

FLSA-1048

August 29, 1984

This is in response to your letter, with enclosures, on behalf of the *** You request an opinion concerning the application of section 13(b)(10)(B) of the Fair Labor Standards Act (FLSA) to individuals primarily engaged in the sale of manufactured, or mobile, homes. You also wish to know if a mobile home dealership qualifies as a retail establishment for purposes of applying FLSA section 7(i).

FLSA requires that an employee who is covered under its provisions and not otherwise exempt be paid a minimum wage of at least \$3.35 an hour and overtime pay of not less than one and one-half times his or her regular rate of pay for all hours worked in excess of 40 in a workweek. Section 13(b)(10)(B) exempts from the overtime pay requirements of section 7 "any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers." In determining whether the establishment and the employee are primarily engaged in selling the vehicles named in section 13(b)(10)(B), the term "primarily" is regarded as meaning more than 50 percent of the establishment's gross annual dollar volume or the employee's worktime as the case may be.

In the past, the Wage and Hour Division has distinguished between manufactured housing that could be considered a "trailer" and the type of mobile homes that, even though transportable, were actually intended to be a permanent structure on a fixed site. This distinction was based on (1) whether the mobile home was designed to be towed as a trailer (i.e., with its own suspension system, running gear, etc.) and (2) whether the mobile home was intended for use as a fixed-site residential structure. In other words, the classification of the mobile home as a "trailer" and, consequently, the proper application of FLSA section 13(b)(10)(B) depended upon not only what the mobile home was considered at the time of sale but, also, the purpose for which it could subsequently be used. The current instructions in our Field Operations Handbook (FOH) also appear to place undue emphasis on the trailer's degree of mobility and its possible emplacement on a fixed site as guidelines for applying the exemption to the salespersons.

In addition to carefully evaluating developments in manufactured housing, we have reviewed our enforcement activity under FLSA involving the industry. There appears to be a sufficient basis for revising our administrative position in this matter to insure a more uniform application of the exemption. The safety standards for transportation systems of mobile homes prescribed by the U.S. Department of Housing and Urban Development, referred to in your letter as the HUD Code, provide useful guidance in this regard. Therefore, a mobile home built on a permanent chassis or transportation system with a drawbar and coupling mechanism, frame, running gear assembly, and lights will be considered a "trailer" for purposes of applying FLSA section 13(b)(10)(B). Further, the exemption's applicability will not be affected by the fact that the trailer is ultimately emplaced as a permanent residence on a fixed site *** this intention is documented at the

time of the sale. Appropriate FOH instructions reflecting this policy will be drafted and issued to our field staff as soon as possible. When this revision has been made, you will be furnished a copy.

Section 7(i) of the Act provides an overtime pay exemption for any employee of a retail or service establishment if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate of \$3.35, and (2) more than half of his or her compensation for a representative period (not less than one month) represents commissions on goods or services. In order for an employee to come within the section 7(i) exemption from the Act's overtime pay requirements, the employee must be employed by an establishment which meets the definition of a "retail or service establishment" in FLSA section 13(a)(2). This section of the Act defines a retail or service establishment as an establishment 75 percent of whose annual dollar volume of sales of goods or services is (1) not for resale and (2) is recognized as retail sales in the industry.

We regret any misunderstanding that members of the Federation may have concerning the application of the section 7(i) exemption to employees of mobile home dealerships. In his letter of November 17, 1982, to which you refer, Assistant Regional Administrator Olson's statement that "Sales of mobile homes designed as a permanent home generally lack the retail concept" is correct and continues to represent the enforcement policy of the Division.

However, in view of our decision to revise the position of the Division concerning the classification of a "trailer", the characteristics of a permanent residence described in that letter would no longer be an accurate criteria for determining the retail nature of a mobile home sale. Therefore, the sales of mobile homes or manufactured housing that are considered to be a "trailer" as defined above will also qualify as retail sales for purposes of applying FLSA section 7(i) to salespersons employed by the dealership.

Thank you for the opportunity to respond to your concerns in this matter.

William M. Otter
Administrator