

FLSA-532

November 27, 1973

This is in reply to your letter of September 20, 1973, requesting an opinion on the application of the minimum wage requirements of the Fair Labor Standards Act to automobile salesmen who are exempt from the overtime provisions of the Act by virtue of section 13(b)(10).

You indicate that these automobile salesmen are paid by the month on a straight commission basis, but each receives a draw against his commissions on or around the fifteenth (15th) of each month. At the end of each month, the balance of his commission (total commission due minus draw) is paid. To determine whether the minimum wage requirement is met, the employer divides the salesman's total earnings on sales made during the month by the total number of hours worked during the workweeks ending during the month. When the result of this calculation is at least \$1.60 per hour, the employer assumes that the minimum wage requirement has been met. When the result of this calculation yields less than \$1.60 per hour, the employer pays the salesman the difference required to bring the wages up to at least the required minimum hourly wage for all hours worked in the workweeks ending within the month. You ask whether the minimum wage provisions of the Act are satisfied by the method.

The Act applies on a workweek basis, and in order to satisfy its minimum wage requirements, an employee must receive not less than the applicable statutory minimum wage for all hours worked in each workweek without regard to his sales productivity. This amount must be paid to him free and clear. If an employee receives a weekly draw or guarantee of at least the minimum wage for each hour he works, the minimum wage provisions of the Act will be satisfied. In such a situation, the employer can take credit for this draw or guarantee when settling out the amount due the employee as commissions which he has earned. This may be done at the end of the period used to determine the total commissions earned for that period.

It appears that the method of pay you describe, in which a mid-monthly draw is provided, would establish a semi-monthly pay period. This obligates the employer to meet the minimum wage requirement in each semi-monthly pay period standing by itself with respect to all hours worked in workweeks ending within the pay period. If payment is so made each semi-monthly pay period, this method would comply with the Act's requirements.

The employer may wish to avoid the complications of a semi-monthly pay period by adopting a pay plan under which the employee receives free and clear a weekly draw sufficient to meet the statutory minimum wage for that week. Under this method the employees can take credit for this draw when settling out the amount of commissions due at the month's end, as explained above. This is the customary manner of assuring minimum wage compliance for such employees, as it avoids bookkeeping miscalculations.

Sincerely,

Warren D. Landis
Acting Administrator
Wage and Hour Division