

September 11, 2019

Massachusetts High Court Holds 100%-Commissioned Inside Sales Employees Are Entitled to Overtime and Sunday Pay on Top of Draws and Commissions

The Massachusetts Supreme Judicial Court (SJC) recently held that inside sales employees paid entirely through draws and commissions are entitled to separate and additional payments for overtime and Sunday work.

In *Sullivan v. Sleepy's*, Sleepy's, a retail store that sells mattresses, was sued by two inside sales employees on behalf of a class of other employees. Those employees were paid on a 100% commission basis, which included a \$125 daily draw plus any sales commissions in excess of the draw. The plaintiffs worked more than 40 hours in at least one week and on at least one Sunday. On those occasions, Sleepy's did not pay them any additional compensation beyond their daily draws and commissions. Those payments, however, always met or exceeded the minimum wage and 1.5 times the minimum wage for any overtime or Sunday work.

In general, Massachusetts law requires that employers pay employees who work more than 40 hours a week 1.5 times their "regular rate." Employees who work on Sunday are similarly entitled to 1.5 times their regular rate. While "regular rate" is not defined, the overtime statute provides that draws and commissions are excluded in calculating an employee's regular rate.

The plaintiffs argued that Sleepy's payment policy violated Massachusetts' Wage Act and its overtime and Sunday pay statutes. Even though employees' draws and commissions always equaled or exceeded the minimum wage and 1.5 times the minimum wage for any overtime and Sunday work, the plaintiffs argued they were entitled to separate and additional overtime and Sunday pay in addition to their draws and commissions. The plaintiffs' argument concerned the interpretation of state law, so the federal court certified two questions about the payment policy to the SJC. The first question was whether Sleepy's must pay employees a separate and additional payment for overtime, and the second question was whether Sleepy's must make a similar payment for Sunday work. The SJC answered both questions in the affirmative.

On the overtime question, the SJC held that the plaintiffs were entitled to 1.5 times the minimum wage as a separate payment for overtime work in addition to their commissions. The SJC also concluded that the retroactive allocation and crediting of draws and commissions by Sleepy's to equal or exceed minimum wage for the first 40 hours worked and 1.5 times minimum wage for hours worked more than 40 was improper. In so holding, the SJC relied on its prior decisions and the purposes of the overtime statute, which were to reduce the number of hours of work, encourage the employment of more people, and compensate employees for the burden of a long workweek. Those purposes, according to the SJC, would be frustrated if the payment policy were allowed to stand. Under Sleepy's payment policy, employers would be incentivized to have employees work more than 40 hours a week. The payment policy, the SJC continued, would also discourage employers from hiring additional employees.

The SJC also opined on what the plaintiffs' regular rate should be. Because "regular rate" is not defined, the SJC adopted the Massachusetts Department of Labor Standards' interpretation and held that the plaintiffs' regular rate should be the minimum wage. The plaintiffs, therefore, were entitled to 1.5 times the minimum wage for overtime pay as an additional payment on top of their draws and commissions.

The SJC concluded that the plaintiffs were entitled to separate and additional pay for Sundays as well. The SJC noted that the Sunday pay statute is sufficiently similar to the overtime statute. It therefore construed the two statutes harmoniously. As a result, the SJC held that the plaintiffs were entitled to 1.5 times the minimum wage as a separate and additional payment for Sunday work.

Businesses in Massachusetts that employ 100%-commissioned sales employees should take notice of this decision. Those businesses should carefully review their compensation policies and, if necessary, revise them to follow the SJC's guidance in *Sullivan*.

Would you like to receive our *Employment and Labor Quarterly Update*? Sign up [here](#).

Authors



Keith H. Bensten
Partner

Boston, MA | (617) 345-4740

kbensten@daypitney.com