to actually constitute commissions. If the employer elects not to pay the base hourly rate of 2x minimum wage in addition to the employee’s incentive-based wages – which is still perfectly legal – those incentive-based wages are instead considered to be piece rate wages rather than commissions. So what difference does this make to the employer?



The primary difference – aside from the obvious financial impact – is record keeping. Remember, California requires that employees be compensated *for every hour worked* and does not allow earnings to be averaged over multiple hours, days or weeks. Moreover, employers are required to keep accurate records which establish that they are meeting this strict requirement. By paying the base hourly rate of 2x minimum wage in addition to incentive-based wages on the services sold or provided, an employer automatically satisfies the requirement to compensate *for every hour worked* and need not worry about distinguishing between, and tracking, compensation for productive time and non-productive time.

The same cannot be said when the employee is paid solely in the form of incentive-based wages, even if the employee's gross incentive-based wages for a given pay period exceed that which she should have been paid had she earned just the minimum wage for all hours worked. This is so because such employees do not earn any incentive-based wages during their non-productive time and earnings from the services they have already sold/provided cannot be averaged to satisfy the requirement of compensating employees *for every hour worked*.

Thus, an employer electing not to pay the base hourly rate of 2x minimum wage on top of incentive-based wages is required to keep *accurate* record of not only their employees' time spent selling/performing services, but also the number of services sold/performed, the rate earned per service sold/performed, and the non-productive time each employee spends on the clock. In addition, there are certain ways the employer is required to calculate the hourly rate its employees must be paid for overtime, non-productive time and their state-mandated rest breaks. Even more, all of that information and all of those different rates must appear *accurately* on every one of the employees' respective paystubs.

While all of this accounting, reporting and recordkeeping is *wise* to do when implementing a commission policy, it is *required* when implementing a piece rate policy. Thus, the practical effect of paying piece rate wages is an accounting nightmare waiting to happen. The legal effect of failing to accurately keep all of these records and failing to provide accurate itemized wage statements can cost a business literally thousands of dollars.

Here is the scary part: almost all of the businesses we have worked with on this issue mistakenly believe that they are paying commissions when in fact they are paying piece rate wages (based on their election to not pay the base hourly rate of 2x minimum wage). As a result of this mistaken belief, these business owners are falling woefully short of satisfying their burden of maintaining those accurate records and providing those accurate itemized wage statements.

Yet, this added burden does not mean that the piece rate method should not be utilized. In many cases it is the only option that makes financial sense based on the shop's current business model. In fact, most of the businesses we have worked with thus far have seamlessly converted from what they thought was a commission policy to a new piece rate policy. Though it took some time to devise and set up, it is most definitely possible and, in some cases, it is even the most advisable thing to do.



If this all makes little-to-no sense to you, it should. It took us several hours and a couple phone calls with the drafters of §204.11 and the Professional Beauty Association to fully understand it, so if it does not come to you after reading a four-page newsletter, you are not alone. The bottom line is, this new law leaves several barbershops and beauty salons who currently pay incentive-based wages in a sticky situation: either they substantially increase overhead by paying employees 2x minimum wage in addition to their incentive-based wages, or they pay piece rate wages and completely overhaul their record keeping and accounting methods. A third potential option is to pay straight hourly wages, but incentive-based wages have become a staple in the industry such that employees are likely to look elsewhere when they are not included within the employer's compensation structure.

Maneuvering through this sticky situation is something that should only be done with the help of a lawyer. Using the services of a trained professional will help you to not only devise a new, well-thought-out, lawful and incentivizing compensation structure, but to also figure out how to best go about telling your employees that the terms of their employment are changing. Once these changes are implemented within your business, it is also vital to communicate them to your payroll companies, bookkeepers and/or accountants so they can help you satisfy your recordkeeping obligations.

Do not be left behind. If you pay, or thought you paid, your barbers and/or stylists in the form of commissions, contact an attorney immediately. A little upfront time and expense now can save you thousands of dollars, and maybe even your business, in the long run.

