

Wage and Hour and Public Contracts Division
Washington, D. C.

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This is in reply to your letter of December 27, 1965, concerning the application of the overtime pay exemption provided in section 7(h) of the Fair Labor Standards Act to pest control servicemen employed by the company at its various branches throughout the country. With the letter you attached data on the types of customers, number of servicemen employed, and the average weekly hours worked and average monthly earnings of the servicemen for 18 branch establishments of the company.

As you point out, the section 7(h) exemption applies only to employees employed by a retail or service establishment, i.e., an establishment 75 percent of whose annual dollar volume of sales of goods or services is (1) not for resale and (2) recognized as retail sales in the industry. (See section 779.412 of Interpretative Bulletin, Part 779 on Retailers of Goods or Services). In reference to the second part of this test, it is the Division's position that exterminator services which require the use of specialized facilities and equipment designed for servicing industrial and commercial buildings, and of a type not ordinarily used in serving the general consuming public, are specialized services which are not traditionally recognized as retail within the meaning of the exemption. Also exterminating services performed regularly and repeatedly for a commercial or industrial firm under a contract covering a period of time are maintenance operations and are not recognized as retail services. Other services performed by exterminators which are not retail are extensive repair work on buildings damaged by termites and soil poisoning work done in connection with new construction. It is not possible to determine from the information you have submitted whether the company's branches identified in your letter are retail or service establishments as defined in the act.

Assuming that a branch does qualify as a retail or service establishment, there are two tests which must be met with respect to each employee for whom the exemption is sought:

1. More than half of the employee's compensation over a representative period (not less than one month) must represent commissions on goods or services. The application of this requirement is discussed at length in 29 CFR 779.416-779.427. The information submitted with your letter indicates the payment to servicemen of a commission of 5% of initial sales of pest control contracts and "a commission of 25% of the total collections each month from the pest control route serviced." No agreement for other compensation is indicated.

2. The employee's regular rate of pay must be in excess of one and one-half times the applicable minimum hourly rate. Unlike the "commissions" test, this requirement applies on a workweek basis. In other words, the exemption will not apply to an employee for any workweek in which his regular rate of pay, computed on the basis of earnings properly attributable to that week, is not more than \$1.875 an hour ($\$1.25 \times 1\frac{1}{2}$). In such a workweek the employees must be paid overtime compensation at the premium rate required by section 7 of the act for all overtime hours worked, which may not be charged against or recovered from earnings paid for or allocable to any other workweek. Computation of the regular rate for employees paid by commissions is explained in sections 778.117 - 778.121 of Interpretative Bulletin, Part 778, on Overtime Compensation, and further discussion on commission employees is found in sections 779.411 - 779.421 of Interpretative Bulletin, Part 779. Section 779.419 where dual systems of payment are discussed may be of interest.

For reasons indicated in the above explanation, the applicability of the section 7(h) exemption can be determined only on the basis of all the facts concerning the nature of business of each particular establishment and the hours of work and compensation of each individual employee. For any branch of the company which is interested in the availability of this exemption, the nearest Regional or Field Office of the Divisions is in a position to ascertain the facts and to give all possible advice and assistance.

Sincerely yours,

1817 Clarence E. Lundquist

Administrator

Enclosures 4

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Regional and Field office list