



June 29, 2006

FLSA2006-15NA

Dear **Name*** :

This is in response to your request for an opinion concerning whether payments made pursuant to your client's pay plan represent "commissions" for purposes of Fair Labor Standards Act (FLSA) section 7(i) (copy enclosed). Based on a review of the information provided, it is our opinion that payments under the plan represent "commissions" under FLSA section 7(i).

You state that your client, an automobile dealership, sells new and used vehicles, and provides automotive repair services to the general public. The dealership employs detailers and painters. Detailers provide touch-up, detailing, cleaning, washing, waxing, drying, and vacuuming work. Painters, on the other hand, paint the vehicles.

The detailers and painters are paid based on how many vehicles they service each week. Each vehicle is assigned a predetermined number of hours (referred to as "flag hours" or "flat rate" hours). For new vehicles, the vehicle manufacturer provides to the dealership information regarding flag hours, which vary according to the vehicle model. For used vehicles, the dealership determines the flag hours based on the amount of work needed to prepare the vehicle, as well as a comparison to what the other dealerships in the area use. The detailer or painter is assigned a "flag rate" per hour that is based on the individual's level of skill and experience. Regardless of the time a detailer or painter spends on each vehicle to complete the job, he or she is paid for the number of flag hours allotted to that vehicle.

By way of example, you state that a used vehicle that requires detailing work may be allotted four flag hours, while a new vehicle may be allotted three flag hours. A detailer working an eight hour shift and completing detailing work on three used vehicles would be paid for 12 flag hours (four flag hours allotted per used vehicle multiplied by three used vehicles) at his or her flag rate per hour. In contrast, a detailer who finishes one detailing job on a used vehicle during an eight hour shift would only be paid for four flag hours at his or her flag rate per hour. The detailer or painter's share per flat rate hour does not change if the charge to the customer is changed, for example, because the dealership provides a discount to the customer.

This pay plan provides an incentive for the detailers and painters to finish as many detailing or painting jobs as possible during each shift. In order to determine the employee's weekly pay, the dealership multiplies the detailer's or painter's flag rate per hour by the number of flag hours he or she has accumulated during the pay period. Generally, a detailer's or painter's pay varies each week.

The application of the section 7(i) exemption to individual employees of a retail or service establishment depends, in part, on their specific earnings. To qualify for the section 7(i) exemption from the FLSA's overtime requirements, three conditions must be met:

- 1) The employee must be employed by a retail or service establishment;
- 2) The employee's regular rate of pay must exceed one and one half times the applicable minimum wage under FLSA section 6; and
- 3) More than half of the employee's total earnings in a representative period must consist of commissions on goods or services.

See 29 C.F.R. §§ 779.313-.324, 779.410-.420 (copies enclosed).



For purposes of this reply, you ask us to assume that conditions 1 and 2 are met. Since all of the compensation paid to detailers and painters is based on the pay plan described above, you ask whether such payments constitute “commissions” under FLSA section 7(i).

As discussed in the Wage and Hour Field Operations Handbook (FOH) § 21h04(c) (copy enclosed), a commission for purposes of section 7(i) “usually denotes a percentage of the amounts paid out or received,” and employees who receive flat fee payments “paid without regard to the value of the service performed . . . are considered to be paid on a piece rate basis and not on the basis of commissions.” See also Wage Hour Opinion Letter November 14, 2005 (copy enclosed).

Commissions also can be based on the value of a service that is ultimately reflected in the price of the finished item, such as the value of work done to recondition a used car that is reflected in the price of the car. FOH § 21h04(b) (copy enclosed). The FOH specifically provides:

some auto service garages and car dealerships compensate mechanics and painters on the following basis: The painter or mechanic receives a “flat rate” hour for the work he or she performs. A “flat rate” hour is not an actual clock hour. The painter or mechanic may work only 7, 8 or 9 hours a day and still receive credit for 10, 11 or 12, etc., flat rate hours depending upon how much work he or she has done. Each job is assigned a certain number of hours for which the customer is charged, regardless of the actual time it takes to perform the job. The employee is given a certain proportion of that charge expressed in terms of so many dollars and cents per “flat rate” hour rather than in terms of a percentage of the charge to the customer. The dealer does not change the employee’s share per flat rate hour if the charge to the customer is changed. In such situations Wage and Hour will not deny that such payments represent “commissions on goods or services” for purposes of section 7(i).

FOH § 21h04(d).

Under the pay plan you describe, detailers and painters are not paid according to their clock hours; rather, they are paid, according to the flag hours accumulated during the pay period multiplied by their flag rate per hour. The flag hour may be more or less than the actual clock hour. The pay plan rewards detailers and painters for working rapidly and efficiently. The dealer does not change the employee’s share per flat rate hour if the charge to the customer is changed. Based on a review of the information provided, it is our opinion that payments under the plan represent “commissions on goods or services” because the amount of the payment appears to be related to the value of the service performed. Thus, the pay plan meets all of the requirements of FOH § 21h04(d). See *Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251 (11th Cir. 2001) (where the court ruled compensation paid to an automobile painter representing his hourly rate multiplied by the number of “flag hours” constitutes “commissions”); Wage and Hour Opinion Letter May 24, 1988 (copy enclosed).

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.



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

We trust that this letter is responsive to your inquiry.

Sincerely,

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

Enclosures:

FLSA section 7(i)
29 C.F.R. §§ 779.313-.324, 779.410-.420
Field Operations Handbook § 21h04
Wage and Hour Opinion Letters November 14, 2005 and May 24, 1988

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