

FLSA-985

June 29, 1984

This is in further reply to your letter of April 18, in which you request an opinion concerning the application of the exemption in section 7(i) of the Fair Labor Standards Act (FLSA) to the salespersons of a retail organization.

The employees in question receive a commission of 10% of the gross profit on regular sales and 5% on direct sales. Each workweek they are paid a draw of \$5.04 an hour for every hour worked. Within ten days of the close of each calendar month, they are paid all their commission earnings for the previous month, less the weekly draws paid. If the commissions do not exceed the draws received, no further adjustment is made. It is anticipated that commission earnings on the average will exceed \$5.04 an hour times total hours worked by more than \$5,000 a year.

You are particularly concerned about the effect on the exempt status of an individual whose commission earnings may not exceed his/her hourly rate for a couple of pay periods.

Section 7(i) of FLSA provides an exemption from its overtime pay requirements for any employee of a retail or service establishment 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 the employee, and (2) more than half of his/her compensation for a representative period (not less than one month) represents commissions on goods or services.

In order for an employee to come within the exemption in section 7(i) of the Act for certain employees receiving commissions, (s)he must be employed by a "retail or service establishment" as defined in section 13(a)(2) of the Act. The term "retail or service establishment" means an establishment 75 percent of whose annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or service in the particular industry. Your letter does not provide sufficient information for a determination in this regard.

Unlike the commission test in section 7(i)(2), which is applied over a representative period, section 7(i)(1) applies on a workweek basis. It would appear that this workweek test of section 7(i)(1) is met in your situation in that the employees receive for each hour worked, in excess of one and one-half times the minimum wage ($1.5 \times \$3.35 = \5.025). In addition, the requirement of section 7(i)(2) appears to be met as the employees are paid entirely on a commission basis, except for those infrequent occasions when their monthly commissions do not exceed their weekly draws. However, absent information as to how the pay plan operates in actual practice, we are unable to provide you with a definite answer as to whether it meets the commission test. In this regard, for a commission pay arrangement to be bona fide, the amount of an employee's earnings during the representative period must generally be determined by the computed commissions rather than the guarantee draw. If, in the proposed pay plan, an employee's commissions seldom

or only infrequently exceed the weekly guarantee (\$5.04 an hour), serious doubts would be raised as to the bona fides of the commission arrangement. Please note section 779.416 of 29 CFR Part 779, which discusses the application of section 7(i) of FLSA in sections 779.410 through 779.421 (copy enclosed).

We trust the above is responsive to your inquiry. If you have any further questions, you may wish to contact our Wage-Hour Area Office located in the Hoyer building, Suite 100, 22 Capitol Street, Charleston, West Virginia 25301, telephone: (304) 347-5207. The staff in that office is in a better position to obtain all the necessary facts, and would be pleased to be of all possible assistance.

Sincerely,

William M. Otter
Administrator