



FLSA2020-8

June 25, 2020

Dear **Name***:

This letter responds to your request for an opinion on whether salespeople who set up displays and perform demonstrations at various retail locations not owned, operated, or controlled by their employer to sell the employer's products qualify for the outside sales employee 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 salespeople described in your letter travel to various retail operations such as home and garden shows, trade shows, state and county fairs, and so-called big-box stores. The salespeople set up displays in which they exhibit and demonstrate products they are selling. Such sales shows may be a one-day event or extend as long as 21 days. Typically, however, they last 10 days. On average, a given retail location will be used for the sales demonstrations no more than 30 total days a year. During the shows, the salespeople spend most of their time pitching products to potential customers at the various retail locations. More specifically, the salespeople describe and illustrate the products' use and other qualities, engaging customers to identify and cultivate interest, and otherwise using sales techniques to drive sales. You state that, while salespeople spend time working from their homes, which they use as personal "headquarters," they do not perform any direct sales activities there. The salespeople spend more than 80 percent of their workweek directly engaging in active sales pitches to customers. The employees' other functions are related to the sales activities, such as buying demonstration materials and participating in sales-related meetings.

Here, the employer recruits and hires applicants with sales experience and trains its salespeople, who participate in sales meetings, have sales goals, receive commissions, and are eligible for bonuses based on purchases made by customers during their assigned shows. Customers generally make purchases through the retail operations where the shows are conducted, under an arrangement whereby the retailer passes to the employer an agreed-upon portion of all sales of the employer's products. At home and garden shows, trade shows, state and county fairs, and similar events, the salespeople process the payment directly and no third-party retailer is involved.

GENERAL LEGAL PRINCIPLES

The FLSA exempts from overtime and minimum wage requirements employees employed “in the capacity of outside salesman.” 29 U.S.C. § 213(a)(1). The logic of the exemption is that “[a] 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.” *Meza v. Intelligent Mexican Mktg., Inc.*, 720 F.3d 577, 581 (5th Cir. 2013) (quoting *Jewel Tea Co. v. Williams*, 118 F.2d 202, 207–08 (10th Cir. 1941)).

There are two requirements for the outside sales exemption. First, the employee’s 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. “Sales” 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). Promotional work incidental to and in conjunction with an employee’s own sales or solicitations may be exempt outside sales work; promotional work incidental to sales made, or to be made, by someone else is not exempt. *See* 29 C.F.R. § 541.503. An employee who spends more than half of his or her time performing exempt work generally satisfies the primary duty requirement, although time is not the sole test. *See* 29 C.F.R. § 541.700(b).

Second, the employee 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). “Away from the employer’s place of business” is defined as making sales at the “customer’s place of business or, if selling door-to-door, at the customer’s home.” 29 C.F.R. §§ 541.500(a), 541.502. “[A]ny fixed site, whether home or office, used by a salesperson as a headquarters ... is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.” 29 C.F.R. § 541.502. “Customarily and regularly” means greater than occasional but less than constant. 29 C.F.R. § 541.701.

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]” and, therefore, must receive a “fair (rather than narrow) interpretation[.]” *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal citations omitted). As a result, WHD interprets statutes committed to it according to conventional canons of construction—neither expansively nor narrowly.

OPINION

Based on the facts you have provided, the salespeople at locations other than big-box stores qualify for the outside sales exemption; the salespeople at those locations qualify for the exemption only if their primary duty is performing sales work directed toward the consummation of their own sales. The employees’ primary duty at events such as trade shows, where the employees make their own sales and no third-party retailer is involved, is sales work directed toward the consummation of their own sales, and would thus qualify for the exemption. Sales made through a third-party retailer, as you describe happening at the big-box stores, may not qualify as sales work directed toward the consummation of their own sales unless the employees

obtain a commitment to buy from the customers and are given credit for the sales that were consummated specifically through their efforts.

A. Primary Duty of Making Sales.

1. Time Spent Working at Home and Garden Shows, Trade Shows, and Fairs.

The employees' primary duty at the home and garden shows, trade shows, and state and county fairs, where no third-party retailer is involved, is to make sales. At these events, the employees display and demonstrate the employer's products and engage with customers with the goal of influencing customers to purchase the employer's products. The customers then purchase the products directly from the employees.

“[T]he term ‘sale’ is broadly defined by the law.” *Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219, 233 (2d Cir. 2018). Because the employees sell the products directly to the customers, they are making sales within the meaning of the FLSA. *See* 29 U.S.C. § 203(k); 29 C.F.R. § 541.501. In addition, work “incidental to and in conjunction with the employee’s own outside sales or solicitations” is “regarded as exempt outside sales work.” 29 C.F.R. § 541.500(b). Here, the employees spend over 80 percent of their workweek directly engaging in active sales pitches to customers. During their remaining time, the salespeople perform tasks such as completing paperwork related to their sales and demonstrations, purchasing materials for their demonstrations, and attending sales-related meetings. “These duties further the salespersons’ sales efforts,” and, under the FLSA’s broad definition of “sales,” are construed as sales and therefore “are regarded as exempt work.” WHD Opinion Letter FLSA2008-6NA (May 8, 2008); *see also* WHD Opinion Letter FLSA 2006-11 (Mar. 31, 2006).¹ Similarly, the time the employees spend displaying and demonstrating products at these events is exempt work because it is incidental to and in conjunction with their own outside sales. *See* 29 C.F.R. §§ 541.503(a)–(b).

The employees also bear the external indicia of acting “in the capacity” of outside salesmen. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161, 165-66 (2012). The salespeople are hired for their sales experience, paid commissions and bonuses based on purchases made at their assigned “shows,” and receive sales training from their employer, which are “hallmark activities” of outside salespeople.²

Ultimately, all of these employees’ principal activities are sales or related to their own sales. We thus conclude that making sales is their primary duty and that they are performing exempt outside sales work while at these events.

¹ Indeed, the regulations specifically list “writing sales reports” as an example of exempt sales-related work. *See* 29 C.F.R. § 541.500(b).

² *See also* *Martinez v. Superior HealthPlan, Inc.*, 371 F. Supp. 3d 370, 384 (W.D. Tex. 2019) (“All courts agree that incentive compensation such as commissions and bonus pay based on sales goals is a hallmark of outside sales.”); *Lint v. Nw. Mut. Life Ins. Co.*, No. 09cv1373, 2010 WL 4809604, at *2 (S.D. Cal. Nov. 19, 2010); *Bouder v. Prudential Fin., Inc.*, No. 06-4359, 2010 WL 3515567, at *4 (D.N.J. Aug. 31, 2010).

2. The Outside Sales Exemption May Apply to Employees at Third-Party Retailers Under Certain Circumstances.

The outside sales exemption may not apply to employees working at big-box stores because customers at those locations purchase products through a third-party retailer rather than through the employees. The employees' primary duty thus may not be "making sales." Employees are exempt outside-sales employees only if the employer "demonstrates objectively that the employee, in some sense, has made sales." 69 Fed. Reg. 22,121, 22,162 (Apr. 23, 2004). They do so "if they 'obtain a commitment to buy' from the customer and are credited with the sale." *See id.* Employees are not exempt if their work is "directed toward stimulating the sales of [their] company generally rather than the consummation of [their] own specific sales." *Id.* at 22,163. Accordingly, an employee must obtain a commitment to buy from the customer and be credited with the sale to be eligible for the outside sales exemption.

Based on the facts you have provided, we cannot say with certainty whether the employees are actually selling the products while working at the third-party retailers. Your description of the employees' activities does not describe whether or how an employee obtains a commitment from the customer to buy the employer's products. In addition, while you state that the third-party retailer passes an agreed-upon portion of all sales of the employer's products to the employer, it is unclear if the employees are given credit for the sales that were consummated specifically through their efforts. *See Christopher*, 567 U.S. at 161, 165-66 (holding that pharmaceutical drug representatives were entitled to the outside sales exemption because they obtained the "maximum commitment possible" from their customers and were credited with the sale); *Flood*, 904 F.3d at 231 ("And it is this commitment that suffices to constitute the making of a sale for purposes of the outside salesman exemption."). Without this information, we cannot say whether the employees are generally stimulating the employer's sales or making their own specific sales. *See* 29 C.F.R. § 541.503(a)-(b).

If the employees are obtaining commitments from customers and being credited for the sales consummated because of their efforts, they are performing exempt work. If not, they are likely engaged in general promotion work that is not exempt.

3. All Employees May Still Be Eligible for the Outside Sales Exemption.

Generally, employees who spend more than 50 percent of their time performing exempt work will satisfy the primary duty requirement. *See* 29 C.F.R. § 541.700(b). Employees who spend a majority of their time posted at home and garden shows, trade shows, fairs, and similar sites will likely satisfy the primary duty requirement even if a minority of their time is spent performing nonexempt promotional work at big-box sites. Additionally, the Department of Labor's regulations specifically state that time alone is "not the sole test" and "[e]mployees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion." *Id.* Therefore, employees who spend the majority of their time during a pay period performing such nonexempt work may still be exempt if the character of their jobs as a whole shows that their primary duty is performing exempt work. 29 C.F.R. § 541.700(a).

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

We also conclude that the employees, whether at the trade shows or the third-party retailers, are customarily and regularly away from the employer’s place of business. “The phrase ‘customarily and regularly’ is not a ‘majority of the time’ test.” *Dixon v. Prospect Mortg., LLC*, 11 F. Supp. 3d 605, 610 (E.D. Va. 2014).³ It requires only that the employees perform the tasks normally and recurrently every workweek. 29 C.F.R. § 541.701.

1. The Meaning of “Employer’s Place of Business.”

The locations where the salespersons perform their activities are not the employer’s place of business. Our regulations explain that an “employer’s place of business” (1) includes “any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales” and (2) does not include a hotel room where a salesperson displays samples or a trade show where a salesperson displays goods, and where sales actually occur, for a limited duration, such as one or two weeks. 29 C.F.R. § 541.502.

The regulation excludes sites where the employee intends to remain for a limited time, listing a hotel sample room and a trade show as examples. *See* 29 C.F.R. § 541.502. WHD has previously concluded that an employee who sets up a display to sell an employer’s novelties in front of a retail location for up to six days has not established a place of business for his employer. *See* WHD Opinion Letter FLSA2008-6NA (May 8, 2008). In contrast, we have assumed that a model home where real-estate sales personnel are stationed—a location to which salespeople will regularly return until the home is sold—constitutes an employer’s place of business from which they can conduct sales activity related to outside sales. *See* WHD Opinion Letter FLSA2007-1 (Jan. 25, 2007).

The locations you describe do not constitute the employer’s place of business under our regulations. The employees set up their sales shows and conduct their sales activities at a given location for no more than 21 days and usually 10 days on average. The employees move to a different location after the show is over. Further, the rotating retail operations do not constitute a “fixed” location equivalent to the employer’s place of business. Indeed, were the employees undertaking the same actions at conventions, conferences, or trade shows as you describe them taking at big-box stores, one could easily recognize that those locations did not constitute the employer’s place of business. *Lane v. Humana Marketpoint, Inc.*, is illustrative. There, a federal district court held that sales representatives who sold health-benefit and insurance products such as Medicare at public locations like Walmart were “away from the employer’s place of business.” No. 1:09-CV-380 (MHW), 2011 WL 2181736, at *9 (D. Idaho June 3, 2011). While noting that some of the public locations that sales took place could arguably be considered “fixed sites,” the sales representatives did not use these locations “as headquarters.” *Id.* The court concluded that “[n]ot every public location where sales presentations, seminars, social functions

³ *See also Taylor v. Waddell & Reed, Inc.*, 2012 WL 10669, at *3 (S.D. Cal. 2012); *Lint*, 2010 WL 4809604, at *3 (spending 10–20 percent of the time outside of the office engaged in sales activity is sufficient for the exemption); *Hartman v. Prospect Mortg., LLC*, 11 F. Supp. 3d 597, 603 (E.D. Va. 2014).

and the like took place are Humana's place of business." *Id.* Similarly, the locations under the facts you describe here do not constitute the employer's place of business.

2. The Locations Are Not the Employer's Place of Business.

The salespeople described in your letter conduct all of their sales activities at retail operations and other locations away from their respective "headquarters," their home offices. While the regulations generally discuss the outside sales exemption in terms of a salesperson who makes sales at a client's home or place of business, 29 C.F.R. § 541.502, that language is not exclusive, but illustrative. The same regulation notes that outside sales employees do not lose their exemption by selling items at trade shows or in hotel sample rooms, which is neither a customer's home nor a customer's place of business. *Id.* As courts have concluded, the exemption is not limited to employees who consummate sales at a customer's home or place of business. *See, e.g., Tracy v. NVR, Inc.*, 599 F. Supp. 2d 359, 363 (W.D.N.Y. 2009) (finding "no practical basis, in the regulations or elsewhere, upon which to base such a conclusion, particularly in light of the regulations' provision of a more limited definition for the term, 'employer's place of business'"); *Marcus v. AXA Advisors, LLC*, 307 F.R.D. 83, 93-94 (E.D.N.Y. 2015) (that "narrow reading . . . is not supported by [the] text"). Indeed, for more than 50 years WHD has interpreted the outside-sales exemption to encompass employees making sales somewhere besides a customer's home or office. *See, e.g., WHD Opinion Letter FLSA* (Apr. 21, 1964). And courts have gone further to hold that qualifying exempt sales can be conducted "at the gym, restaurants, sporting events, community events, [and] car dealerships"; at "seminars and trade shows"; at the theater; in coffee shops; at "bridal shows, baby shows, and street fairs"; and generally anywhere "away from a fixed site." *Hall v. Haworth, Inc.*, No. H-12-1776, 2014 WL 12537074, at *4 (S.D. Tex. Apr. 3, 2014) (gathering cases).

CONCLUSION

For these reasons, we conclude that the salespeople are engaged in selling at most of the sites you describe; may be engaged in selling at the retail sites you describe if they obtain commitments to buy and are credited with the sale; are away from the employer's place of business at all of the sites you describe; and will qualify for the outside sales exemption if their primary duty is making sales at those sites, which would usually be the case if more than half of their time is spent on that task.

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 responds to your inquiry.

Sincerely,

A handwritten signature in black ink that reads "Cheryl M. Stanton". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(6).**