



October 24, 2005

FLSA2005-44

Dear *Name**,

This is in response to your letter requesting an opinion on the application of section 7(i) of the Fair Labor Standards Act (FLSA) to a proposed commission-only pay plan of a client of yours who operates a carpet and furniture cleaning business. Employees perform these cleaning services on the customers' premises. You state that at least 75% of your client's annual dollar volume of sales of goods and services is with direct customers and is not for resale. You believe that under 29 C.F.R. § 779.441 your client qualifies as a retail or service establishment for purposes of the section 7(i) overtime exemption. See 29 U.S.C. § 207(i) (copy enclosed).

Section 7(i) of the 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 him under section 6, and (2) more than half of his compensation for a representative period (not less than one month) represents commissions on goods or services." You believe that your client's plan would meet both of these compensation requirements, so your primary question is whether your client's carpet and furniture cleaning business may qualify as a "retail or service establishment."

First, with regard to the compensation requirements, you state that the employees in question will at all times receive more than 50% of their income through commission payments. Therefore, it appears that the pay plan would satisfy the percentage compensation requirements at section 7(i)(a)(2). However, it is not clear whether the pay plan would satisfy the regular rate compensation requirement at section 7(i)(a)(1). You state that "[i]t has been projected that under the proposed plan, the location crews could earn between \$35,000 and \$70,000 per year." Yet, as you also note, the regular rate requirement of section 7(i) applies on a workweek basis. Averages of compensation for two or more weeks do not satisfy the "regular rate" requirement of the retail or service establishment exemption. See 29 C.F.R. § 779.18 (copy enclosed). Therefore, you must assess the applicability of section 7(i) on a workweek-by-workweek basis for each employee.

Second, with regard to your specific question, the FLSA does not define the term "retail or service establishment." However, 29 C.F.R. § 779.411 (copy enclosed) adopts the definition in section 13(a)(2) (repealed) and 29 C.F.R. § 779.24 (copy enclosed). "Retail or service establishment" is defined in 29 C.F.R. § 779.24 (copy enclosed) as "an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." Furthermore, 29 C.F.R. § 779.313 (copy enclosed) summarizes the following requirements:

- a) must engage in the making of sales of goods or services and
- b) 75% of its sales of goods or services, or of both, must be recognized as retail in the particular industry and
- c) not over 25 % of its sales of goods or services, or of both, may be sales for resale.

For more information on the "retail or service establishment" requirement, see 29 C.F.R. §§ 779.313 -.328. See also WH Opinion Letter November 9, 2004 (copy enclosed).

You state that you originally requested guidance from your local Wage and Hour District Office in St. Louis on whether a carpet and furniture cleaning business can qualify as a retail or service establishment. That office responded by providing you WH Opinion Letter July 30, 1984, which concluded that none of the provisions applicable to retail or service establishments could apply to laundry and dry cleaning establishments. You state that the same issue was also addressed in *Reich vs. Delcorp, Inc.*, 3 F.3d 1181 (8th Cir. 1993). The court in *Delcorp* found that while Congress excluded laundries from the exemption contained in FLSA section 13(a)(2) (repealed effective 1990),



there was no such exclusion from section 7(i). The Eight Circuit ruled that the exception contained in section 13(a)(2) was not from the definition of “retail or service establishment” but rather from the section 13(a)(2) exemption itself and thus that carpet cleaners potentially could meet the definition of “retail or service establishment” and qualify for the section 7(i) exemption. Delcorp, like your client, was in the business of in-home carpet and furniture cleaning. Because the Eight Circuit in that decision concluded that laundries *may* qualify as “retail or service establishments” for the purposes of section 7(i), and because your client does business in the 8th Circuit, you request confirmation that your client may rely upon the opinion in *Delcorp* and take advantage of the section 7(i) exemption.

29 C.F.R. § 779.318 (copy enclosed) lists various factors which determine whether an establishment qualifies as a retail or service establishment. Such establishments 1) sell goods or services to the general public, 2) serve the everyday needs of the community, 3) are at the very end of the distribution stream and are not a part of the manufacturing process, and 4) provide the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living. Carpet and upholstery and cleaning services meet all four of these requirements. They sell their services to the general public. Carpet and upholstery cleaners do not manufacture their product and are at the end of the distribution stream when they perform the cleaning process. Finally, carpet and upholstery cleaning is provided for the comfort and convenience of the public in its daily living.

Therefore, it is our opinion that carpet and upholstery cleaning establishments which launder, clean, or repair fabric or clothing, may fall within the definition of retail or service establishment and therefore qualify for the section 7(i) overtime exemption provided all of the other parts of the test are met. Additionally, as of this date we are withdrawing opinion letters dated July 30, 1984 and November 6, 1986 to the extent that these letters conflict with the position described above.

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. This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures:
FLSA § 7(i)
29 C.F.R. §§ 779.18, .24, .313, .318, and .411
WH Opinion Letter November 9, 2004

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