

FEB 16 1995

This is in response to your letter requesting an opinion concerning the application of the overtime pay exemption contained in section 7(i) of the Fair Labor Standards Act (FLSA) to a new compensation system your client, a retail employer, is considering to implement for its sales employees.

Your specific question is as follows:

Where an employee is paid on a straight commission basis, can the section 7(i) overtime exemption apply if the employee's compensation is calculated as a percentage of all retail sales by all sales employees in a given store, as opposed to being based on only the retail sales of that particular employee?

You state that your client operates several retail stores which sell "big ticket items." The stores vary in size with approximately 5 to 30 full-time sales persons at any given store. Your client believes that a "team approach" to assisting the customers gives all sales persons an incentive to do their best to serve all store customers, as opposed to having little incentive to assist customers if each employee receives commissions based only on his or her own individual sales. Furthermore, your client believes that such a compensation system would eliminate administrative problems relating to determining which sales person should properly be credited with a sale and whether commissions should be split between more than one sales person. The actual percentage commission rates may vary among the sales persons based upon their experience, tenure with the company, job performance and other factors.

As you know, under section 7(i) of the FLSA an employee of a retail or service establishment who is paid in full or in part on a commission basis may be exempt from the overtime pay requirements of the FLSA if (1) the regular rate of pay of such employee in a workweek is in excess of one and one-half times the minimum

wage (currently \$4.25 an hour), 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.

Where an employee is paid on a straight commission basis, it is our opinion that the section 7(i) overtime exemption can apply if the employee's compensation is calculated as a percentage of all retail sales by all sales employees in a given store, as opposed to being based on only the retail sales of that particular employee. Based on the information provided, we have no objections to the implementation of your client's proposed compensation system.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator