



FLSA2006-33

September 14, 2006

Dear **Name***:

This is in response to the request from your firm for an opinion regarding whether propane gas service center drivers qualify for exemption under section 7(i) or 13(a)(1) of the Fair Labor Standards Act (FLSA).

The facts, as set forth in the request, are as follows: The drivers' primary responsibility is to deliver propane gas to customers. The drivers spend approximately five percent of their time in sales activities; generally, however, they fill orders that other salespersons have secured. They also perform various other duties, such as inspecting tank installations, inspecting and maintaining delivery vehicles, collecting accounts receivable from customers, reconciling cash receipts, completing delivery-related paperwork, and setting and painting tanks. Their base pay exceeds the minimum wage by over one and one half times, and more than 50% of their compensation comes from commissions based on the volume of propane that they deliver. The employer is a nationwide retailer of propane gas. Its sales and services are recognized as retail in the industry, and at least 75% of its annual dollar volume of sales and services is not for resale. The employer serves over 385,000 customers in 29 states through more than 280 customer service centers.

Your reference to section 13(a)(1) appears to implicate the exemption for workers who perform the duties of outside sales. As discussed in 29 C.F.R. § 541.500, the term "employee employed in the capacity of outside salesman" means any employee whose primary duty is making sales within the meaning of section 3(k) of the FLSA, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer, and who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty. The term "primary duty," as provided in 29 C.F.R. § 541.700, means the "principal, main, major, or most important duty that the employee performs." Because, as you state, the drivers' primary duty is the delivery of gas, not the making of sales, the section 13(a)(1) outside sales exemption does not apply. The enclosed advisory on Outside Sales Employees provides additional information on this exemption.

The section 7(i) overtime exemption applies to individual employees of retail or service establishments depending, in part, on their specific earnings. To qualify for the section 7(i) exemption from the overtime provisions of the FLSA, three conditions must be met:

1. The employee must be employed by a retail or service establishment;
2. The employee's regular rate of pay must exceed one and one half times the applicable minimum wage under section 6 of the FLSA; and
3. More than half of the employee's total earnings in a representative period (not less than one month) must consist of commissions on goods or services.

Three criteria must be met before an establishment can be recognized as a retail or service establishment under the FLSA:

[The establishment] (a) [m]ust engage in the making of sales of goods or services; and (b) 75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry; and (c) not over 25 percent of its sales of goods or services, or of both, may be sales for resale.

29 C.F.R. § 779.313. Typically a retail or service establishment is one that sells goods or services to the general public, servicing the everyday needs of the community by selling products in small quantities to end-users. “The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process.” See 29 C.F.R. § 779.318(a); Wage and Hour Opinion Letter [FLSA2005-53](#) (Nov. 14, 2005) (copy enclosed).

The specific criteria for determining whether a propane gas dealer is a retail or service establishment are found at 29 C.F.R. §§ 779.359-.361. In order to claim the exemption, 75 percent of the establishment’s sales must be recognized as “retail sales.” The following are not considered retail sales: single lot deliveries exceeding 1,000 gallons; sales made on a competitive bid basis (such as to government agencies); sales for use in production when the gas is an essential ingredient or principal raw material (such as the production of synthetic rubber); and sales for use as truck or bus fuel. Based on the information you have provided regarding the nature of your client’s sales and services, and assuming that none of these disqualifying criteria will change the result, it appears that the service centers will qualify as “retail or service establishments,” thus meeting the first element of section 7(i). Note, however, that each establishment must separately meet the 29 C.F.R. § 779.313 criteria discussed above to qualify as a “retail or service establishment.” Please also note that the section 7(i) exemption is an establishment-based exemption, and is based upon the nature of the employer’s business rather than on the work actually performed by the employees of the establishment.

Consequently, if the establishment qualifies as a retail establishment, any employee employed by that establishment may be exempt so long as the compensation requirements of section 7(i) are met with respect to such employee. See Wage and Hour Opinion Letter [FLSA2003-1](#) (Mar. 17, 2003) (copy enclosed).

The final two requirements of section 7(i) relate to the employee’s compensation. The regular rate requirement applies on a workweek basis. See 29 C.F.R. §§ 779.18,-.419. You state that the employees earn more than one and one half times the minimum wage, and each workweek the employees earn at least this amount which will satisfy the second criterion of section 7(i).

The final factor requires that employees receive more than half of their earnings in a representative period (not less than one month) from “bona fide” commission payments. The regulation at 29 C.F.R. § 779.416(c) provides an interpretation of “bona fide commission rate” as follows:

A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek (as would be the case where the computed commissions seldom or never equal or exceed the amount of the draw or the guarantee). Another example of a commission plan which would not be considered as bona fide is one in which the employee receives a regular payment constituting nearly his entire earnings which is expressed in terms of a percentage of the sales which the establishment or department can always be expected to make with only a slight addition to his wages based upon a greatly reduced percentage applied to the sales above the expected quota.

“The whole premise behind earning a commission is that the amount of sales would increase the rate of pay. Thus, employees may elect to work more hours so they can increase their sales, and in turn, their earnings. When a commission plan never affects the rate of pay, the purpose behind using a commission rate also fails.” *Ericks v. Venator Group, Inc.*, 128 F. Supp. 2d 1255, 1260 (N.D. Cal. 2001) (quoting *Herman v. Suwannee Swifty Stores, Inc.*, 19 F. Supp. 2d 1365, 1371 (M.D. Ga. 1998)). Note that all of the compensation plans found in 29 C.F.R. § 779.413(a) “except for the ‘straight salary or hourly rate’ may qualify as ‘bona fide commission’ plans under § 207(i).” *Viciedo v. New Horizons Computer Learning Ctr. of Columbus, Ltd.*, 246 F. Supp. 2d 886, 896 (S.D. Ohio 2003). Wage and Hour’s Field Operations Handbook explains that “[c]ommissions, for purposes of Sec[ti]on 7(i), usually denotes a percentage of the amount of monies paid out or received.” FOH § 21h04(c) (emphasis in original); see also Wage and Hour Opinion Letters [FLSA2006-15NA](#) (June 29, 2006) and [FLSA2005-53](#) (Nov. 14, 2005) (copies enclosed).

Your letter states that employees receive base pay and commissions based upon the volume of propane that they deliver, with the commissions representing more than 50% of their compensation, but it does not describe exactly how the commissions are earned and computed. Assuming that the drivers’ commissions are bona fide based upon the factors discussed above, the drivers would satisfy the third criterion for exemption. We hope that the above discussion will be of assistance to you in evaluating each individual employee’s status at each establishment. For more information on how to properly evaluate the final two elements of the section 7(i) exemption, see 29 C.F.R. §§ 779.410-.421.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above satisfactorily responds to your inquiry.

Sincerely,

Paul DeCamp
Administrator

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**