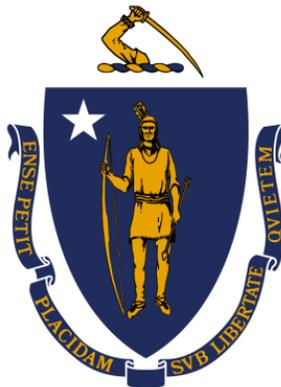


Massachusetts Supreme Judicial Court Rejects Compensation Plan Allocating Commissions to Overtime and Premium Pay

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On March 28, 2024, in *Sutton v. Jordan's Furniture, Inc.*, the Massachusetts Supreme Judicial Court (SJC) upheld a Massachusetts Superior Court decision finding the furniture retailer's commission-based compensation scheme violated the Massachusetts Wage Act for paying commission-based sales employees their overtime and Sunday premium pay out of their earned commissions.



Quick Hits

- The Massachusetts Supreme Judicial Court upheld a lower court's ruling that a retailer's commission-based compensation plan violated the Massachusetts Wage Act by paying commission-based sales employees their overtime and Sunday premium pay out of their earned commissions.

- The retailer used a compensation plan that functioned like an advance on sales employees' future commissions, with sales employees being paid three different types of advances and charged with a "negative balance" if their earned commissions during a pay period were less than the amount of the advances paid to them for that pay period.
- The SJC upheld the lower court's opinion that the employees were entitled to separate overtime pay and Sunday premium pay, and further held that employees have a private right of action under the Massachusetts Wage Act for violations of the Sunday pay statute.

Background

The Massachusetts overtime statute requires employers to pay employees time-and-a-half for hours worked in excess of forty hours in a workweek. Similarly, prior to its repeal as of January 1, 2023, the Massachusetts Sunday pay statute required employers to pay retail employees a "premium" rate for hours worked on Sundays. And in 2019, the SJC ruled that retail salespeople who are paid entirely in commissions are entitled to additional overtime and premium pay for hours worked in excess of forty hours per week or on Sundays.

In an effort to avoid violating these requirements, Jordan's Furniture used a "Sales Draw Plan" that functioned like an advance on sales employees' future commissions. Under the plan, sales employees were paid three different types of advances (or "draws"): (1) a "base draw," calculated by multiplying the number of hours that a sales employee worked up to forty hours per week in a pay period, excluding hours worked on Sundays; (2) an "overtime draw," calculated by multiplying the number of hours over forty per week that the employee had worked during the pay period by 1.5 times the minimum wage rate; and (3) a "premium draw," calculated by multiplying the number of hours that the employee had worked on Sundays during the pay period by the premium rate then in effect. (Before December 31, 2018, the premium rate was 1.5 times the minimum wage; the rate was reduced by 0.1 times the minimum wage each year thereafter until December 31, 2023.)

If a sales employee failed to earn more in commissions than the amount of his or her advance, Jordan's reduced future commissions by the difference between the advance and the commissions earned that pay period, resulting in a "negative draw balance." Thus, at the end of the pay period, if the commissions earned by a sales employee during the pay period were less than the draw, he or she would receive the sum of the base draw, overtime draw, and premium draw, and a negative draw balance would be carried over into the next pay cycle. If the commissions earned by a sales employee during the pay period were greater than the sum of the base draw, the overtime draw, and the premium draw, the employee would be paid the amount of their commissions during the period less any negative draw balance (if any).

One consequence of the compensation scheme, as the court emphasized, was that employees who worked overtime or on Sundays could receive the same compensation as individuals who did not work overtime or on Sundays. The scheme thus effectively eliminated the effect of the increased pay rates that the legislature had prescribed for overtime and Sunday work.

The SJC's Decision

In assessing the plaintiffs' challenge to Jordan's Sales Draw Plan, the Superior Court held that the plan violated the Massachusetts Wage Act and that the employees were entitled to separate overtime pay and Sunday premium pay. On appeal, the SJC affirmed that decision, and also held that employees have a private right of action under the Massachusetts Wage Act for violations of the Sunday pay statute.

In support of its ruling, the SJC noted that although Jordan's separately tracked overtime and Sunday hours on employee paystubs, its Sales Draw Plan failed to provide commission-based employees with "separate and additional" payments for those hours as required by the overtime and Sunday pay statutes (and by its 2019 decision). The court reasoned that the compensation scheme was in violation of the Wage Act because an employee would receive the same gross compensation had the employee not worked overtime or on Sunday, as demonstrated above, thus "evad[ing] the purpose of the overtime and Sunday pay statutes" by avoiding the incentive it creates for employers "to have [their] sales employees work shorter weeks." Jordan's attempted to avoid liability by arguing that unlike the compensation plan that the court had invalidated in its 2019 decision, its Sales Draw Plan did not violate the Wage Act because it never retroactively allocated commissions to overtime and Sunday pay. The SJC disagreed, holding that regardless of whether the allocation is retroactive, a compensation plan violates the Wage Act if it allocates or credits payments made to fulfill one set of wage obligations (e.g., commissions) against separate and independent obligations (e.g., overtime and premium pay). The court summarized its reasoning as follows:

Simply put, a sales employee's commissions are one type of compensation, and overtime and Sunday pay are *separate* types of compensation that require employers to make *additional* payments to employees. By attempting to allocate amounts owed to its sales employees in commissions toward their overtime and Sunday premium draws, Jordan's did not provide its sales employees with separate and additional overtime and Sunday pay, thereby violating the overtime and Sunday pay statutes. (Emphasis in the original.)

The court also held that although the Sunday pay statute does not expressly provide employees with a private right of action against employers for violating it, and also is not included among the statutes that may be enforced under the private right of action provided by the Wage Act, the statute nevertheless can be enforced by employees under the Wage Act. As grounds for that holding, the SJC reasoned that the Wage Act "requires employers to timely pay their employees 'wages earned,'" including those prescribed by statutes such as the Sunday pay law. Thus, the Wage Act applies to all wages an employee earns, including those earned under the Sunday pay statute, and the employee can therefore "bring an action to recover for Sunday pay violations under the Wage Act's private right of action."

Key Takeaways

The SJC’s decision in *Sutton* reinforces its 2019 decision that employees paid entirely by commission are entitled to additional overtime and premium pay for hours worked on Sundays or in excess of forty hours per week. By rejecting the retailer’s argument that its compensation plan did not violate the law because it did not “retroactively” allocate commissions to overtime and Sunday pay, the court made clear that such distinctions are irrelevant: any compensation scheme for commissioned employees that allocates amounts owed to employees in commissions toward overtime or premium draws violates the overtime and Sunday pay statutes. The court further clarified that violations of the Sunday pay statute are enforceable under the Massachusetts Wage Act, with its provision for automatic treble damages and attorneys’ fees. Accordingly, employers with employees in Massachusetts who are paid by commission may want to review their compensation plans for such employees and ensure that they are not allocating commission amounts to overtime pay, retroactively or otherwise, and also that the employees’ commission and overtime payments are entirely separate from one another.

Ogletree Deakins’ [Boston office](#) will continue to monitor developments and will provide updates on the [Class Action](#), [Massachusetts](#), and [Wage and Hour](#) blogs as additional information becomes available.

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