

COMMISSION PAY AND THE OVERTIME LAWS FOR NON-SALES EMPLOYEES

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LEGAL BACKGROUND

In a case that was decided March 6, 2003, the Washington State Supreme Court ruled that the retail sales and service exemption for commissioned employees applied to all commissioned employees, not just to salespeople. The case, *Stahl v. Delicor of Puget Sound, Inc.*, 64 P.3d 10 (2003), involved route drivers for a retail supplier and operator of food and drink vending machines. The drivers received a base salary of \$235 per week plus 5-1/2% of gross sales on all revenue from machines and any invoice drop of product with a guaranty of \$14.25 per hour. The base pay was later reduced to \$200 per week. One of the drivers sued the employer, claiming that he was entitled to receive time and a half for all overtime worked because he did not make sales. The court ruled that RCW 49.46.130(3) applied to non-sales employees.

Under RCW 49.46.130, commissioned employees who work in the goods and services industry can be exempt from the overtime laws if their base salary and commission meet certain requirements. Specifically, the employees are exempt from the overtime laws if: (a) The regular rate of pay of the employee is in excess of one and one-half times the minimum hourly rate required under RCW 49.46.020; and (b) More than half of the employee's compensation for a representative period, of not less than one month, represents commissions on goods and services.

In determining the proportion of the compensation representing commissions, all earnings resulting from the application of a bona fide commission rate is to be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee. RCW 49.46.130(3).

A "retail or service establishment" is defined as "an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry." RCW 49.46.010.

The state supreme court in the *Stahl v. Delicor* case noted that the Washington law was based on the federal Fair Labor Standards Act (FLSA), and that, under the FLSA, employees of service and retail establishments can be exempt from overtime if they are properly paid as commissioned employees by their employers. 29 USC § 207(i). Under federal law, the exemption was applied to truck drivers hailing on a commission basis who earned 20% commission for the first 40 hours worked and 30% commission for hours worked in excess of 40 per week. *Brennan v. Sinor*, 391 F. Supp. 681 (N.D. Okla 1974). Additionally, according to the Washington court in *Stahl v. Delicor*, delivery men are listed in the federal regulations as an example of retail sales employees who could be exempt as commissioned employees so long as they are paid under a valid commission system under the federal statute. 29 CFR § 779.307.

The *Stahl v. Delicor* case is somewhat unusual in that the trend in Washington lately has been to narrow the exemptions to the wage and hour laws. Thus, this case is good news for employers in retail or service establishments.

PRACTICAL GUIDELINES

- If you are a retail or service establishment and you want to pay non-sales employees on a commission basis, be sure that you meet the following test:

The regular rate of pay of the employee is in excess of one and one-half times the minimum hourly rate required under RCW 49.46.020; and

More than half of the employee's compensation for a representative period, of not less than one month, represents commissions on goods or services.

- In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate are considered commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.
- Even if your employees work on a commission basis, be sure to track the number of hours worked for reporting wages and taxes due. Under WAC 192-310-040(4), “An employer will report the actual number of hours worked by employees paid by commission. In the absence of reliable time keeping records, the employer will report a full-time commissioned employee for 40 hours worked for each week in which any of their duties were performed.”
- Commission agreements should be in writing. They should also specify when the commission is considered earned to avoid disputes after termination regarding whether an employee is entitled to a commission for work that was in progress when the employee left, or for work that had been billed by the employer but for which the employer had not yet been paid.
- The wrongful withholding of wages laws apply to disputes over unpaid commissions, which means that employers could be liable for double damages and attorney’s fees if they miscalculate commissions or refuse to pay them when due.

The above suggestions are broad, general comments only, and are not legal advice, nor do they create an attorney-client relationship. Individual situations require individual analysis. For assistance with a specific situation, contact an attorney with experience in this area, such as Karen Sutherland, Chair of the Employment and Labor Law Practice Group of Ogden Murphy Wallace, P.L.L.C. She can be reached at (206) 447-7000 or by e-mail at ksutherland@omwlaw.com.