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A New Direction For Commission-Only Compensation In Mass.

By **Emily Crowley** (July 12, 2019, 1:11 PM EDT)


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A recent ruling by Massachusetts' highest court has changed the way employers with commission-only compensation plans must pay their employees going forward. On May 8, 2019, the Supreme Judicial Court held in Sullivan v. Sleepy's LLC et al. that employees compensated on a 100% commission basis are entitled to separate and additional compensation for overtime and Sunday work, even where the employee's total compensation is equal to or greater than 1.5 times the minimum wage for those overtime and Sunday hours.[1]

By overturning 16 years of guidance from the Massachusetts Department of Labor Standards, the Sullivan decision may signal the start of open season for overtime claims by employees who already earn more under their commission-based compensation plan than they would otherwise be entitled to under the state's minimum wage and overtime laws.

Background

Plaintiffs Laurita Sullivan and Carlos Bryant were employed as inside salespeople at Sleepy's locations in Massachusetts during 2014 to 2016.[2] At varying times, the plaintiffs worked in excess of 40 hours per week, as well as some Sundays. Sleepy's, a national mattress chain, paid each plaintiff a daily recoverable draw of $125, plus commissions over and above that draw, but no hourly wage.[3] It was undisputed that Sleepy's paid the plaintiffs the same wages without regard to the number of hours worked or Sundays worked, but that the plaintiffs' total commissions and draws always equaled or exceeded the state minimum wage for the first 40 hours worked, and 1.5 times the state minimum wage for hours worked in excess of 40 hours per week and on Sundays.

On Sept. 11, 2017, the plaintiffs filed suit in Suffolk County Superior Court on behalf of themselves and similarly situated Sleepy's employees, alleging that Sleepy's failed to pay them for overtime and Sunday hours, in violation of the Massachusetts Wage Act and the statutes governing overtime and Sunday work.[4] Sleepy's subsequently removed the case to federal court on diversity grounds.

Like federal law, Massachusetts law requires employers to pay nonexempt employees at a rate of at least 1.5 times the employee's "regular rate" for hours worked in excess of 40 per week.[5] During the time period at issue in Sullivan, the state overtime statute also entitled retail employees to 1.5 times their regular rate for all hours worked on a Sunday. [6] Pursuant to a related regulation, an employee's "regular rate" is the

greater of the state minimum wage or the amount reached by "dividing the employee's total weekly earnings by the total hours worked during the week."[7] However, this regular rate calculation specifically excludes commissions and draws on commissions.

Employers have long operated under the assumption that pursuant to these regulations, as long as 100% commission employees' total compensation equaled or exceeded 1.5 times the minimum wage for their overtime and Sunday hours, they were not entitled to separate and additional overtime or Sunday compensation. Their assumption was based on Department of Labor Standards opinion letters published in 2003 and 2009 that appeared to reach the same conclusion.[8]

It was the plaintiffs' position that they were entitled under the law to overtime and Sunday pay that was separate from and additional to their total commissions and draws. Sleepy's argued that its commission and draw pay structure satisfied the state overtime and Sunday pay statutes, because the plaintiffs always received at least minimum wage for the first 40 hours worked per week, plus at least 1.5 times the minimum wage for all hours worked after that or on Sundays.

Under Massachusetts law, a federal court faced with interpreting a state statute may seek guidance from the SJC on matters of first impression, like those presented by the parties in Sullivan.[9] Upon a joint motion of the parties, the federal court in Sullivan certified two questions of first impression to the SJC for guidance.

First, the federal court asked: "If a [100%] commission inside sales employee works more than forty hours in a given work week, is the employee entitled to any additional compensation specifically for overtime hours worked when the employee's total compensation (through draws and commissions) for that workweek is 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 [forty] hours in a workweek?"[10] And, if additional compensation is due, "what is the employee's regular rate for purposes of calculating overtime pay?"

The second certified question asked whether these same employees were entitled to additional compensation for working Sunday hours, despite earning total compensation equal to or greater than 1.5 times the minimum wage for those Sunday hours, and if so, how the employee's regular rate should be calculated for these purposes.

100% Commission Employees Are Entitled to Separate and Additional Overtime and Sunday Premium Pay

The SJC's answer to both certified questions was an emphatic "yes": an employee whose compensation is based solely on draws and commissions is entitled to additional compensation for overtime and Sunday hours, based on a "regular" hourly rate at least equivalent to the state's minimum wage, even when their combined draws and commissions for that workweek equals or exceeds what that employee would otherwise be due under the state's overtime and Sunday wage statutes if they were compensated on an hourly basis.

In reaching these conclusions the SJC focused on the legislative purposes behind the overtime statute (and by analogy, the Sunday wage statute). The SJC has previously described the purpose of the overtime statute as three-fold: "to reduce the number of hours of work, encourage the employment of more persons, and compensate employees for the burden of a long workweek."[11]

Here, the court concluded that the $125 daily recoverable draw Sleepy's paid out to its inside salespeople functioned as a flat rate payment that did not change based on whether the employee worked overtime. According to the court, by failing to put a premium on overtime work this compensation plan created an

incentive for Sleepy's to require its employees to work overtime, and a disincentive to hire additional employees. Therefore, Sleepy's compensation plan contravened the purposes of the overtime statute and was not permissible "absent separate and additional overtime payment."[12]

The SJC's analysis was unaltered by the parties' stipulation that the plaintiffs' weekly earnings always equaled or exceeded 1.5 times the minimum wage for overtime and Sunday hours. In keeping with its own precedent, the court explained that employers cannot retroactively allocate payments to avoid liability for failing to meet their statutory overtime obligations. According to the court, if employers could retroactively "credit" payment for one purpose to a different purpose, employers would "lack an incentive to comply with wage and overtime statutes in the first place."[13]

The court found separate regulatory support for its conclusions in 454 CMR 27.03, which provides that "[w]hether a nonexempt employee is paid on an hourly, piece work, salary, or any other basis, such payments shall not serve to compensate the employee for any portion of the overtime rate for hours worked over [forty] in a work week." The court read this regulation to prohibit retroactive "crediting" of payments against an employer's overtime obligations when those payments were made for a different purpose.

Finally, while the SJC recognized that the DLS opinion letters upon which Sleepy's (and many other employers) relied in structuring its compensation plans were "less than a model of clarity" and "may have mislead" Sleepy's, the court determined these letters did not vindicate its position. First, the SJC found no direct conflict between the opinion letters and the relevant regulation, merely "confusion."[14] Second, as the court explained, even if the DLS guidance had directly contradicted 454 CMR 27.03, as a matter of policy the court would have disregarded the agency's guidance in favor of the contradictory regulation.

What's Next?

The Sullivan decision will almost certainly have a major impact on overtime litigation in Massachusetts. However, the extent of employers' exposure is not yet clear, as the SJC's decision did not directly address whether it was intended to apply retroactively or prospectively.

If retroactive application of Sullivan's conclusions is permitted, every employer in Massachusetts that has paid employees on a commission-only or commission-plus-draw plan may be liable for three years of unpaid overtime and Sunday hours, plus attorney's fees. Even worse for those employers, unlike federal law the Massachusetts overtime statute does not provide a safe harbor from mandatory treble damages to an employer who believes in good faith that it has complied with its legal obligations under the statute. So it is not surprising that even without clarity on retroactivity, in the two-month period since the decision multiple class actions have been filed against employers, particularly auto dealerships, by commission-based employees demanding compensation for unpaid overtime.

Aside from the potential legal consequences for past practices, going forward employers with employees on a commission-only or commission-plus-draw plan must immediately begin paying these employees an additional, separate payment of 1.5 times the state minimum wage ($18 per hour based on the present minimum wage of $12 per hour) for all hours worked over 40, and 1.4 times the state minimum wage for all Sunday hours. These separate and additional payments should be documented by breaking down the sources of each employee's total compensation on their paychecks.

Employees may also find themselves affected by the Sullivan decision in ways that are unintended, but potentially detrimental. In light of new overtime obligations, employers may choose to decrease commission rates in order to pay for overtime or Sunday hours. Or, employers could limit or forbid overtime work by

employees who would otherwise volunteer for the extra hours and instead hire part-time staff (who would not be entitled to benefits) to make up the deficiency.

Ultimately, the Sullivan decision will change the way retail employers do business. And depending on whether the decision is applied retroactively, any employer with a commission-only or commission-plus-draw plan could soon be facing lawsuits and costly judgments. For those reasons, affected employers should consult with their counsel as soon as possible to ensure compliance with the Sullivan decision and assess their potential legal exposure.

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[1] Sullivan v. Sleepy's LLC, 482 Mass. 227, —— N.E.3d ——— (2019).

[2] Sleepy's affiliate Mattress Firm, Inc. was also defendant based on the same set of facts.

[3] While Sleepy's employees were paid on a "commission-plus-draw" plan, not a "commission-only" plan, the SJC's opinion (and this article) treated the two plans interchangeably for purposes of an employer's overtime and Sunday work obligations.

[4] Massachusetts General Law Chapter 149, § 148 (Wage Act); M.G.L. c. 151A, § 1A (governing overtime); M.G.L. c. 136, § 6(50) (governing Sunday work).

[5] M.G.L. c. 151A, § 1A.

[6] M.G.L. c. 136, § 6(50). As of Jan. 1, 2019, Massachusetts began a four-year process of phasing out premium pay for Sunday work.

[7] 454 Code of Massachusetts Regulations § 27.03.

[8] Dep't Labor Stds. Op. Ltr., MW-2003-004 (March14, 2003); Dep't Labor Stds. Op. Ltr., MW-2009-04 (Dec. 21, 2009).

[9] Massachusetts Supreme Judicial Court Rule 1:03.

[10] Sullivan, 428 Mass. at 228.

[11] Id. at 233-234, quoting Mullally v. Waste Mgt. of Mass., Inc., 452 Mass. 526, 531 (2008).

[12] Sullivan, 428 Mass. at 236.

[13] Id.

[14] Id. at 237, n. 18.