



June 23, 2006

FLSA2006-22

Dear *Name**:

This is in response to your request for an opinion on behalf of your client, a franchisee association. A number of association members have stated they have experienced problems with the application of the section 7(i) (copy enclosed) exemption of the Fair Labor Standards Act (FLSA). The association maintains that this exemption eliminates the requirement to pay overtime to many of its members' service technicians. You are requesting clarification as to the application of the 7(i) retail and service exemption to association members if they can produce the appropriate supporting documentation of eligibility for this exemption.

You state that the following facts are common to the majority of association members, unless otherwise noted:

- Each association member has a franchise agreement with a corporation under which a member may use the corporate marks in connection with plumbing repair services and pipe inspection services, and may utilize licensed plumbers or secure licensing as plumbing contractors for the limited purpose of performing plumbing repair services;
- Association members do not install bathrooms, kitchens, or laundry rooms in new construction or remodeled construction;
- Most customers contact association members on an as-needed emergency or other basis, with no contract in place at the time of the call to the association member;
- Service technicians provide manual labor (such as opening clogged drains using specialized equipment) and sell corporate products (such as drain cleaners) to customers. The mix of sales/service varies on a job-to-job basis;
- Although the mix of customers served varies among association members, the bulk of the members' customers are residential customers, who are the final users of sewer, drain, and pipe cleaning services, as well as septic tank cleaning services, plumbing repair services, and pipe inspection services;
- Some association members also provide services to commercial locations such as restaurants or apartment buildings;
- By virtue of the nature of the sales and services provided, none of the sales and services by service technicians are for resale;
- Association members advertise their services to the general public in a variety of ways, including, but not limited to, billboards, radio spots, telephone books, and participation in televised events such as the Tournament of Roses Parade;
- Service technicians are generally paid on a commission basis for service provided and for sales of product. More than one-half of their compensation comes from commission payments;
- The equivalent hourly rate of pay computed from such commission payments exceeds one and one-half times the minimum hourly wage of \$5.15 per hour; and



- Most association members meet the 75% of volume test, but acknowledge that individual members must provide appropriate documentation to prove they are meeting the test.

Section 7(i) of the FLSA provides an exemption from the overtime pay requirement 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, \$5.15 per hour; and,
2. more than half of the employee's compensation for a representative period (not less than one month) are from 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 of both) is not for resale and is recognized as retail sales or services in the particular industry." 29 C.F.R. § 779.411.

A retail or service establishment is one which sells goods or services to the general public and serves the everyday needs of the community in which it is located. See 29 C.F.R. § 719.318(a). It "performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process . . . It provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living." 29 C.F.R. § 779.318(a); see also Wage and Hour Opinion Letter November 9, 2004 (copy enclosed). Additionally, the regulations state:

Certain business establishments engage in the retail sale to the general public, as goods are delivered to purchases at a stipulated price, of items such as certain plumbing and heating equipment, electrical fixtures and supplies and fencing and siding for residential installation. In addition to selling the goods they may also install, at an additional charge, the goods which are sold. Installation which is incidental to a retail sale (as distinguished from a construction or reconstruction contract to do a building alteration, or repair job at a contract price for materials and labor required...) is considered an exempt activity. By way of example, if the installation for the customer of such goods sold to him at retail requires only minor carpentry, plumbing or electrical work (as may be the case where ordinary plumbing fixtures, or household items such as stoves, garbage disposals, attic fans, or window air conditioners are being installed or replaced), or where only labor of the type required for the usual installation of chain link fences around a home or small business establishment is involved, will normally be considered as incidental to the retail sale of the goods involved (unless, of course, the transaction between the parties is for a construction job at an overall price for the job, involving no retail sales of goods as such).

29 C.F.R. § 779.321(d). Thus, while construction contractors, plumbing contractors, and other similar contractors lack a retail concept, companies that provide general repair services for the public (such as auto repair shops, household refrigerator repair shops and clock repair shops) can qualify as retail or service establishments. See 29 C.F.R. §§ 779.317-.321. Such repair services may qualify under section 7(i) even when they are sometimes performed for a commercial user rather than a homeowner, so long as the commercial repair services do not require the use of specialized facilities or equipment and the services are not different services than those provided for the general consuming public. See 29 C.F.R. §§ 779.318(b), .329; Wage and Hour Opinion Letters July 14, 1982 and October 19, 1981 (copies enclosed).

The information you have provided indicates that many association members are service companies rather than plumbing contractors. The members are providing plumbing services that serve the everyday needs of the community. Plumbing contractors, on the other hand, are primarily



engaged in home construction and remodeling projects involving major structural or installation work. The types of services your members provide are more akin to a repair shop than a plumbing contractor. See 29 C.F.R § 779.314. Therefore, if 75% or more of a particular member's annual dollar volume of sales of goods and services is not for resale and constitutes retail sales or services, the member would meet the definition of retail or service establishment for purposes of the section 7(i) exemption.

The section 7(i) exemption may thus be applied to employees of such members if the employee's regular rate of pay is in excess of one and one-half times the minimum wage, \$5.15 per hour, and more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. Whether the employee's earnings will, in fact, qualify as commissions within the meaning of section 7(i) of the FLSA will, of course, depend upon the details of the compensation plan, and an evaluation of the employee's compensation over a "representative period."

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.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Enclosures

Wage and Hour Opinion Letters November 9, 2004
Wage and Hour Opinion Letters July 14, 1982
Wage and Hour Opinion Letters October 19, 1981

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