



# Commissioned-Salesperson Ruling Is Big Win For Employers

Insights

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Employers who have commission-sales employees working under two California Wage Orders recently received good news from a California appellate court which essentially clarified and strengthened the commission-sales exemption contained in Section 3D of Wage Orders 4-2001 (certain listed occupations) and 7-2001 (mercantile). *Muldrow et al v. Surrex Solutions Corporation*.

The decision was handed down August 29, 2012. In it, the Fourth Appellate District affirmed the trial court's judgment, and held that commissioned salespersons working for the employer (Surrex) were exempt from overtime under Section 3D, rejecting a variety of creative arguments raised by plaintiff counsel.

Under Section 3D, California employers are not required to pay overtime wages to employees "whose earnings exceed one and one-half (1 1/2) times the minimum wage if more than half of that employee's compensation represents commissions." The Labor Code defines commission wages as "compensation paid to any person for services rendered in the sale of such employer's property or services, and [which are] based proportionately upon the amount or value thereof." The meaning of the various components of this definition of "commissions" has been litigated for many years.

## The Facts Behind The Ruling

In *Muldrow*, the employees were employment recruiters of Surrex who obtained job orders from clients and sought to recruit candidates to fill the positions. The job of the employment recruiters included persuading the job candidate and the client that the placement of the candidate as an employee with the client was a "good fit." Only if the candidate was successfully placed with, and retained by, the client would Surrex obtain revenue from the client from which its sales force (employment recruiters) were then compensated.

The plaintiff employees first argued that they were not employed principally in selling a product or service, citing *Keyes Motors, Inc. v. Division of Labor Standards Enforcement*. In support, they referred to a variety of tasks that they considered to be outside the zone of "selling" such as "searching on the computer, searching for candidates on the website, cold calling, interviewing candidates, inputting data, and submitting resumes."

The trial court flatly rejected this argument, concluding that the whole point of these activities was to satisfy conditions required for achieving "sales" through placing candidates with the client, and the appeals court agreed. The court further noted that the "essence of a commission... is a payment based on sales that is decoupled from actual time worked."

The employment recruiters were paid either a percentage of the client placement fee for "direct placement," or if the candidate was hired only as a consultant, they received a percentage of "adjusted gross profit." Adjusted profit was a net amount reached after subtracting a variety of "cost-related factors." The plaintiff employees argued that their commissions were not sufficiently related to the "price" of the sale.

The court rejected this argument as a misreading of prior case law and the clear language of the statute that defines "commissions" as including a percentage of the "value" of the sale, which the court indicated could be fixed after considering the employer's allocated costs. Nor did the court consider the profit formula to be "too complex," as the plaintiffs contended, for the employees to understand it. In reaching its conclusion, the court settled in favor of Surrex a number of hyper-technical arguments raised by plaintiff counsel as they misinterpreted prior case law.

Finally, the employees argued that the compensation plan was not "bona fide" in part because regular draws were paid over a long period of time and that they were only paid additional amounts when cumulative commissions were found to exceed the cumulative draws at various times of reconciliation. The court rejected this argument, noting that the guaranteed draws were regularly reconciled against commissions and that the evidence established that over a period of years the total commissions were "far in excess" of their regular draws.

### **Putting It In Perspective**

The good news for employers is that this case finally puts to rest a number of arguments commonly raised by plaintiff attorneys regarding whether incentives paid by compensation plans qualify as "commissions" within the meaning of the Section 3D exemption. Among other things, it is now clear that a variety of activities outside the point of actual sale often characterized as clerical can qualify as "sales related" sufficient to satisfy the exemption test. Many employers have profit-based formulas for calculating commissions, and this case emphasizes that these methods for paying commissions are legal, enforceable, and fully compliant with the relevant regulations.

This case provides valuable guidelines for drafting commission plans, but each commission agreement should be evaluated individually to assure that each of the elements of the commission plan are laid out clearly and unambiguously. Consult your legal counsel to make sure your agreements are air tight in accordance with these legal standards.

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