**U.S. Department of Labor**

Wage and Hour Division
Washington, DC 20210

**FLSA2020-11**

August 31, 2020

Dear **Name***:

This letter responds to your request on behalf of your client, a private "oilfield service company" that provides waste-removal services for oilfield operators, regarding whether the Fair Labor Standards Act (FLSA)'s "retail or service establishment" exemption applies to certain truck drivers who work for your client. This opinion is based exclusively on the facts you provided in your request and in response to follow-up questions. 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

You state that your client employs truck drivers at three different establishments and pays the drivers solely on a commission basis to transport fluid waste from customer oilfield locations to disposal facilities. The truck drivers use vacuum pumps to pump liquid waste into tankers and then haul the tankers to approved disposal sites. The trucks are equipped with a durable trailer underpinning and heavy-duty hoses specifically designed for water hauling. Your client pays each driver 27 percent of the gross revenue received by your client for each truck driven, regardless of how many hours are worked per week. Each driver works approximately 60 hours each week, scheduled as 12-hour shifts five days each week. Your letter represents that the regular rate of pay for each driver exceeds one and one-half times the federal minimum wage.

## GENERAL LEGAL PRINCIPLES

The FLSA exempts from its overtime pay requirements certain employees of "retail or service establishment[s]." 29 U.S.C. § 207(i). The exemption applies to any employee (1) who works at a retail or service establishment; (2) whose regular rate of pay exceeds one and one-half times the federal minimum wage; and (3) whose earnings in a representative period are composed of more than fifty percent commissions. *Id.*

The United States Supreme Court recently held that exemptions under the FLSA deserve a "fair (rather than narrow) interpretation" because the exemptions are "as much a part of the FLSA's purpose as the overtime-pay requirement." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks and citation omitted). Accordingly, WHD applies a "fair reading" standard to all exemptions to the FLSA, including the Section 7(i) exemption addressed in this letter.

## OPINION

Your letter states that the entirety of earnings of your client's truck drivers consists of commissions and their regular rate of pay exceeds one and one-half times the federal minimum wage. Thus, the truck drivers would qualify for the Section 7(i) exemption if your client is a

"retail or service establishment." To qualify as a "retail or service establishment": (1) a business must "engage in the making of sales of goods or services"; (2) "75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry"; and (3) "not over 25 percent of its sales of goods or services, or of both, may be sales for resale." 29 C.F.R. § 779.313. Based on the information you have provided, and insofar as the waste removal industry recognizes the services that your client provides as retail and its waste removal services are not different from services furnished to the general public, it appears that your client satisfies all three requirements of a "retail or service establishment."

(1) "Engaged in the making of sales of goods or services"

As your letter indicates, your client removes oilfield waste from customers' oil well locations and transports it to disposal facilities. This satisfies the "sales of goods or services" requirement. That your client sells waste removal services to commercial entities does not change this conclusion. *See Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 200–03 (1965) (sale to a business purchaser can be a retail sale). As we have previously noted, courts have repeatedly held that businesses may qualify as retail or service establishments when their customers are predominantly commercial entities. *See* WHD Opinion Letter FLSA2018-21, 2018 WL 4562931, at *1–2 (Aug. 28, 2018) (citing *Alvarado v. Corporate Cleaning Servs., Inc*., 782 F.3d 365, 369–71 (7th Cir. 2015); *Charlot v. Ecolab, Inc*., 136 F. Supp. 3d 433, 468–69 (E.D.N.Y. 2015); *Schwind v. EW & Assocs., Inc*., 371 F. Supp. 2d 560, 565–67 (S.D.N.Y. 2005)).

(2) "75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry"

The second requirement for a "retail or service requirement" has two components: first, 75 percent of the establishment's sales must be recognized by the industry as retail; and second, the establishment must have a retail concept. *See* 29 C.F.R. § 779.316.

As to this first requirement, your letter does not state whether your client's waste-removal services are currently recognized in the industry as retail. The recognition may be demonstrated by statements from industry leaders or relevant trade associations.[1] If your client's waste-removal services are recognized by the industry as retail, those services (either alone or in combination with other services recognized by the industry as retail) must comprise at least 75 percent of total sales from the establishment at which the drivers are employed for the establishment to qualify. However, as explained above, industry recognition that at least 75 percent of total sales are retail is not, by itself, controlling; to satisfy the second requirement, an establishment must also have a "retail concept" in order to qualify as a "retail or service establishment." *See* 29 C.F.R. § 779.316; *Idaho Sheet*, 383 U.S. at 199–200 (disapproving of a

[1] *See, e.g., Reich v. Cruises Only, Inc.,* No. 95-660-CIV-ORL-19, 1997 WL 1507504, at *5 (M.D. Fla. June 5, 1997) (relying on affidavits from industry experts to conclude that services provided by a travel-agency were recognized as retail in its particular industry).

"literal reading" that would "give the industry self-determination as to whether the exemption applies").[2]

Indicia of a "retail concept" are set forth in 29 C.F.R. § 779.318(a), which states that a retail or services establishment typically:

- "sells goods or services to the general public;"
- "serves the everyday needs of the community;"
- "is at the very end of the stream of distribution;"
- "dispos[es] in small quantities [its] products or skills;" and
- "does not take part in the manufacturing process."

Until recently, the Department's regulations (former 29 C.F.R. § 779.317) listed "waste removal contractors" among a list of establishments that categorically could not qualify as a "retail or service establishment" under any circumstance because they lacked a retail concept.[3] On May 19, 2020, the Department withdrew that list, 85 FR 29867, in part because numerous courts have questioned its reasoning. For instance, one court of appeals criticized the list as an "incomplete, arbitrary, and essentially mindless catalog." *Alvarado*, 782 F.3d at 371. Another noted that the list "does not appear to flow from any cohesive criteria." *Martin v. The Refrigeration Sch., Inc.*, 968 F.2d 3, 7 n.2 (9th Cir. 1992). With the withdrawal of the list, WHD now applies the same analysis to all establishments to determine their "retail concept," thus reading the Section 7(i) exemption more consistently. *See* 85 FR 29867. Establishments that had been listed as lacking a retail concept, including waste-removal contractors, may now qualify as retail or service establishments. In light of the Department's new practice of affording the same analysis to all establishments in order to determine the presence of a "retail concept" under 7(i), the information you have provided indicates that your client may satisfy these criteria.

Services that "are sometimes performed for a commercial user" may satisfy the "general public" criterion, "so long as [they] do not require the use of specialized facilities or equipment and the services are not different services than those provided for the general consuming public." WHD Opinion Letter FLSA2006-22 (June 23, 2006); *see also* 29 C.F.R. § 779.329 ("Where a [service] is recognized as retail regardless of the type of customer, its character as such will not be affected by . . . whether [the customer] is a private individual or a business concern."). According to the information that you provided, drivers pump liquid waste at commercial oilfields into tanks, and then haul those tanks to disposal sites. And according to your response to follow-up questions, your client's trucks are equipped with a durable trailer underpinning for driving on unpaved terrain and heavy-duty hoses designed for water hauling.

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[2] Notably, in reaching this conclusion now reflected in 29 C.F.R. § 779.316, the *Idaho Sheet* Court acknowledged that "the most literal reading of the statute" at 29 U.S.C. § 213(a)(2) "lends itself well to an inquiry into how the businessmen concerned term their dealings." *Id*. at 199. However, in considering the legal and legislative history and the provision's purpose, the Court ultimately concluded that "[o]n balance . . . the arguments against this literal reading are more persuasive," so that industry usage should not be the "single touchstone" of the inquiry. 383 U.S. at 199–202.

[3] The categorical exclusion of waste removal contractors in former 29 C.F.R. § 779.317 appears to directly contradict the holding in *Wirtz v. Modern Trashmoval, Inc*., 323 F.2d 451, 465–66 (4th Cir. 1963), that a trash removal company can have a retail concept and be a "retail or service establishment" under the FLSA.

Based on this information, it is possible your client's service satisfies the "general public" criterion. This depends on whether your client's trucks and equipment are specialized for their current use and whether the service is different from the kinds of waste-removal services offered to the general consuming public. *See* WHD Opinion Letter FLSA2006-22 (June 23, 2006); *see also Schultz v. Instant Handling, Inc*., 418 F.2d 1019, 1024 (5th Cir. 1969) (industrial waste removal services that "required the use of specially designed containers and trucks equipped with lifting devices and spraying mechanisms [] were so unlike any service rendered to the general consumer as to preclude their classification as 'retail'"). Waste-removal services whereby truck drivers transport liquid waste from the location where it is generated to disposal facilities are indeed used by the general public, including residences. For instance, rural homeowners routinely hire professionals to pump liquid waste from septic tanks and transport the waste to disposal facilities.[4] To the extent that your client's services are similar to waste-removal services furnished to the general public, your client may satisfy the "sells to the general public" criterion.

In addition, waste removal can satisfy "the everyday needs of the community" and be at "the very end of the stream of distribution." *See Modern Trashmoval*, 323 F.2d at 466 ("The removal and final disposal of waste ministers to the everyday needs of the customers and is a clear manifestation of the 'end of the stream of distribution.'").[5] The oilfield operators are the end customer of the waste-removal services; sales to them are not sales for resale. Your client may or may not meet the "disposing in small quantities" criterion, again depending on how the trucks and the quantity of waste they remove compare to those typical in general consumer waste-removal services.[6] And finally, your client "does not take part in the manufacturing process."

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[4] The Environmental Protection Agency (EPA) recommends that homeowners hire professionals to pump septic tanks every three to five years, depending on household size, wastewater generated, solid waste generated, and tank size. *See* EPA, *How to Care for Your Septic System*, https://www.epa.gov/septic/how-care-your-septic-system (last visited Apr. 8, 2020).

[5] The court in *Wirtz v. English*, 245 F. Supp. 628, 633 (D. Kan. 1965), similarly found that the company's wastewater removal from oilfields and occasionally from sewers and septic tanks "met the everyday needs of the community." But the *English* court concluded that the company's wastewater removal services were non-retail because they were not at the end of the stream of distribution *of the oil industry*. *See id.* ("Since at least 80% [o]f defendants' [wastewater removal] services were sold to oil producers, the business organization to be considered [for "stream of distribution" analysis] is the oil industry. The end of the stream of distribution of the oil industry is far from the oil fields[.]"). Yet, numerous more recent court decisions have analyzed whether the goods or services *sold by the company at issue*—as opposed to *sold by that company's commercial clients*—were at the "end of the stream of distribution." *See Charlot*, 136 F. Supp. 3d at 466 (cleaning supplies sold to restaurants and hospitality institutions are at the end of the distribution stream); *Alvarado v. Corp. Cleaning Serv., Inc*., 719 F. Supp. 2d 935, 944–45 (N.D. Ill. 2010) (company that provides window cleaning services to commercial and residential buildings "provides services at the end of the stream of distribution"); *Schwind*, 371 F. Supp. 2d at 566 (computer training services to IBM and other corporate clients were at the end of the distribution stream). In addition, "[i]n the case of a service establishment, the 'end of the distribution stream' has been described as 'providing a service with a distinct beginning and end.'" *Gatto v. Mortg. Specialists of Ill., Inc.,* 442 F. Supp. 2d 529, 541 (N.D. Ill. 2006) (quoting *Cruises Only*, 1997 WL 1507504, at *5). The wastewater removal services provided here have a distinct beginning and end, and therefore, appear to be the end of the distribution stream.

[6] "What constitutes a small quantity … depends, of course, upon the facts in the particular case and the quantity will vary with different commodities and in different trades and industries." 29 C.F.R. § 779.328(a).

Thus, your client appears to have a retail concept, and its sales of waste-removal services may be properly recognized as retail by the waste-removal industry.

(3) "Not over 25 percent of its sales of goods or services, or of both, may be sales for resale."

Your client appears to satisfy the third requirement. "The common meaning of 'resale' is the act of 'selling again.' A sale is made for resale where the seller knows or has reasonable cause to believe that the goods or services will be resold." 29 C.F.R. § 779.331. Your client furnishes its services to the end users, the oilfield operators.

**CONCLUSION**

We conclude that your client, provided that its waste removal services are not different from services furnished to the general public and that its services are recognized as retail within the waste-removal industry, may qualify as a "retail or service establishment" eligible to claim the Section 7(i) exemption for the truck drivers you describe.

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

Cheryl M. Stanton
Administrator

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