FLSA-823

February 3, 1982

This is in reply to your letter of January 11, 1982, requesting an opinion as to the application of the Fair Labor Standards Act to mechanics employed by one of your clients.

You state that the company is a small truck and automotive repair facility employing sixteen employees. Nine of the employees are mechanics engaged in the performance of repairs to trucks and automobiles. The mechanics currently work on a commission basis, receiving 50 percent of the labor charge on any job performed. The mechanics normally work from 8 AM to 6 PM with an hour off for lunch. You are concerned with any overtime pay exemptions contained in the Act that may apply to these mechanics. Specifically you request an opinion as to the application of section 7(i) of the Act to these employees.

Section 7(i) of the Act provides that no employer shall be deemed to have violated the overtime pay provisions of the Act by employing any employee of a retail or service establishment for a workweek in excess of 40 hours, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him or her under the Act, and (2) more than half of his or her compensation for a representative period (not less than one month) represents commissions on goods or services.

One requirement that must be met in applying the provisions of section 7(i) of the Act is that the employee in question be employed by a retail or service establishment. Section 13(a)(2) of the Act defines a retail or service establishment to mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry. As we understand the facts, your client exceeds the percentage limitation on nonretail sales of goods or services in that more than 25 percent of the business' annual dollar volume comes from sales of servicing and repair work of specialized vehicles weighing 16,000 pounds or more. Sales of servicing and repair work on such vehicles are nonretail sales for the purpose of determining whether or not a business qualifies as a restail or service establishment under the Act. (See section 779.371(b) of Interpretative Bulletin, Part 779).

Typically a retail or service establishment is one that sells goods or services to the general consuming public. Although the legislative history of section 13(a)(2) of the Act intended that the retail exemption extend in some measure beyond consumer goods and services to embrace certain products or services almost never purchased for family or noncommercial use, such as the selling and servicing of small trucks and farm implements, it did not intend to include those commercial type vehicles that the general public would never purchase or have serviced.

It is our opinion that since over 25 percent of your client's annual dollar volume comes from nonretail sales, the establishment would not qualify as a retail or service establishment under the Act. Therefore, neither section 7(i) nor section 13(a)(2) of the Act would apply to your client's employees. In addition, as you point out, section 13(b)(10) of the Act would not apply to the mechanics since the establishment is not primarily engaged in the business of selling trucks to the ultimate purchasers. As other businesses similarly situated are treated in the same manner, we do not feel that your client is put at a competitive disadvantage.

Employees who are covered under the Act and not otherwise exempt must be paid in accordance with its minimum wage and overtime pay provisions. See sections 778.117 through 778.122 of Regulations, Part 778, for a detailed discussion of overtime compensation and commission employees.

If after reading the enclosed material you have any further questions, do not hesitate to let us know.

Sincerely,

William M. Otter
Administrator