

'No commission' ad doesn't destroy exemption

A recent court decision is good news for employers of commissioned, exempt salespeople that also imply in their advertising that the salespeople don't work on commission.

A federal court has rejected the argument that advertising "no commissions" automatically means salespeople must be reclassified as hourly employees entitled to overtime pay. A decision in favor of employees would have led to a class-action lawsuit.

Recent case: Rinda and a co-worker were salespeople for a furniture store chain. They were paid on a commission basis, earning a flat 4% on delivered sales, plus bonuses upon achievement of certain levels of sales in various categories. The bonuses included one for total sales volume, for warranty sales (known as a "Smart Buy" bonus), for specific products (known as a "SPIFF" bonus) and for sales of accessories, pillows and bedding.

The store chain classified the salespersons as exempt under the retail and service establishment commissioned salesperson exemption. The Fair Labor Standards Act exempts such workers from overtime eligibility if they earn at least half their compensation from commissions on sales and their regular earnings equal at least one and one half times the minimum wage.

The salespeople sued, alleging that their employer had begun an advertising campaign in which they claimed to be a commission-free operation. Employees even wore tags that touted no commissions. They claimed this representation meant their employer couldn't claim the commissioned salesperson exemption even if they did, in fact, pay their salespeople on a commission basis.

The court said what counted wasn't advertising, or even whether the employer used the word "commission" to describe their compensation plan. What mattered was that they were paid commissions on sales—and they had been. The case was dismissed. (*Thomas v. Bob Mills Furniture*, No. 14-CV-219, WD TX, 2016)