

## Supreme Confusion: Massachusetts High Court Outlaws 100% Commission Pay

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To the surprise of most observers, the Massachusetts Supreme Judicial Court (SJC) held that 100% commission employees are entitled to separate and additional payments for any overtime, Sundays, and certain holidays worked. In *Sullivan v. Sleepy's* the Court sided with enterprising plaintiffs' lawyers, finding that 100% commission employees are owed separate overtime payments that cannot be covered by commission payments.

Background: Since 2003, the Department of Labor Standards had opined that employers are in compliance with their wage and hour obligations to 100% commission employees so long as employees receive commissions that cover minimum wage up to forty hours, and 1.5x minimum wage for all overtime. For example, if an employee worked 45 hours, she would be entitled to \$570. As long as her commissions for that week equaled or exceeded \$570, there was no issue. Unfortunately – after an ambiguous change in regulations in 2015 – plaintiffs' lawyers began filing claims seeking separate and additional payments for overtime.

The Sleepy's Decision: The issue was before the Court in *Sleepy's* and Massachusetts law now requires separate and additional payments at a rate of 1.5x the minimum wage for all time worked over forty hours a week and on Sundays or certain holidays. In the example above, the employee now must receive an additional \$90 on top of her \$570 commission.

Will This Be Retroactive? Despite the fact RAM specifically raised this important issue in a brief filed with the Court, the Court did not discuss whether this would only be the rule moving forward or, rather, whether employers could be on the immediate hook for “noncompliance” going back three years from the filing of any lawsuit. This issue will be addressed in the coming months in several pending cases.

### What Should You Do Now?

- Review and revise pay plans to provide “separate and additional” payments for all overtime worked
- Speak with counsel to explore ways to compensate employees prior to receiving a complaint
- Consider paying salespersonnel hourly and adjust commissions accordingly
- Adjust schedules to avoid anyone working more than 40 hours
- Reiterate the importance of keeping accurate records of employee time worked

This decision is unfortunate. The Court did not appear to comprehend or appreciate its full impact – and how it will affect your operations. RAM and other industry groups are pursuing legislative fixes to this disastrous decision and will update you with any developments. ■

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