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## Labor and Employment Alert

2000-08-01

On July 31, the Massachusetts Supreme Judicial Court clarified three points of Massachusetts wage and hour law in the case of *Kelli K. Goodrow v. Lane Bryant, Inc.*

### **Fluctuating Workweek Method Is Valid Under Massachusetts Law**

First, the court ruled that Massachusetts law permits employers to use the so-called "fluctuating workweek" method to calculate overtime payments for salaried employees who are non-exempt under state law regarding payment of overtime, overruling a superior court judge who had held the contrary. Under the fluctuating workweek method, an employee's base salary covers all hours worked in a workweek on a straight time basis. Because the employee's base salary provides straight time compensation for all hours worked (including hours over forty in a week), the employee only receives an extra "half-time" overtime premium for the hours worked in excess of forty per week. In addition, under this method the employee's regular rate of pay varies from week to week, depending upon the actual hours worked: the greater the number of hours worked, the lower the "rate" of pay upon which overtime is calculated. The fluctuating workweek method of overtime calculation has been recognized under federal law since the 1930s. This decision by the Supreme Judicial Court (SJC) makes clear that this method is acceptable under Massachusetts law as well.

### **Plaintiff Not Entitled to Mandatory Treble Damages**

Second, the court clarified an ambiguity in the damages provision of the state overtime law. The plaintiff argued that the overtime statute mandates an award of treble damages in the event a plaintiff proves her case. Lane Bryant argued that the statute merely permits a court to award treble damages at its discretion, if they are warranted under the circumstances. The SJC sided with Lane Bryant, ruling that treble damages are essentially punitive in nature and only will be awarded against "those defendants with a higher degree of culpability than that sufficient to ground simple liability." The court noted a complete absence of "evil in motive" or "reckless indifference to the rights of others," and declined to award treble damages. This is

good news for employers because many plaintiffs, when asserting claims to overtime pay, have in the past inflated their settlement demands, playing upon the fear of mandatory treble damages if the matter were fully litigated. The SJC has made clear that while a plaintiff may obtain treble damages, he is not entitled to them as a matter of right.

### **State Law Definition of "Exempt" Employees May Differ From Federal Definition**

While these two aspects of the *Goodrow* decision are good news to employers, one aspect of the decision is troubling for Massachusetts companies. At issue in this case was whether Ms. Goodrow was appropriately characterized by Lane Bryant as an employee "exempt" from the overtime provisions of state wage and hour law. Lane Bryant argued that Ms. Goodrow was a "*bona fide* executive" who was not entitled to overtime. (Ms. Goodrow was a store manager at one of Lane Bryant's retail stores.)

Massachusetts statutory and regulatory law does not provide a clear definition of a "*bona fide* executive." Lane Bryant urged the court to apply the definition set forth in the federal regulations promulgated in conjunction with the federal Fair Labor Standards Act. This would have provided a measure of certainty: the federal regulations are fairly specific. In addition, following the federal definitions would have harmonized state and federal overtime law, providing employers with a single, consistent group of definitions.

Unfortunately for employers, the court did not bind state law to the federal definitions, and instead affirmed the lower court's finding. In the absence of a specific Massachusetts statutory or regulatory definition, the court looked to the "common understanding" of the term "executive," drawing upon dictionary definitions and tangential statutory references. Among the factors the court considered was the extent to which Ms. Goodrow had exercised "managerial responsibility," which the court described as "significant control or discretion over the principles, practices, and strategies applied by Lane Bryant," and participation in "formulating or determining policy." The court provided no further specific guidance other than ruling that state law is "at least as beneficial" to the employee as federal law. The court did not make clear exactly in what way or to what extent state law is "more beneficial" to the employee than federal law.

The court's decision in *Goodrow* has significant implications for Massachusetts employers, which are left without clear definitions of "exempt" employees under state law. Given the potential impact of this decision, Hale and Dorr will work with industry organizations and appropriate administrative agencies to encourage the implementation of regulations under Massachusetts law that are consistent with federal wage and hour law.

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