

Minimum Wage Opinion Letter **03-14-03 - 100 Percent Commission-Based Pay and OT**

March 14, 2003

I am writing in response to your request for this Office's written opinion regarding the applicability of M.G.L. c. 151, the Massachusetts Minimum Fair Wage Law, to retail employees paid on a 100 percent commission basis. Specifically, you have asked the following eight questions, which I will address in turn. [\[1\]](#)

1. Can a retail employer in Massachusetts pay an inside sales employee on a 100 percent commission basis, provided that the employee receives an amount equal to at least the minimum wage for all hours worked?

Yes. Employees may be paid on a 100 percent commission basis provided they are not paid less than the applicable minimum wage for all hours worked. As the phrasing of your question acknowledges, inside salespersons, as opposed to outside salespersons, are covered by M.G.L. c. 151, and must be paid the minimum wage for all hours worked. See M.G.L. c. 151, §1.

2. Does a retail employer in Massachusetts need to pay an overtime premium for hours worked over forty in a workweek to an inside sales employee who is paid on a 100 percent commission basis?

Unlike the federal Fair Labor Standards Act (FLSA) which permits a limited exception to federal overtime requirements for certain inside salespersons, state law does not include any such exception. [\[2\]](#) Therefore, unless another overtime exemption applies, inside salespersons are subject to the state overtime law, even though the commissions they receive are not included in the regular hourly rate for purposes of overtime calculation. See M.G.L. c. 151, §1A.

3. Does a retail employer in Massachusetts need to pay a premium for work on Sundays and holidays to an inside sales employee who is paid on a 100 percent commission basis?

Under M.G.L. c. 136, §§6, 13, & 16, some retailers are required to pay premium pay for Sundays and certain holidays. Questions regarding the applicability of these laws to a particular retail employee should be addressed to the Department of Labor and Workforce Development (DLWD).

4. If the answer to Question (2) is yes, what is the employee's regular rate for purposes of calculating overtime (given that the state statute expressly excludes commissions from the regular rate)?

A non-exempt employee must be compensated at a rate not less than one and one half times the regular rate at which he is employed for all hours worked in excess of 40 hours in a given workweek. M.G.L. c. 151, §1A. See also 455 C.M.R. 2.02(4).

The Massachusetts Minimum Wage Regulations, 455 C.M.R. §2.01 et seq., further define how overtime is calculated. Section 2.03(3) defines the overtime rate, in pertinent part, as "1½ times the employee's regular hourly rate, such rate not to be less than the basic minimum wage. Section 2.01 defines "regular hourly rate" as:

[t]he amount that the employee is regularly paid for each hour of work. When an employee other than a bona fide executive, administrator or professional is paid on a piece work basis, salary, or any basis other than an hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total weekly earnings. Regardless of the basis used, whether time rate, commission basis or piece rate, the employee shall be paid not less than the applicable minimum wage each week. In computing the regular hourly rate, sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production shall be excluded. [\[3\]](#)(emphasis added). In the case of an employee who is paid on a 100 percent commission basis, the employee's total earnings for purposes of overtime calculation must exclude commissions, but pursuant to 455 C.M.R. §2.03(3), the employee's regular hourly rate must not be less than the

minimum wage. Therefore, Massachusetts law requires that such an employee be paid at least the equivalent of minimum wage for the first 40 hours, and time and one-half minimum wage for all hours worked over 40 in a given workweek. An example is illustrative:

If an employee paid on a 100 percent commissions basis works 50 hours in a given work week, the employee's total compensation for that week must equal or exceed \$371.30. (\$270 [\$6.75 x 40 hours] + \$101.30 [\$10.13 x 10 hours])

Of course, an employer must separately determine overtime compensation due under federal law. [\[4\]](#)

If the answer to Question (3) is yes, what is the employee's premium rate for work on Sundays and holidays (given that the statute expressly excludes commissions from the regular rate)?

Questions regarding the calculation of premium pay required by M.G.L. c. 136 should be addressed to DLWD.

If the answers to Questions (2) and (3) are yes, can the employer count the premium(s) paid to the employee as a recoverable draw against future commissions?

As stated earlier, questions regarding the calculation of premium pay required by M.G.L. c. 136 should be addressed to DLWD. As for the part of this question that concerns M.G.L. c. 151, compensation paid as a recoverable draw may reduce future commissions provided the employee always receives at least minimum wage for all hours worked and overtime compensation as detailed in the answer to Question 4. Two examples are illustrative, using the example of an employee paid a weekly recoverable draw, with commissions determined and paid monthly: [\[5\]](#)

Example 1: Employee's draw exceeds the minimum wages due.

<u>Month one:</u>	Recoverable Draw	Hours Worked
Week One	\$500	50
Week Two	\$500	50
Week Three	\$500	50
Week Four	\$500	50

Total draw: \$2000 (This amount is permissible under state law as it exceeds the required wages of \$1485.20, or \$371.30 x 4 weeks)

Commissions earned: \$1300

Employee retains \$2000, \$700 carried over against future commissions

<u>Month two:</u>	Recoverable Draw	Hours Worked
Week One	\$500	50
Week Two	\$500	50
Week Three	\$500	50
Week Four	\$500	50

Total draw: \$2000

Commissions earned: \$5000

Employee may be paid: \$2300 [\$5000 (commissions) - \$2000 (draw in month 2) - \$700 (carried over as recoverable draw) = \$2300]

Example 2: Employee's draw equals the minimum wages due.

<u>Month one:</u>	Recoverable Draw	Hours Worked
Week One	\$371.30	50
Week Two	\$371.30	50
Week Three	\$371.30	50
Week Four	\$371.30	50

Total draw: \$1485.20

Commissions earned: \$0

Employee retains \$1485.20, and \$1485.20 is carried over against future commissions

<u>Month two:</u>	Recoverable Draw	Hours Worked
Week One	\$371.30	50
Week Two	\$371.30	50
Week Three	\$371.30	50
Week Four	\$371.30	50

Total draw: \$1485.20

Commissions earned: \$2000

Employee retains \$1485.20 and \$970.40 is carried over against future commissions [\$2000 (commissions) - \$1485.20 (draw in month two) - \$1485.20 (carried over as recoverable draw) = <\$970.40>]

7. In the same scenario, does the payment of some of the commissions in the form of a weekly recoverable or non-recoverable draw affect the answers to any of the questions above? Does the reference in M.G.L. c. 151, §1A, to "drawing accounts" refer to recoverable or non-recoverable draw payments?

See answer to Question (6) for examples of two recoverable draw pay arrangements. Any further response to the first part of this question would require a more specific inquiry about a particular pay arrangement.

In response to the second part of this question, M.G.L. c. 151, §1A, does not distinguish between recoverable and non-recoverable draws.

8. In the same scenario, can the retail employer pay an inside sales person his or her commissions on a monthly or quarterly basis without violating the timely payment of wages requirement in M.G.L. c. 149, §148 (i.e., he or she would only receive commissions on a monthly or quarterly basis, and not receive any other compensation during the month or quarter)?

This question should be addressed to the Office of the Attorney General's Fair Labor and Business Practices Division.

I hope this information has been helpful. Please note that this opinion is based solely on the information provided with your request. The existence of other facts not contained in your request might

require a different conclusion. If you have any further questions, please feel free to contact me.

Sincerely,
Lisa C. Price
Legal Counsel

[1] Please note that employers are also subject to the federal minimum wage and hour law, found in the Fair Labor Standards Act (FLSA), and regulations promulgated thereunder. For information about applicable federal

wage and hour laws, you should contact the U.S. Department of Labor. The telephone number for the Boston Office is (617) 624-6700.

[2] Under 29 U.S.C. §207(i), overtime compensation is not required for retail or service employees "if (1) the regular rate of pay of such employee is in excess of one and one-half times the [statutory minimum wage], and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services."

[3] This exclusion of commissions and similar pay originates in the statute. See M.G.L. c. 151, §1A.

[4] Under federal law, commissions must be included in the regular hourly rate. 29 C.F.R. §778.117. Therefore, in some circumstances, federal law may require compensation in excess of the amount required under state law.

[5] Again, an employer must separately determine overtime compensation due under federal law, which may require additional compensation

= Names have been omitted