



FLSA2007-1

January 25, 2007

Dear **Name***:

This is in response to your request for an opinion concerning whether sales associates employed by your client qualify for the outside sales exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).¹ Based on the information presented, it is our opinion that your client's sales associates are exempt as outside sales employees.

You state that your client is a multi-state real estate and construction company that employs sales associates to market and sell single-family housing units to the public. The company's sales associates are employed to sell homes to be built on available home sites within residential communities built and developed by the company itself as part of a common land plan. Sales associates are based at the company's offices located within subdivisions that are in the process of being constructed and sold, or in temporary sales trailers outside such subdivisions, sometimes as far as 10 to 20 miles away.

The company's sales offices are the locations from which the sales process begins. At the initial walk-in, the sales associate meets with the prospective buyer and conducts a preliminary interview to register the prospect; to determine his/her housing needs; to introduce the prospect to the amenities of the community; and to preview the nature, location, and pricing of the units that are available for sale. Thereafter, the sales associate leaves the sales office with the prospect and conducts a tour of the community, the model homes, and available units, and travels to available, undeveloped lots that are offered for sale in the community.

Because customers frequently do not make a decision at the time of the initial site visit, the sales process continues through subsequent telephone contacts with the prospect to respond to questions and concerns about the community, proximity to schools, shopping and public services, financing options, construction delivery schedules, and related buyer concerns. Sales associates spend relatively little work time on the telephone, typically 60 minutes or less per work day. This estimate includes time spent following up with prospective buyers who have previously had a walk-through visit, speaking with independent realtors who represent prospective buyers, and other duties related to selling new homes. Following up with prospects typically consumes up to a third of a sales associate's workweek.

Ultimately, sales associates are expected to close sales by having buyers return to the company's sales office in order to complete a contract of sale. Once a home is under contract, the sales associate is required to attend pre-construction orientation with the buyer, to walk the home site with the buyer, to show the buyer how the home is to be constructed, and to point out exterior features such as where the well and septic systems are to be located. Sales associates are also required to communicate with construction personnel to

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

investigate backlogs and delays in the construction process and to answer buyer concerns about such matters, because time of delivery is frequently a paramount concern.

The company's sales offices may or may not be located within a community that is under development. When the offices are not located within the development, the associates must travel to the location where model homes are available for inspection or to the site of the available lots being offered for sale. Even where the sales office is located within a sales community, sales associates must leave the office to escort prospective buyers on a tour of the amenities available in the community and the model units being offered for sale. The visual inspection of the properties for sale in the community and the sales associate's ability to demonstrate the unique architectural and design features of the company's home products outside of the office are critical to the sales process.

The company's sales associates are also responsible for ensuring the readiness of all model sales units for buyer walk-throughs. Accordingly, sales associates inspect each model sales unit at the start and end of each work day. Sales associates engage in relatively little paperwork, and none that is not directly related to the sales process. For example, when a prospect first visits a sales office, the sales associate is responsible for ensuring the satisfactory completion of a sales registration form. Subsequently, sales associates are responsible for presenting and completing the sales contract on behalf of the company and for assisting the buyer in completing mortgage qualification forms if such assistance is requested.

In order to increase their knowledge of the community and closing success, the company's sales associates are expected to travel outside the sales office to meet with independent realtors regarding the benefits of the homes and the community they are selling, to build relationships with buyer associates, and to obtain information about new and existing home inventories within the sales market. The sales associates are required to familiarize themselves with schools, churches, libraries, shopping, entertainment venues, and government facilities serving its communities because knowledge of community services is critical to prospective buyers. In connection with "shopping the competition," sales associates are responsible for filing reports with sales managers and for participating in weekly sales meetings to share such information with co-workers. The company's sales associates also spend an additional one to two hours per week traveling to and attending sales training programs offered by the company in locations away from the sales offices. In a typical week, the company's associates spend approximately as much time in these activities away from the sales office or model home as they do in their in-office activities.

FLSA section 13(a)(1), 29 U.S.C. § 213(a)(1), provides an exemption from the minimum wage and overtime provisions for "any employee employed... in the capacity of outside salesman." The Department has issued regulations, contained in 29 C.F.R. Part 541, that set forth the requirements for this exemption.

Under 29 C.F.R. § 541.500(a), "[t]he term 'employee employed in the capacity of outside salesman' in section 13(a)(1) of the Act" means "any employee":

- (1) Whose primary duty is: (i) making sales within the meaning of section 3(k) of the Act, or (ii) 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
- (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

Id. As described in 29 C.F.R. § 541.700(a),

an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

As for determining the primary duty for the outside sales exemption, the regulations state that the

work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

29 C.F.R. § 541.500(b).

To qualify for the outside sales exemption,

[a]n outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

29 C.F.R. § 541.502.

The Wage and Hour Division has long recognized that

[r]eal estate salesmen stationed in a model home on a tract from which parcels of real property are being sold with or without improvements, leaving the model

home for such purposes, customarily and regularly, would meet the requirement of the definition, so far as making sales "away from" the employer's place of business is concerned. This is true even though all of the property shown to prospects by the salesmen is within the tract on which the model home is located.

Field Operations Handbook (FOH) § 22e06(c). In short, "[s]o long as a salesman customarily and regularly goes to the site of the property or to prospects as a part of making his sales, this requirement for 'outside' sales work would be met." *Id.* "The phrase 'customarily and regularly' means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed 'customarily and regularly' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks." 29 C.F.R. § 541.701.

Please note that, under 29 C.F.R. § 541.500(c), "[t]he requirements of Subpart G (salary requirements) of this part do not apply to the outside sales employees."

Based on a review of the information you provided, it is our opinion that the sales associates employed by your client qualify for the outside sales exemption under section 13(a)(1) of the FLSA. First, the sales associates employed by your client meet the requirement that the primary duty must be making sales within the meaning of section 3(k) of the FLSA because the sales associates' principal duty is to sell homes. "Real estate salesmen will generally meet this test, since 'sales' under Sec. 3(k) of the Act include contracts to sell." *See* FOH § 22e06(a). Other duties of the sales associates, such as contacting the prospective buyer by telephone following a site visit to respond to questions concerning financing or construction delays, inspecting each model unit at the start and end of the workday to ensure readiness of model units for buyer walk-throughs, aiding a prospect in completing the sales registration form, meeting with independent realtors to obtain information concerning existing home inventories, "shopping the competition," and traveling to and attending sales training programs, are, in this case, examples of work performed incidental to, and in conjunction with, the sales associates' own outside sales or solicitations. These are also the type of duties that further the employee's sales efforts and, therefore, are regarded as exempt work. *See* 29 C.F.R. §§ 541.500(b), 541.503; Wage and Hour Opinion Letters December 21, 1967 and April 21, 1964 (copies enclosed); FOH § 22e06(e).

Second, the sales associates meet the requirement that they be customarily and regularly engaged away from the employer's place or places of business in performing their primary duty of selling homes. As you describe, a sales associate leaves the sales office with the prospect and conducts a tour of the community, the model homes, and available units, and travels to available, undeveloped lots that are offered for sale in the community. While the sales office is the employer's place of business, because it is a fixed site used as a "headquarters" for making sales, *see* 29 C.F.R. § 541.502, the lots for sale are not part of the employer's place of business but rather are the products to be sold by the sales associates. Once a home is under contract, the sales associate is required to walk the home site with the buyer, show the buyer how the home is to be constructed, and point out exterior features, such as where the well and septic systems

are to be located. The visual inspection of the properties for sale in the community and the sales associate's ability to demonstrate the unique architectural and design features of the company's home products outside of the office are critical to the sales process. Thus, leaving the sales office to show properties, even properties located within the same subdivision, satisfies the requirement that the sales associates be engaged away from their employer's place of business in performing their primary duty of selling homes. Furthermore, you indicate that activities away from your client's offices constitute a significant amount of the sales associates' typical workweek, demonstrating that these outside activities are customary and regular. *See* 29 C.F.R. § 541.500(a)(2).

Therefore, the sales associates in question are exempt outside salespersons.

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 issues 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 this letter is responsive 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).