

WASHINGTON COURT RESTRICTS OVERTIME EXEMPTION FOR COMMISSIONED EMPLOYEES TO SALES PERSONNEL ONLY

Continuing its recent trend of limiting exemptions from the overtime provisions of the Washington Minimum Wage Act, the Washington Court of Appeals has held that the exemption from overtime pay for commissioned employees of retail and service establishments applies only to those employees working principally as salespersons. Accordingly, the court held that drivers who serviced vending machines and were paid commissions were not exempt and therefore were entitled to be paid time and a half for their overtime work.

In 1997, the Washington Legislature amended the Minimum Wage Act to incorporate an exemption for "Commissioned Salespersons." The language of Washington's exemption, which is identical to the language of the exemption from overtime pay requirements contained in the federal Fair Labor Standards Act (29 U.S.C. § 207(i)), provides that retail or service establishments are not obligated to pay overtime to employees whose regular rate of pay exceeds one and one-half times the minimum wage and who receive more than half of their compensation from "commissions on goods or services." RCW 49.46.130(3). Despite the fact that the federal and Washington "commissioned salesperson" exemptions are identical in their language, last week's Court of Appeals ruling in *Stahl v. Delicor of Puget Sound, Inc.*, construed the state exemption more narrowly than federal courts have construed its federal counterpart.

In this case, Mr. Stahl was employed as a route driver, traveling from customer to customer to stock and clean vending machines, collect money from the machines and address related customer concerns. Although Delicor's route drivers had previously been paid on an hourly basis with time and a half for overtime work, under its new collective bargaining agreement Delicor began to pay them on a commission basis and stopped paying extra for overtime work. The trial court agreed with Delicor that the drivers fell within the statutory exemption for commissioned retail and service employees and dismissed Mr. Stahl's claim for overtime pay.

In reversing the trial court, the appellate court examined the legislative history of the Minimum Wage Act's exemption for commissioned employees. The court noted an "express legislative intent" that the exemption for commissioned employees be limited to commissioned salespersons. According to the appellate court's opinion, to earn a "commission" within the meaning of the exemption, an employee must be involved principally in selling a product or service. As an example, the court explained that it would not comply with the law's purpose to pay a cashier on a commission basis based on the amount in the till, rather than providing him or her overtime pay. The court determined that Mr. Stahl, whose tasks were primarily driving and stocking vending machines, was not involved principally in selling a product or service and, therefore, could not earn "commissions." Since, as a delivery driver, Mr. Stahl did not earn "commissions" within the meaning of RCW 49.46.130(3), the Court of Appeals held that Delicor was required to pay him time and a half for his overtime work.

What This Means for Employers

Retail or service establishment employers should determine whether their commissioned employees are actually engaged in sales, as opposed to other work within the retail or service establishment. Although the *Stahl v. Delicor* decision has not as yet been accepted for review by the Washington Supreme Court, it is consistent with that court's recent "employee-friendly" decisions on wage and hour issues. Because failure to pay overtime wages to non-exempt employees can subject an employer to expensive penalties and litigation costs, employers should always seek legal advice if they have any question regarding whether their employees are exempt or non-exempt from the overtime provisions of the Washington Minimum Wage Act.

Because of the changing nature of this area of the law and the importance of individual facts, this information is not meant to provide legal opinions and is not a substitute for the advice of legal counsel.

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