

FLSA-821

December 17, 1982

This is in reply to your letter of November 17, 1982, concerning the application of the exemption under Section 13(a)(1) of the Fair Labor Standards Act (FLSA) to traveling photographers and traveling salespersons of your client *** of Matthews, North Carolina.

*** is a portrait photography company that sells to the individual consumer either through its own fixed retail photography studios or through its traveling photographers and traveling salespersons who work within a designated geographical territory. The base of operations for the traveling photographers and salespersons is twenty-five regional offices each with a multi-state area of responsibility. The traveling photographers and salespersons perform their activities on the premises of retail department stores. Arrangements are made with the retail establishment so that the traveling photographers can use the premises of the establishment to take photographs during a designated time period. The typical photographer spends three to five days in one establishment taking photographs and selling the various combinations of photographs before traveling to another store. The typical photographer covers a maximum of two retail stores a week in a multi-state area, and there is a great deal of overnight travel away from home.

After the photographs are developed, a traveling salesperson returns to the retail establishment to deliver the merchandise to the customers and to make additional sales to the customers at the time of delivery of the original order. Like traveling photographers, traveling salespersons spend a great deal of time away from home. You ask if the traveling photographers and salespersons are considered to be employed away from their employer's place of business as that term is defined and delimited in Section 541.502 of Regulations, 29 CFR Part 541.

Transitory assignments of salespersons permanently headquartered at an office of the employer to temporary sites, such as real estate salespersons on the premises of a "model home", do not defeat an otherwise applicable exemption. This is analogous to the hotel sample room of a traveling salesperson referred to in section 541.502(b). Likewise, the transient use of the premises of a retail department store by the traveling salesperson does not defeat an otherwise applicable exemption.

However, with respect to the traveling photographers, we have serious reservations as to whether they may qualify for exemption as outside salespersons. In order to be exempt as an outside salesperson, it is imperative that an employee's chief duty or primary function be taking sales or taking orders. Any nonsales work must be limited to 20 percent of the hours worked in the workweek. It has been our longstanding position that salespersons-photographers do not qualify for exemption under 29 CFR Part 541.5 during workweeks when the time spent taking photographs exceeds the 20 percent tolerance in section 541.5(b). Such tolerance is more fully explained in Section 541.507 of 29 CFR Part 541. Taking photographs is not considered sales work and is not considered incidental to the photographer's sales work.

We trust that the above satisfactorily responds to your inquiry. Please let us know if you have further questions.

Sincerely,

James L. Valin
Assistant Administrator
Wage and Hour Division

William M. Otter
Administrator