**FLSA-1051**

July 30, 1984

This is in further response to your February 21 request for an opinion concerning the applicability of sections 7(i) and 13(a)(1) of the Fair Labor Standards Act (FLSA) to senior technicians of ***. You state that *** senior technicians are commissioned salespersons whose principal function is to sell additional carpet and upholstery cleaning services to the customers while at the customers' homes. You believe that the senior technicians who are paid in accordance with section 7(i) of the Act are exempt from overtime pay under that section. In addition, you feel that section 13(a)(1) of FLSA applies to these employees.

Section 13(a)(1) of the Act provides a complete minimum wage and overtime pay exemption for any employee employed in the capacity of outside salesman. Section 541.5 of 29 CFR Part 541 requires that the "outside salesman" be engaged in making sales within the meaning of section 3(k) of the Act or obtaining orders or contracts for services or for the use of facilities. The term "services" extends to employees who sell or take orders for a service, which is performed for the customer by someone other than the person taking the order.

As discussed in section 541.501, the inclusion of the term "services" was not intended to exempt all persons who may be selling services. For example, not included are individuals such as service persons even though they may sell the services which they perform. Selling the service in such cases is incidental to the servicing. In this regard, the senior technicians would not be considered as exempt outside salespersons under section 13(a)(1) of the Act.

Section 7(i) of FLSA provides an exemption from the overtime pay requirements of section 7(a) 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 under section 6 and (2) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services.

A retail or service establishment is defined in section 13(a)(2) of FLSA as an establishment in which 75 percent of the annual dollar volume of sales of goods and/or services is not for resale and is recognized as retail sales or services in the particular industry.

An establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics is not engaged in retail or service activities for the purposes of the Act as now in effect. Carpet and furniture cleaning, whether in a plant or on the customer's premises, are services which are considered laundering, cleaning or repairing clothing or fabrics.

It is true that prior to the 1949 Amendments the minimum wage and overtime pay exemption for retail or service establishments under section 13(a)(2) included some laundry and dry cleaning establishments. However, the 1949 Amendments provided a separate exemption for laundry and dry cleaning establishments in section 13(a)(3) which remained in effect until its repeal effective February 1, 1967. This separate exemption did not depend on any status as a retailer since in 1949 the congressional view was that there is not a clear concept of "retail services" in the laundry and dry cleaning industry.

It is clear from the 1966 Amendments that Congress intended for employees of laundry and dry cleaning establishments to have complete minimum wage and overtime protection. (See House Report No. 1366 on H.R. 13172, 89th Congress, 2nd Session, p.40 and 112 Cong. Rec. 11280). An amendment by Representative Martin to treat those engaged in the business of laundering and cleaning or repairing clothing or fabrics the same as those engaged in the retail industry was defeated. (See 112 Cong. Rec. 11369 - 11371).

In 1973. H.R. 7935, known as the Fair Labor Standards Amendments of 1973, passed the House containing a provision that establishments engaged in laundering, cleaning, or repairing clothing or fabrics shall be considered service establishments for the purposes of administration of sections 7(i) and 13(a)(1). The Senate amendment of this bill, S. 1861, contained no corresponding provision. During conference with the Senate, the House receded and the provision was dropped. Ultimately, this bill was vetoed by the President and the veto was sustained by the House. Subsequently, the 93rd Congress passed S. 2427, which became the Fair Labor Standards Amendments of 1974, P.L. 93-259, without such provision. Similarly, the 1977 FLSA Amendments did not include such a provision.

In view of our longstanding position that carpet and furniture cleaning activities are not retail services, section 7(i) would have no application to employees of an establishment where more than 25 percent of its annual dollar volume of sales was derived from such activities or other nonretail activities. This is true since such an establishment would not qualify as a retail or service establishment under FLSA.

We regret any misunderstanding which may have occurred as a result of the Wage and Hour Division's application of FLSA to employees of ***. However, we wish to point out that *** refusal to comply in the future subjects the firm to the sanctions contained in sections 16 and 17 under the Act. Under section 16(b), an employee may institute a private suit for back pay and an equal amount as liquidated damages and, in addition, attorney's fees and court costs. Section 17 provides that the Secretary may obtain an injunction to restrain violations of the Act, including the unlawful withholding of proper minimum wage and overtime compensation.

Sincerely,

William M. Otter
Administrator