

Massachusetts SJC Rules Commission-Only Employees Are Entitled to Overtime, Sunday Pay

Written by Jonathan A. Keselenko, Christopher Feudo, Emily Nash

May 16, 2019

Massachusetts law requires that non-exempt employees be paid at least 1.5 times their hourly rate for hours worked beyond the first 40 hours per week, and that certain employees be paid at least 1.5 times their hourly rate for all hours worked on Sundays. However, there has been confusion as to how these laws apply to employees who are paid exclusively by commissions.

Late last week, the Massachusetts Supreme Judicial Court (“SJC”) ruled in *Sullivan v. Sleepy’s LLC* that non-exempt employees paid entirely on commissions or advances are eligible for overtime and Sunday pay, regardless of how much they make in commissions. Thus, even if employees make the equivalent of or more than 1.5 times the minimum wage in commissions, non-exempt employees are still entitled to overtime pay for hours worked over 40 in a work week and, if eligible, Sunday premium pay for hours worked on Sundays.

The plaintiffs in the case, sales employees at Sleepy’s mattress stores, were paid a \$125.00 daily draw plus any commissions they earned in excess of the draw. When the employees worked more than 40 hours in a work week or on Sunday, they were not paid any additional compensation. However, their compensation always equaled or exceeded the minimum wage for the employee’s first 40 hours worked plus 1.5 times the minimum wage for all hours worked over 40 hours and on Sundays.

In 2017, the plaintiffs sued in state court for unpaid overtime and Sunday pay. The defendants claimed that the employees were not entitled to any additional compensation beyond what they had received, because their commissions and advances always equaled or exceeded the minimum wage for the first 40 hours worked plus 1.5 times the minimum wage for hours worked in excess of 40 and on Sundays.

The defendants removed the case to federal court, where the judge subsequently stayed the proceedings and certified two questions of first impression under Massachusetts law to the SJC:

1. Is an employee paid on commission entitled to additional compensation for overtime hours if the employee’s draws and commissions are equal to or greater than 1.5 times the employee’s regular rate or at least 1.5 times the minimum wage for all hours worked over 40 hours in a work week?
2. Is a commission retail employee who works on a Sunday entitled to any additional compensation for Sunday premium pay when the employee’s draws and commissions compensate the employee in an amount equal to or greater than 1.5 times the employee’s regular rate or at least 1.5 times the minimum wage for all Sunday hours worked?

The SJC answered both questions in the affirmative. While the Court agreed that the minimum wage constitutes a commission-only employee’s “regular rate” for the purposes of calculating his or her overtime or Sunday pay, the Court explained that commission-based compensation cannot be retroactively allocated as hourly and overtime compensation, even if that compensation equaled or exceeded the minimum wage for the first 40 hours worked and 1.5 times the minimum wage for all hours worked over 40 hours and on Sundays. Instead, employees are entitled to separate and additional payments of 1.5 times the minimum wage for every hour worked over 40 hours in a week and on Sundays.

To the extent employers have maintained policies by which they did not pay overtime rates or, if applicable, Sunday rates for their non-exempt commission-only employees when their commissions equaled or exceeded the overtime compensation, these policies must now change. These employees must be compensated for their overtime or Sunday hours worked, regardless of their weekly draws and/or commissions.

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.