

FLSA-327

February 22, 1983

This is in reply to your letter of January 3, 1983, which is in further reference to your letter of July 23, 1982, and our response of August 16, 1982. You have submitted further information with respect to certain assistant managers of your client for consideration in determining whether such employees may qualify for exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).

We understand that your client, through its chain of 22 retail establishments, is engaged in automotive repair and servicing and sales of accessories, tires, batteries, and the like. We also understand that the store managers and the assistant managers wait on the customers in order to sell the goods or services desired by the customer and offered by your client. You also point out, contrary to our prior inference, that your client employs only five to six service managers chain-wide, and only one sales clerk chain-wide. We understand that, as a minimum, an establishment would have a store manager, an assistant manager, two laborers, and two commissioned service mechanics. Service managers are employed only in some of the higher volume establishments.

Against this clarified background, we have again carefully considered the duties and responsibilities of the assistant managers, as amplified by the additional information in exhibits A, B, and C of your January 3, letter. In so doing, we have considered the criteria in section 541.103, Regulations, 29 CFR Part 541, as amplified by Field Operations Handbook (FOH) Insert #1627 to which you refer. As indicated in FOH Insert #1627, where an employee is in charge of an establishment, or a customarily recognized department thereof, during his/her tour of duty, and satisfies the "other pertinent factors" set out in section 541.103, (s)he will be considered to have management as his/her primary duty.

Management personnel in small retail or service establishments who are in charge of the establishment during their tour of duty and are paid substantially higher wages than their subordinates will typically met the primary duty test.

With regard to the assistant manager in the three-store group (Exhibit B), a majority of their scheduled work hours on duty overlap with the scheduled hours on duty of the store manager. For the assistant managers in the nineteen-store group (Exhibit A, the overlap is somewhat less, but substantial (22 out of 50 scheduled hours; in alternate weeks 24.5 of 48 scheduled hours). These facts concern us with respect to primary duty, since the assistant managers are admittedly subordinate to the store managers. Under these facts we do not think the assistant managers are relatively free from supervision. Neither do we think that they frequently exercise discretionary powers, and the relative importance of their managerial duties does not appear to be most significant as compared with other types of duties. It is not sufficient that an employee merely participate in the management of the unit. The employee must be in charge of and have as his/her primary duty the management of a recognized unit.

Equally significant, as you know, is the requirement that an exempt executive employee's duties include the customary and regular direction of the work of two or more other employees. An employee who merely assists the manager and supervises two or more employees only in the absence of the store manager does not meet this requirement. A shared responsibility for the supervision of the same two or more employees does not satisfy the requirement that the employee "customarily and regularly directs the work of two or more employees therein." See section 541.105(e). Thus, based upon the information you have presented, we do not believe the assistant managers can qualify as exempt executive employees within the meaning of the regulations.

Please let us know if you have further questions.

Sincerely,

William M. Otter
Administrator