



WHD-OL-1964-0143

April 21, 1964

Name*

This is to confirm the oral advice given at our meeting of April 10, 1964 and to clarify further the status of real estate salesmen under the Fair Labor Standards Act. The need or some amplification of the views expressed in my letter of January 31, 1964 in order to avoid misunderstanding because apparent in the course of our discussion. This letter will, I hope, provide the necessary answers to the questions raised in the document which you left with us.

The definition of an exempt "outside salesmen" in 29 CFR 541.5 requires that such an employee be employed for the purpose of, and be customarily and regularly engaged in making "sales" within the meaning of section 3(k) of the Act or in obtaining certain orders or contracts for the use of facilities. The real estate salesmen about whom you inquire will generally meet this test, since "sales" under section 3(k) of the Act include contracts to sell.

The problem under the definition and our January letter which has given you particular concern is the requirement that an exempt "outside salesmen" be customarily and regularly engaged "away from his employer's place or places of business" in making such sales. Our letter pointed out that a fixed site, such as a model home, used by a salesman as a headquarters may be a place of business of the employer within the meaning of the definition and that an employee stationed there may not qualify as an "outside salesmen." The broad language of the statement in the letter apparently led you to believe that salesmen using such a model home as headquarters would not, as a rule, be considered exempt as outside salesmen. This is not so.

Real estate salesmen, as you pointed out, typically are required, as a customarily and regular part of their employment, to spend whatever time is necessary at the site of property to be sold and in visiting prospects at the latter's homes and offices as a part of their sales effort. Most of them must leave whatever place of business of the employer they use as headquarters in order to perform these tasks. In the case of salesmen stationed in a model home on a tract from which parcels of real property are being sold with or without improvements, leaving the model home for such purposes, customarily and regularly, would meet the requirement of the definition, so far as making sales "away from" the employer's place of business is concerned. This is true even though all of the property shown to prospects by the salesmen is within the tract on which the model home is located.

Further, not every home called a "model home" would be a place of business of the employer. One which is in the nature of an "open house" to which a salesman is assigned to meet prospects who may buy that house or another similar one on the tract may more properly be viewed as analogous to the hotel sample room of a traveling salesman referred to in 29 CFR 541.502(b) than to an actual place of business of the employer. Transitory assignments of salesmen permanently headquartered at an office of the employer who are sent to a "model home" or other

location at a tract where it will be their duty to engage in sales efforts with respect to real estate on the tract would not defeat on otherwise applicable exemption. The salesmen would ordinarily be considered to be engaged in such work "away from" the employer's place of business. On the other hand, where for purposes of convenience a "model home" on a real estate development is maintained on a relatively permanent basis as an office of the employer, staffed with necessary personnel for making sales, salesmen who do not customarily and regularly leave this headquarters as a part of their sales efforts would be "inside" rather than "outside" sales men just as they would be if confined to such inside work in any other office maintained by the employer. In the case of real estate salesmen, however, this would appear to be the unusual, rather than the usual, case. So long as the salesmen customarily and regularly goes to the site of the property or to prospects as a part of making his sales, this requirement for "outside" sales work would be met. Moreover, time spent on return to the model home or other headquarters to conclude a sales transaction or to continue sales effort with the prospect would be deemed part of the salesman's outside sales activity.

Certain activities performed by real estate salesmen in the employer's place of business may be exempt work if the activities performed are in conjunction with and in furtherance of their outside sales work. In this connection, the following activities may be exempt. 1. Bringing a multiple listing book up to date; 2. Calling prospects with whom the salesmen has been dealing during his outside sales activity; 3. Dictating or writing letters to such prospects; 4. Talking to such prospects in the office about their particular transactions; 5. Calling a list of prospective buyers or sellers of homes with whom the salesman has had no prior contact; 6. Preparing a contract and other forms required for a sale negotiated during the salesman's outside sales activity; 7. Talking to a "walk-in" prospect with whom he has had no prior contact and showing him photographs and discussing terms on specific houses, if such activity results in subsequent outside sales activity with the prospect.

Since it would appear that the real estate salesmen with whom your industry is most concerned would generally qualify for exemption as "outside salesman" under the principles stated above, detailed consideration of the exemption available for retail commission salesmen under section 7(h) of the Act would seem unnecessary at this time. However, we remain of the opinion that the "retail concept" is inapplicable to real estate sales for the reasons previously expressed. The sale of real estate is not the sale of goods or services in which the retail or service establishments defined in section 13(a)(2) of the Act must be engaged.

I trust that the foregoing discussion will be adequate to resolve the problems you mentioned in our meeting and explained in the summary of your association's views which you left for our consideration.

Sincerely yours,

Clarence T. Lundquist
Administrator

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