



October 12, 2004

FLSA2004-22NA

Dear *Name **,

This is in response to your request for an opinion regarding the application of Section 13(b)(10)(A) of the Fair Labor Standards Act (FLSA) to an employer and its salespersons selling cars and related merchandise via the internet.

Customers who are interested in purchasing a car select the make, mode, and configuration of a car from the employer's website. The submitted request is then assigned to a salesperson. The salesperson determines which vehicles are available from participating dealers and contacts the customer. The salesperson also sells financing and related merchandise, such as vehicle service contracts and security systems. The salespersons at issue have no duties apart from the sale of vehicles, financing, and related merchandise.

For each vehicle sold, the employer enters into a vehicle confirmation agreement with a participating dealer followed by the employer entering into a separate agreement with the customer for the sale of the motor vehicle. Generally, the titling of the vehicle occurs between the customer and the participating dealer, but the employer bears the risk of ownership between the execution of the deal with the dealer and consummation of the deal with the customer. In those instances where the customer fails to consummate the transaction, the employer does take title to the vehicle. In that circumstance, the employer might attempt to sell the car to another customer or alternatively sell the car to another dealer. With the exception of a small amount of sales to other dealers, all sales are made to the ultimate purchasers of the vehicles. Sales of cars to dealers, after a customer fails to consummate a transaction, comprise less than one per cent of the employer's sales.

The employer is licensed in the *Name ** as a vehicle dealer, and each salesperson holds a *Name ** vehicle salesperson license. The sale of vehicles is the primary line of business at the establishment where the salespersons are employed. The employer is not owned by, an owner of, or an affiliate of any entity which manufactures vehicles.

In these circumstances you believe that the exemption set forth in Section 13(b)(10)(A) would apply to the employer and the salespersons. Section 13(b)(10)(A) exempts from the overtime pay requirements of Section 7 "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers."

An establishment will qualify for this exemption if the following two tests are met:

- (i) The establishment must not be engaged in manufacturing; and
- (ii) The establishment must be primarily engaged in the business of selling automobiles, trailers, trucks, or farm implements to the ultimate purchaser.

When these tests are met by an establishment, the exemption will be available for salesmen, partsmen, and mechanics employed by the establishment who are primarily engaged in the selling or servicing of the named items. See 29 C.F.R. 779.372(b). The term "primarily" is regarded as meaning more than 50 percent of the establishment's gross annual dollar volume or the employee's work time as the case may be. See 29 C.F.R. 779.372(d).

As the employer in question is engaged in selling automobiles to the ultimate consumer and not engaged in manufacturing, Section 13(b)(10)(A) will apply if more than 50 percent of the establishment's gross annual dollar volume is derived from the sales of automobiles or trucks, and the exemption will be available to salesmen who spend more than 50 percent of their time selling automobiles and trucks. As



you may be aware, the Ninth Circuit held in Gieg v. Howarth, 244 F.3d 775 (9th Cir. 2001), that the Section 13(b)(10)(A) exemption does not apply to employees selling financing and other products such as service contracts. The court stated that, “the exemption plainly applies only to the sales and servicing of automobiles.” 244 F.3d at 776. Therefore, it is important to consider only the time spent selling or servicing the vehicles named in Section 13(b)(10) when evaluating the applicability of the exemption.

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

Sincerely,

Barbara R. Relford
Office of Enforcement Policy
Fair Labor Standards Team

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