



May 22, 2006

FLSA2006-16

Dear **Name***:

This is in response to your letter inquiring whether “residential” and “roaming” solicitors who solicit charitable donations are exempt outside salespersons under section 13(a)(1) of the Fair Labor Standards Act (FLSA) (copy enclosed). For the reasons that follow, it is our conclusion that soliciting charitable contributions is not exempt “outside sales” work under the FLSA.

Your client is a for-profit professional fundraising business that solicits charitable contributions on behalf of various charitable organizations. The solicitors in question have a primary duty of soliciting donations to charitable organizations through in-person contact in public areas. There are two different types of solicitors: residential solicitors, who solicit in the same geographical area on a regular basis, and roaming solicitors, who travel throughout the country to conduct solicitations. All of the solicitations occur outside of the employer’s place of business. The residential solicitors report to the employer’s office each morning to receive materials needed for the solicitations and report back to the office at the end of the day to communicate the day’s results. The roaming solicitors travel as a team and attend staff meetings in the evenings for discussions related to the solicitations.

The outside sales exemption is set forth in FLSA section 13(a)(1) and is defined in 29 C.F.R. §§ 541.500-.504 (copies enclosed). The regulations addressing the outside sales exemption have been revised since we received your inquiry, and the revised regulations became effective on August 23, 2004 (69 Fed. Reg. 22,122 (Apr. 23, 2004)). An outside sales employee is “any employee”:

- 1) Whose primary duty is:
 - (i) making sales within the meaning of section 3(k) of the [FLSA], or
 - (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- 2) Who is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.

29 C.F.R. § 541.500. Section 3(k) of the FLSA (copy enclosed) defines sale as including “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.”

When the FLSA’s outside sales employee exemption was first defined and interpreted by the Wage and Hour Division, early questions were raised concerning what are qualifying “sales” under this exemption. As described in the 1940 Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition:

[T]he Division has expressed the opinion that the word “sales” as defined in section 3(k) does not cover certain activities which are popularly described as sales. Particular reference is made to the selling of time on the radio, the solicitation of advertising for newspapers and other periodicals and the solicitation of freight for railroads and other transportation agencies. * * * Accordingly, it is deemed desirable to add a further clause which will specifically include within the exemption persons engaged in selling activities of this type.

* * * In extending the scope of the term “outside salesman” to include such employees as radio time, advertising, and freight solicitors, it is not intended to include persons who in a very loose sense are sometimes described as selling “service.”

There have been frequent requests for inclusion within the exemption of outside buyers, both of a general type and the special type employed by renderers (footnotes omitted). It has been alleged that these persons are engaged in selling their employer’s “service” to the person from whom they obtain their goods. While occasionally the phrase “selling service” is used in this sense in common speech, it is obvious that the relationship here is the reverse of that of salesman-customer. Congress might have included an exemption for outside buyers in the act, if it had so desired, but it would clearly be a violation of the Administrator’s power of definition and delimitation to include within an outside salesman exemption the exemption of the



salesman's opposite and counterpart, the outside buyer. Similarly, requests to include as outside salesmen such employees as service men, installation men, delivery men, and collectors must be denied as lying outside the scope of the Administrator's authority.

"Executive, Administrative, Professional . . . Outside Salesman" Redefined, Wage and Hour Division, U.S. Dep't of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition, at pp. 45-46 (Oct. 10, 1940).

The regulations were revised in 1949 to include persons engaged in obtaining orders or contracts for "services" in the definition of outside sales, but the remaining underlying concepts were not changed. *See* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, at pp. 81-82 (June 30, 1949). Accordingly, when applying these principles in response to requests for opinions, the Division has concluded, for example, that soliciting organ and tissue donors by selling the concept of being a donor does not constitute "sales" under the regulations. *See* WH Opinion Letter August 19, 1994 (copy enclosed).

We view the activities of the solicitors of charitable donations that you describe to be very similar to these activities previously determined to be non-exempt. Soliciting promises of future charitable donations or "selling the concept" of donating to a charity does not constitute "sales" for purposes of the outside sales exemption. In the case of your client, the solicitors do not obtain orders or contracts for services or for use of your client's facilities for which a consideration will be paid. Furthermore, the exchange of a token gift for the promise of a charitable donation does not constitute a "sale" or "selling" for purposes of the outside sales exemption. Therefore, it is our opinion that the solicitors, whether "residential" or "roaming," who solicit charitable donations do not qualify for the outside sales exemption under the FLSA and must be paid in accordance with the FLSA's minimum wage and overtime requirements.

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 issue 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. This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. *See* 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that this letter is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Enclosures
FLSA §§ 3(k) and (s) and 13(a)(1)
29 C.F.R. §§ 541.500-.504
WH Opinion Letter August 19, 1994

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