



**FLSA2020-6**

June 25, 2020

Dear **Name\***:

This letter responds to your request for an opinion on whether salespeople who travel to different locations to sell products using their employer’s mobile assets qualify for the outside sales exemption under section 13(a)(1) 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 (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

## **BACKGROUND**

The employer deploys salespeople to high-population areas and events to sell products. These are typically locations with high foot traffic and dense populations—corporate campuses or multiple-person dwellings and businesses during weekdays and public events, such as concerts and festivals, during the weekend. The salespeople use stylized trucks that are stocked with merchandise, marketing displays, and demonstration units. The salespeople go outside the trucks to mingle with consumers to persuade them to buy tangible products and service contracts. These salespeople spend their time completing their own sales and being credited for those sales.

The salespeople use the trucks as marketing tools to assist with making sales, using them to help attract customers and facilitate sales. The salespeople use electronic tablets to demonstrate products, answer questions, and complete sales. They may bring potential customers to the truck, where the customers can test products, view demonstration units, and ask questions.

At least four of five days of the week, or approximately 80% of their working time, the salespeople are deployed with the truck as drivers or passengers. (We assume for purposes of this letter that the drivers and passengers make sales in the same manner and that the driver-passenger distinction is the only distinction in the employees’ duties. *See* 29 C.F.R. § 541.504.) The deployment locations change each day. During the 20% of their time that they are not deployed, the salespeople spend their time on sales-related duties such as event planning and inventory management. They are responsible for managing the “event” calendar to determine where and when the truck should be deployed. They decide how to stock the truck for each deployment. They receive sales training from the employer and are paid a base salary plus a commission based on their own sales.

## **GENERAL LEGAL PRINCIPLES**

Employees employed “in the capacity of outside salesman” are exempt from the FLSA’s minimum-wage and overtime-pay requirements. 29 U.S.C. § 213(a)(1). The reasons for the

exemption are “fairly apparent”: An outside salesman, “to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates.” *Jewel Tea Co. v. Williams*, 118 F.2d 202, 207–08 (10th Cir. 1941); *Meza v. Intelligent Mexican Mktg., Inc.*, 720 F.3d 577, 581 (5th Cir. 2013) (quoting *Jewel*).

Employees are “outside salesmen” if they meet two requirements. First, their primary duty must be “making sales” to or “obtaining orders or contracts for services” from customers. 29 C.F.R. §§ 541.500(a), 541.501. A sale, in turn, includes “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” 29 U.S.C. § 203(k). The exemption includes not only the sales work itself, but also “work performed incidental to and in conjunction with the employee’s own outside sales or solicitations.” 29 C.F.R. § 541.500(b). This is consistent with courts’ repeated observations that “the term ‘sale’ is broadly defined....” *Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219, 233 (2d Cir. 2018). Second, the employees must be “customarily and regularly engaged” in performing that duty “away from the employer’s place or places of business.” 29 C.F.R. §§ 541.500(a), 541.502. An employee’s “primary duty” is the “principal, main, major, or most important duty that the employee performs.” 29 C.F.R. § 541.700(a).

The outside sales exemption, like other exemptions, is “as much a part of the FLSA’s purpose as the [minimum-wage and] overtime-pay requirement[s].” *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). WHD thus reads that statutory text with a “fair (rather than narrow) interpretation[.]” *Id.* (internal citations omitted).

## OPINION

Based on the facts you have provided, the employees qualify for the outside-sales exemption because their primary duty is to make sales and they are customarily and regularly away from the employer’s place of business in performing that primary duty.

### A. Primary Duty of Making Sales.

First, the employees’ primary duty is to make sales and obtain orders for services. Here, the employees travel to various locations where they sell tangible products and obtain signatures for contracts for services. *See* 29 C.F.R. § 541.501(b)–(d). They use the tablets they are issued in part to complete sales and are paid a commission on their own sales. “All courts agree that incentive compensation such as commissions and bonus pay based on sales goals is a hallmark of outside sales.” *Martinez v. Superior HealthPlan, Inc.*, 371 F. Supp. 3d 370, 384 (W.D. Tex. 2019). Further, the employees bear the indicia of acting “in the capacity” of outside salesmen. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161, 165–66 (2012). They receive sales training; are not supervised in the field; and, because they are selling physical products and obtaining assents to service contracts, are obtaining the maximum possible commitment from the customers. *Id.*; *Flood*, 904 F.3d at 234; *Martinez*, 371 F. Supp. 3d at 383–85. The employees here are similar to the employees in *Vasto v. Credico (USA) LLC*, 767 F. Appx. 54 (2d Cir. 2019), whom the Second Circuit affirmed were exempt outside sales employees as a matter of law. The employees in *Vasto* visited “targeted community locations” and “community events” to solicit applications for mobile-phone service. *Vasto v. Credico (USA) LLC*, No. 15-cv-9298,

2017 WL 4877424, at \*3 (S.D.N.Y. Oct. 27, 2017). Under minimal supervision, they approached potential customers, used tablets as part of an “approved pitch” to furnish information about the service and used the tablets to upload customers’ applications. *Id.* at \*3, 19. They were paid by commission for each application that was approved. *Id.* at \*3. Those employees’ efforts were “directed toward the consummation of a sale.” *Id.* at \*19. The same is true here; the employees in your request travel to consumer locations and are “completing their own sales and being credited for those sales.” This indicates that their “principal, main, major, or most important duty” is to make sales.

Further, the employees spend roughly 80% of their time on sales deployments. *See* 29 C.F.R. § 541.700(b) (employees who spend more than half their time performing exempt work generally satisfy the primary-duty requirement). During the 20% of the time they are not actively making sales, they decide where to deploy the truck, when to deploy it there, and how to stock it. These activities are directed toward furthering their own out-of-office sales efforts, *see* 29 C.F.R. § 541.500(b), and are thus construed as sales activities under the FLSA.

In addition, we understand from the facts provided that employees earn a commission for products sold and that the descriptions of “initiating sales” and “creating sales” refer to either (1) the actual making of sales or (2) promotional work—such as “planning the locations and events to which the mobile assets are deployed and managing the inventory of the mobile assets”—that is incidental to and in conjunction with the employees’ own sales. *See* 29 C.F.R. § 541.500(b); 29 C.F.R. § 541.503(a)-(b) (instructing that promotional work that is performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work). For example, the court in *Schmidt v. Eagle Waste & Recycling, Inc.*, reached a similar conclusion concerning employees’ promotional work. 599 F.3d 626, 631 (7th Cir. 2010). In that case, the employee spent four to eight hours per day on out-of-office sales calls. She also spent ten hours per week on in-office marketing and promotional work. Most of the fruits of her in-office work were realized not by other employees but “through her own sales.” *Id.* Her in-office work was thus part of her exempt outside sales work, not non-exempt promotional work, and the court concluded that she was engaged in outside sales as a matter of law. *Id.* Here, like in *Schmidt*, employees realize the fruits of their own sales and sales-related duties.

Based on this analysis, all of the employees’ principal activities are sales or work that furthers the employee’s sales efforts. We thus conclude that making sales is the employees’ primary duty.

## **B. Customarily and Regularly Engaged Away from the Employer’s Place of Business.**

The employees are customarily and regularly away from the employer’s place of business. “Customarily and regularly” does not mean “a majority of the time;” it means “greater than occasional but ... less than constant.” 29 C.F.R. § 541.701. WHD has previously found that outside sales work away from the employer’s place of business for approximately “one or two hours a day, one or two times a week” can pass the test. WHD Op. Letter, FLSA2007-2, 2007 WL 506575, at \*3 (Jan. 25, 2007). One federal appellate court has stated that performing an activity 60 times over the course of a year—slightly more than once per week—may be enough to qualify as “customarily and regularly.” *Smith v. Govt. Emps. Ins. Co.*, 590 F.3d 886, 894 (D.C. Cir. 2010) (analyzing administrative exemption). Here, these salespeople are deployed away

from the employer's place of business to make sales four days per five-day week (*i.e.*, 80% of their working time), satisfying the requirement.

Nor are the trucks themselves "places of business." A place of business is a "fixed site ... used by a salesperson as a headquarters[.]" 29 C.F.R. § 541.502. Each truck is driven to and from a different sales site each day. Nothing in your request indicates a permanent, or even semi-permanent, physical connection to a deployment site. To deem one of these trucks a "fixed site" would eviscerate that term. No fair application of the rules of statutory construction would permit us to read "fixed site" to apply under these facts. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–16 (2019). Even if we were to read the regulation so narrowly, the exemption would nevertheless apply, because the salespeople, rather than remain stationary in their trucks, go out into the crowds to mingle with consumers. Indeed, so narrow a construction would read out of the regulation perhaps the paradigmatic outside salesman, one who drives to a neighborhood and then solicits sales door to door. *See* 29 C.F.R. § 541.502 (outside salesman is one who "makes sales ..., if selling door-to-door, at the customer's home").

Accordingly, the salespeople described in your letter customarily and regularly perform sales work away from their employer's place of business.

## CONCLUSION

For these reasons, we conclude that the salespeople meet the outside-sales exemption, thus making them exempt from the FLSA's minimum-wage and overtime-pay requirements.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id.*

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).**