



August 17, 2004

FLSA2004-10NA

Dear *Name**,

This is in response to your request for an administrative opinion regarding the application of Section 13(b)(1) of the Fair Labor Standards Act (FLSA) to employees working as sales representatives for your client, a food manufacturer with operations in several states.

You state that the sales representatives travel in “commercial motor vehicle[s]” visiting customer sites each day. Frequently, they transport what you describe as “various job-related items necessary for the performance of the job” that have been shipped from out of state. For example, service representatives carry repair and replacement parts for the display racks on which your client’s food products are displayed. These parts are sent from an out-of-state supplier either to a local warehouse or to the sales representative’s residence and include a letter or label designating the specific retail store for which the parts are intended. You state that, on average, a sales representative transports display rack repair and/or replacement parts three times per month. As another example, you mention service cards which are on each of your client’s display racks and are used to note the times when products are refreshed or replaced. These cards are shipped across state lines to the sales representatives’ homes with a cover sheet listing the specific stores where the cards are to be placed. New cards are sent to the sales representatives each quarter and the sales representatives gather the old cards and ship them to the corporate office each quarter. Additionally, special display products that you refer to as POS items, used with special promotions and sales, are shipped from out of state to the sales representatives’ residences between eight and ten times per year. Based on this activity you ask whether the sales representatives may qualify for the overtime exemption of Section 13(b)(1).

As you know, Section 13(b)(1) of the FLSA provides a complete overtime pay exemption for any employee for whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act (MCA) of 1935. This provision has been applied to any driver, driver’s helper, loader, or mechanic employed by a carrier and whose duties affect the safety of operations of motor vehicles involved in transportation on public highways of passengers or property in interstate or foreign commerce. See the enclosed Interpretative Bulletin, Part 782. This overtime pay exemption also applies to transportation within a single state where the transportation forms part of a practical continuity of movement across state lines from the point of origin to the point of destination. Whether transportation is interstate or intrastate under the MCA is determined by the essential character of the commerce, manifested by the shipper’s fixed and persisting transportation intent at the time of the shipment, and is ascertained from all of the facts and circumstances surrounding the transportation.

You enclose copies of an opinion request you sent to the Federal Motor Carrier Safety Administration (FMCSA) and your reply to Ms. Annmarie J. Ottman, Attorney Advisor for the U.S. Department of Transportation, FMCSA. Ms. Ottman finds that “your client’s drivers are transporting property in interstate commerce and that your client is a ‘motor carrier’ as defined in 49 CFR §390.5.” She states that “the display rack parts, service cards and POS materials are property for purposes of the Federal Motor Carrier Safety Regulations” and that the “delivery and transportation of these items is an integral part of the sales representative’s job.”

Based on the above, the requirements for exemption under Section 13(b)(1) of the FLSA have been met. The facts you present indicate that all of the property crosses state lines, and that at the time the property is shipped across state lines, it is the shipper’s fixed and persistent intent that the products will be delivered to the specifically designated retail establishments by the sales representative and as such, the transportation of the property by the sales representatives constitutes a practical continuity of movement of the property across state lines from the point of origin to the point of destination. Further, inasmuch as the sales representative is the driver of the vehicle transporting the property, the sales representative is engaged in activity directly affecting the safety of operation of the vehicle. See 29 CFR §782.2(a).



However, if at the end of any 4-month period a sales representative is no longer engaged in interstate commerce, or in the regular course of his or her employment is no longer subject to making one of the interstate trips, jurisdiction under Section 204 of the MCA would cease and the driver would no longer be exempt under Section 13(b)(1) of the FLSA. See 46 Fed. Reg. 37902 (July 23, 1981) (DOT Notice of Interpretation).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than 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 information is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
Office of Enforcement Policy
Fair Labor Standards Team

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