



FLSA2019-13

September 10, 2019

Dear **Name***:

This letter responds to your request for an opinion concerning the retail or service establishment exemption of the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

Your letter states that your firm has several restaurant clients who claim the retail or service establishment overtime exemption under Section 7(i) of the FLSA, 29 U.S.C. § 207(i). You note that most of your restaurant clients use a weekly or bi-weekly pay period and do not keep pay information on a daily basis.

You note that one of the requirements of the FLSA Section 7(i) exemption is that more than half of an employee's "compensation for a representative period (not less than one *month*) must represent commissions on goods or services." *Id.* (emphasis added). Because most of your restaurant clients do not keep pay information on a daily basis, you state that they instead use four weekly pay periods or two bi-weekly pay periods as the "monthly" representative pay period. You further state that because you assume that "not less than one month" means a calendar month, you are "concerned that [your] clients' use of a representative period, which is not strictly a calendar month, may result in a denial of the exemption."

Consequently, you pose two questions:

1. May four weekly pay periods or two bi-weekly pay periods (four (4) workweeks) be considered a valid representative period of "not less than one month" for purposes of the FLSA Section 7(i) exemption?
2. In the event that the four weekly or two bi-weekly pay periods (four (4) [work]weeks) do not meet the definition of "not less than one month," would a representative period of six (6) consecutive weekly pay periods or three (3) bi-weekly pay periods constitute a valid representative period since it is "not less than one month" (even if the six (6) weeks do not capture an entire calendar month)?

GENERAL LEGAL PRINCIPLES

Section 7(i) of the FLSA exempts an employee of a retail or service establishment from the overtime pay requirement of the FLSA 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 206 of this title, and
- (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services.

29 U.S.C. § 207(i). The regulation explaining Section 7(i)'s representative-period requirement provides no guidance on the meaning of "not less than one month" other than stating that this period "cannot, under the express terms of [S]ection 7(i), be less than 1 month." 29 C.F.R. § 779.417(c).

In *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), the Supreme Court held that "[b]ecause the FLSA gives no 'textual indication' that its exemptions should be construed narrowly, 'there is no reason to give [them] anything other than a fair (rather than a "narrow") interpretation.'" *Id.* at 1142 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 363 (2012)).

In giving a fair reading to a FLSA exemption for certain salesmen, partsmen, and mechanics, the *Encino* Court said, "[t]he term 'salesman' is not defined in the statute, so 'we give the term its ordinary meaning.'" *Id.* at 1140 (quoting *Taniguchi v. Kan. Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012)). The term "month" as used in Section 7(i) is also not defined by the FLSA. Numerous courts, including the Supreme Court, have recognized that the ordinary meaning of "month" is a calendar month. *See Sheets v. Selden's Lessee*, 69 U.S. (2 Wall.) 177, 190 (1864); *Fogel v. Comm'r of Internal Revenue*, 203 F.2d 347, 349 (5th Cir. 1953); *Whiteside v. Metro. Life Ins. Co.*, 798 F. Supp. 1380, 1390 (D. Minn. 1992); *In re Ionosphere Clubs, Inc.*, 111 B.R. 436, 442 (S.D.N.Y. 1990). A calendar month includes the period of time from a given day of a particular month in the calendar to the corresponding day of the following month. *See Whiteside*, 798 F. Supp. at 1390 n.13 (quoting 86 C.J.S. Time § 10 (now § 8) for the proposition that a calendar month "runs from a given day in one month to a day of the corresponding number in the next specified succeeding month"); *In re Ionosphere Clubs*, 111 B.R. at 442 (quoting Black's Law Dictionary 908 (5th Ed. 1979) for the proposition that calendar month includes the "time from any day of any of the months as adjudged in the calendar to corresponding day, if any, if not any, to last day, of next month"). For example, one calendar month from May 29th is June 29th.

OPINION

The period proposed by your first question—four weekly pay periods or two bi-weekly pay periods—is not a calendar month (with the exception of either period beginning in February of a common year) and therefore does not satisfy the statutory requirement that the representative period be at least one month. For example, in holding that a statutory period of four months meant four calendar months, the Supreme Court held that a requirement that a notice be published for four months was not "satisfied by a publication for 16 weeks[.]" *Guaranty Trust &*

Safe-Deposit Co. v. Green Cove Springs & Melrose R.R. Co., 139 U.S. 137, 145 (1891). Similarly, here, except during the month of February in a common year, four weeks from any given date of one month will necessarily fall short of the corresponding date of the next month, and thus will not satisfy the minimum one-month requirement of Section 7(i).

Your second question asks whether “a representative period of six (6) consecutive weekly pay periods or three (3) bi-weekly pay periods constitute a valid representative period . . . (even if the six (6) weeks does not capture an entire calendar month).” This question presumes that the period involved is “representative,” to the extent that the number of pay periods satisfies the statutory minimum period. Accordingly, we do not separately analyze whether the period described in your letter, based on the facts specific to your clients, is sufficiently “representative.”¹

Six consecutive weekly pay periods or three consecutive bi-weekly pay periods satisfy the statutory minimum period of not less than one month, *i.e.*, one calendar month. That will be the case even if the six consecutive weeks or the three bi-weekly periods do not capture all the days in a given month. As the preceding definition of calendar month reflects, the ordinary meaning of the phrase “not less than one month” is not limited to a period encompassing all of the days within one of the twelve named months of the year.

CONCLUSION

A fair reading of the phrase “not less than one month” in the Section 7(i) exemption requires the conclusion that six, but not four, consecutive weekly pay periods satisfy the retail or service establishment exemption’s requirement that a representative period be not less than one month. It similarly requires the conclusion that three, but not two, consecutive bi-weekly pay periods satisfy the retail or service establishment exemption’s requirement that a representative period be not less than one month. Please note that such a six-week period must also be “representative” and other criteria must be satisfied for the exemption to apply. *See* 29 C.F.R. Part 779.

We trust that this letter is responsive to your inquiry.

Sincerely,



Cheryl M. Stanton
Administrator

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

¹ A period of “not less than one month” will not necessarily be representative. For the indicia of a representative period, *see* 29 C.F.R. § 779.417. The representative period within the meaning of the exemption “may be described generally as a period which typifies the total characteristics of an employee’s earning pattern in his current employment situation, with respect to the fluctuations of the proportion of his commission earnings to his total compensation.” 29 C.F.R. § 779.417(a).