



FLSA2020-10

June 25, 2020

Dear **Name***:

This letter responds to your request for an opinion concerning the application of the retail or service commission sales exemption from the Fair Labor Standards Act's (FLSA) overtime pay requirements. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

Your letter states that your client is involved in the retail sale of home furnishings to the public in small stores employing two to five employees. Your client pays most salespersons commissions that afford them substantial earnings. The letter adds that where it is clear a salesperson will not earn substantial commissions, your client pays the employee hourly with overtime for hours worked over 40 in any workweek.

Your letter asks what obligation an employer incurs when it attempts to use the overtime exemption for a retail or service establishment in Section 7(i) of the FLSA, 29 U.S.C. § 207(i), but more than half of an employee's compensation in the relevant representative period ultimately does not consist of commissions. In particular, you are concerned with two scenarios: (1) the opening of a new store where the sales volume is unknown; and (2) the hiring of a new salesperson with no sales-performance record. The letter states that your client hires salespersons in these situations as commissioned employees subject to Section 7(i)'s exemption and guarantees compensation at one and one-half times the applicable minimum wage for all hours worked during a representative period. You state that your client tracks the sales and commissions of the salesperson, but the commissions requirement is met in some weeks but not in others. Therefore, your client cannot determine whether more than half of the compensation that the salesperson will receive by the end of the full representative period will consist of sales commissions at the end of the representative period.

GENERAL LEGAL PRINCIPLES

The FLSA Section 7(i) exemption applies if: (1) the employee is employed by a retail or service establishment; (2) the employee's regular rate of pay exceeds one and one-half times the minimum hourly rate; and (3) more than half of the employee's compensation for a representative period (not less than one month) consists of commissions on goods or services. 29 U.S.C. § 207(i); 29 C.F.R. § 779.412. "Section 7(i) was enacted to relieve an employer from the obligation of paying overtime compensation to certain employees of a retail or service establishment paid wholly or in greater part on the basis of commissions." 29 C.F.R. § 779.414.

One court has explained that the exemption is aimed at benefitting both employers and employees:

The § 7(i) exemption was designed to address inequities that can arise in paying overtime to commissioned employees. Service specialists, who are paid on a commission basis and are able to set their own schedules, can work fewer hours in one week and more in the next. If they received overtime, employees could compress their hours into one week (e.g., work 60 hours) to obtain overtime pay, and then coast during the next week (e.g., work 10 hours). By doing so, employees would end up working fewer hours than a regular employee working two forty hour work weeks, but yet earn more.

English v. Ecolab, Inc., No. 06-CIV-5672 (PAC), 2008 WL 878456, at *16 (S.D.N.Y. Mar. 31, 2008).

The Supreme Court has held that exemptions under the FLSA deserve a “fair (rather than a narrow) interpretation” because the exemptions are “as much a part of the FLSA’s purpose as the overtime-pay requirement.” *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks and citation omitted). “And that is as should be expected, because employees’ rights are not the only ones at issue and, in fact, are not always separate from and at odds with their employers’ interests.” *Sec’y U.S. Dep’t of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019) (citing *Encino*). Accordingly, WHD must apply a “fair reading” standard to all exemptions to the FLSA—including the Section 7(i) exemption.

OPINION

For purposes of this letter, we assume that your client qualifies as a retail or service establishment, *see* 29 C.F.R. §§ 779.24, .313, that it pays employees a regular rate exceeding one and one-half times the current federal minimum wage of \$7.25 in a workweek in which the employee worked overtime hours, and that the commissions paid to your client’s employees are bona fide commissions based on the provision of goods or services that the establishment sells, *see* 29 C.F.R. §§ 779.413–.416.

Your letter describes a scenario in which there is no prior established representative period and instead the employer is starting a representative period for a new employee or a new store simultaneously with using the Section 7(i) exemption. While this scenario is not explicitly addressed in the regulations, nothing in the FLSA prohibits doing this.

Indeed, WHD addressed similar circumstances in a 1981 opinion letter, which recognized that an employer may use Section 7(i) “simultaneously with the commencement of the representative period.” WHD Opinion Letter FLSA-897 (Apr. 16, 1981) (copy enclosed). The letter made clear, however, that if an employer chooses to do this and, at the conclusion of that initial representative period, Section 7(i)’s requirement that commissions constitute more than half of compensation for a representative period has not been satisfied, the employer must pay overtime

premium compensation for any overtime hours worked during that period.¹ Consistent with the 1981 opinion letter, the employer could again attempt to establish a representative period for the new employee and simultaneously claim the Section 7(i) exemption for that employee on a prospective basis.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is “modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” *Id.*

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink that reads "Cheryl M Stanton". The signature is written in a cursive, flowing style.

Cheryl M. Stanton
Administrator

Enclosure

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

¹ *Id.*; *see also* WHD Opinion Letter FLSA2005-53, 2005 WL 3308624, at *2 (Nov. 14, 2005) (concluding that when information is insufficient “to determine whether the employees receive[d] more than half of their earnings in a representative period from [commissions] ... we are unable to determine whether they qualify for exemption”).