

# Commission-Only Inside Salespersons are Entitled to Overtime and Sunday Pay Under Massachusetts Law

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## Meet the Authors



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## Related Services

Wage and Hour

Adhering to the “plain and ordinary” language of the state’s overtime statute and related regulations, the Massachusetts Supreme Judicial Court has held that inside sales employees paid on a 100-percent-commission basis are additionally entitled to pay for overtime hours worked and premium pay for work on Sundays. *Sullivan v. Sleepy’s LLC*, 2019 Mass. LEXIS 244 (Mass. May 8, 2019).

### Background

Sleepy’s was a retail mattress chain that operated primarily throughout the northeastern U.S., and the plaintiffs are former Sleepy’s salespersons. The plaintiffs were paid a \$125 daily draw (advance) regardless of how many hours per week they worked, as well as commissions in excess of their draws. Undisputedly, the plaintiffs’ compensation always equaled or exceeded the state minimum wage for their first 40 hours of work per week, and likewise equaled or exceeded 1.5 times the state minimum wage for all hours worked in excess of 40 per week and for all Sunday hours worked (the latter required under state law for retail employees).

The plaintiffs contended that in addition to their draws and commissions, they were entitled to pay for overtime and Sunday work hours, while Sleepy’s countered that it had no obligation to pay its commissioned employees for such time. The Massachusetts Supreme Judicial Court considered the question of whether commission-only inside sales employees are entitled to overtime pay or Sunday premium pay and, if so, at what rate.

### The Decision

Concluding that inside sales employees paid on a 100-percent-commission-only basis are, in fact, entitled to overtime and Sunday premium pay, the Supreme Judicial Court first turned to the language of the applicable statute and regulations. Just as under federal law, Massachusetts law requires employers to pay employees who work in excess of 40 hours per week at a rate of at least 1.5 times the employee’s “regular rate,” while a related regulation instructs that the regular rate “shall be determined by dividing the employee’s total weekly earnings by the total hours worked during the week.” The overtime statute further provides that retail employees who work on a Sunday or certain holidays similarly are entitled to pay for all such hours at 1.5 times their regular rate.

Under the Massachusetts statute and regulation, however, the regular rate explicitly excludes, among other things, commissions, draws on commissions, and Sunday premium pay. Because of this language, Sleepy’s (and many other employers) concluded that commission-only employees were not entitled to these forms of compensation. Sleepy’s belief was bolstered by two opinion letters issued by the Massachusetts Department of Labor Standards, which appeared to establish that employers had no overtime pay obligations under Massachusetts law to commission-only salespersons, provided that such

individuals received at least the state minimum wage and time-and-one-half minimum wage for all hours over 40.

Acknowledging that the opinion letters were “less than a model of clarity and may have misled the employers,” the Supreme Judicial Court nonetheless noted that state law unequivocally prohibits employers from “retroactively reallocat[ing] and credit[ing] payments made to fulfill one set of wage obligations against separate and independent obligations.” The Court concluded “that the overtime statute requires separate and additional overtime compensation to be provided to a one hundred percent commission employee regardless of whether that employee receives a recoverable draw or commissions that equal or exceed one and one-half times the minimum wage for any hours worked beyond forty.”

In considering the premium rate that must be paid to these employees, the Supreme Judicial Court held that, because the regular rate excludes commissions, draws, and Sunday premium pay, the overtime or Sunday rate must be at least 1.5 times the state minimum wage (currently, \$12.00 an hour). Despite recognizing that employers may have relied on the Department of Labor Standards opinion letters in formulating their compensation policies, the Court did not address whether its decision would apply retroactively or only prospectively.

### The Takeaway

The Supreme Judicial Court’s opinion almost certainly will have a significant impact on retail employers and other businesses throughout Massachusetts that employ commission-only inside salespersons. Massachusetts employers who employ such individuals should promptly and carefully review and, if necessary, revise their compensation and work-hour policies to ensure that they comply with the dictates of the *Sleepy’s* decision.

If you have any questions about this decision or any other wage and hour issue, please consult the Jackson Lewis attorney(s) with whom you regularly work.

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