

**FLSA2018-2**

January 5, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division (“WHD”) reissue Opinion Letter FLSA2009-8. On January 14, 2009, then-Acting WHD Administrator Alexander J. Passantino signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter “for further consideration” and stated that it would “provide a further response in the near future.”

We have further analyzed Opinion Letter FLSA2009-8. From today forward, this letter, which is designated FLSA2018-2 and reproduces below the verbatim text of Opinion Letter FLSA2009-8, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.

I thank you for your inquiry.

A handwritten signature in black ink, appearing to read "Bryan L. Jarrett".

Bryan L. Jarrett
Acting Administrator

Dear **Name***:

This is in response to your request for an opinion regarding the application of section 7(i) of the Fair Labor Standards Act (FLSA)* to your client’s sales/service technicians. You inquire whether your client’s business qualifies as a retail or service establishment and whether the wage payment plan qualifies as commission compensation within the meaning of section 7(i).

You state that your client’s company primarily engages in drain cleaning and other minor plumbing repair and replacement services involving such items as water heaters, disposals, and toilets. Such services and sales are provided principally to residential homeowners; some services and sales, however, are provided to retail stores and restaurants. The company’s

* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

sales/service technicians meet with the customers, diagnose the problem, price the job based on published prices of the company, and perform the services. Every two weeks, the technicians receive 23% of the revenues attributable to their labor and 5% of the revenue attributable to their parts sales. Additionally, they are paid a monthly commission bonus (between 0% and 10%) based on their gross sales for the previous calendar month. These employees are guaranteed a wage greater than 1½ times the minimum wage, but they typically earn three to six times the minimum wage. In a telephone conversation with a member of my staff, you indicated that 80 to 90 percent of your client's annual income is derived from retail sales or services to private homeowners. The company does not engage in new construction plumbing work under contract with general contractors.

Section 7(i) of the FLSA provides an exemption from the overtime pay requirement of the FLSA 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 wage, and (2) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. A "retail or service establishment" is defined as "an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry." *See* 29 C.F.R. § 779.411; and [Wage and Hour Opinion Letter FLSA2004-20 \(Nov. 9, 2004\)](#).

The case law and the legislative history of the exemption for retail or service establishments confirms that the "retail" concept does not apply to all types of businesses. *See Mitchell v. Kentucky Finance Co.*, 359 U.S. 290 (1959). In particular, the retail concept does not apply to construction contractors. *See* 29 C.F.R. §§ 779.317 and .321(c). The retail concept does apply, however, to businesses that supply the general public with household appliances, including those that perform incidental services on such goods when necessary, such as a refrigerator repair shop. *See* 29 C.F.R. §§ 779.318-.320. The retail concept similarly applies to establishments that engage in the retail sale to the general public of plumbing and heating equipment, including the incidental installation of such goods at an additional charge. *See* [Wage and Hour Opinion Letter FLSA2006-22 \(June 23, 2006\)](#). Based on the information provided, it is our opinion that the retail concept applies to your client's business, which provides drain cleaning and minor plumbing repair and replacement services. Your client qualifies as a "retail or service establishment" within the meaning of section 7(i) because more than 75 percent of its annual dollar volume of sales of goods and services is not for resale.

With regard to your second question, your client's wage payment plan of computing employees' compensation on the basis of a percentage of the charge to the customer, such as the charge for labor and/or the charge for service and parts used in repair, would "represent commissions on goods and services" for purposes of applying section 7(i). *See* FOH § 21h04(a). Please be aware that in order for the exemption to apply, the total amount of commission payments must be more than one-half the employee's total compensation for a representative period (not less than one month). *See* 29 C.F.R. §§ 779.415-.417.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your

letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

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