



FLSA2007-4

January 25, 2007

Dear **Name\***:

This is in response to your correspondence requesting an opinion regarding whether timeshare salespeople at resort properties may qualify for the outside sales exemption from the minimum wage and overtime requirements provided by section 13(a)(1) of the Fair Labor Standards Act (FLSA) and the implementing regulations at 29 C.F.R. Part 541.<sup>1</sup> It is our opinion that the salespeople do not qualify for the outside sales exemption.

You describe three very similar groups of employees whose primary duty is to promote and to sell timeshare interests in resorts to prospective owners. The first group of employees, Group One, works from locations some distance (two to five miles) away from the resort sites. Groups Two and Three work primarily at the resorts.

Group One employees greet the “prospects,” who have been scheduled by employees not at issue here, at the sales office and show them an introductory film. Group One employees do not have an “office” at the sales office, but merely gather at the facility a few minutes before they are scheduled to meet the prospects. After the film, the salesperson drives the prospects to the resort and gives them a tour of the property, including the residences, buildings and grounds, streets, walking paths, spas, golf courses, and other facilities the resort property offers. After touring the property and if the prospect decides to purchase a timeshare interest, the Group One salesperson returns the prospects to the sales office to handle the closing process. The total process takes 2-3 hours, and the average salesperson gives 1-3 tours a day for a total of 30-40 hours a week, but may work more from time to time.

Group Two employees perform work almost identical to that performed by Group One employees, except that Group Two employees meet the prospects at the resort instead of at the off-site sales office, and therefore do not drive the prospects to and from the resort. Group Three employees are likewise very similar except that they have a larger role in scheduling their prospects. Their prospects come from people who already are staying at the resort as guests and who respond to promotional incentives, who request to see a presentation, or who are directly solicited by the salesperson. In all other material respects, all salespeople perform the same duties: greeting prospects, showing an introductory film, giving a tour of the property and any other facilities or attractions the resort property offers, closing the deal with interested prospects, and engaging in occasional sales-related training.

Section 13(a)(1) of the FLSA provides an exemption from the statute’s minimum wage and overtime requirements for “any employee employed . . . in the capacity of outside salesman.” The Department’s regulations define that phrase as including “any employee”:

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<sup>1</sup> Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at [www.wagehour.dol.gov](http://www.wagehour.dol.gov).

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, 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. "Primary duty" means "the principal, main, major, or most important duty that the employee performs." 29 C.F.R. § 541.700. FLSA section 3(k) defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *See also* 29 C.F.R. § 541.501.

Under 29 C.F.R. § 541.701, "[t]he phrase 'customarily and regularly' means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed 'customarily and regularly' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks."

The regulations provide further guidance regarding what it means to be "engaged away from the employer's place of business" for purposes of 29 C.F.R. § 541.500. "The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls." 29 C.F.R. § 541.502. Outside sales employees may perform promotional work as an exempt outside sales activity if it "is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations." 29 C.F.R. § 541.503. Whether promotional work is to be considered exempt is determined on a case-by-case basis. *Id.*

You ask that we assume that the selling activities of the individuals in question culminate in their making sales within the meaning of section 3(k) of the FLSA, and that all sales representatives are engaged in making their own sales or in activities that are directly and closely related to their own sales efforts as required by the regulations. Therefore, the question that remains is whether the salespeople are customarily and regularly engaged away from the employer's place of business in performing their primary duty of making sales. A resort such as the one you describe is generally maintained on a permanent basis as a location of the employer and is staffed with the necessary personnel for maintaining the resort facilities. We understand that although the employer sells timeshare interests in some of the properties on the resort, the employer also retains a continuing business interest in the remaining resort facilities, and in maintaining both the resort and the timeshare units that have been sold. Under these facts, the entire resort must be considered the employer's place of business. This position is consistent with the Department's previous conclusions that employees selling developed campsites from within a "condominium" campground, and apartment rental agents who never leave the apartment community, are not exempt outside sales employees because they never

leave the employer's place of business. *See* Wage and Hour Opinion Letter July 31, 1973 (campground sales employees); Wage and Hour Opinion Letter Dec. 21, 1971 (apartment rental agents) (copies enclosed). The Department has reached a different conclusion in cases involving real estate sales employees selling lots of land from a model home on a subdivision, who customarily and regularly leave the model home, because the employer does not maintain a continuing interest in the subdivision lots once they are sold or in the other facilities in the subdivision, and thus these areas are not part of the employer's place of business. Wage and Hour Field Operations Handbook § 22e06(c).

Although the Department has not previously taken a position regarding whether the section 13(a)(1) outside sales exemption applies to employees who sell timeshares on site at resorts, *see* Wage and Hour Opinion Letter Feb. 1, 1985 (copy enclosed), after giving the matter careful consideration, the Department believes that the outside sales exemption does not apply to employees who sell timeshares on site at resorts because these employees are not "engaged away from the employer's place or places of business." 29 C.F.R. § 541.500. You explain that Group One employees split their time between the sales office and the resort property. While you say that the Group One employees do not have an "office" at the sales office, it appears to be property of the employer, and the Group One employees return there to perform deal closing functions. Therefore, this qualifies as a place of business of the employer. Similarly, as described above, the entire resort qualifies as a place of business of the employer. All of the Group One employees' sales activities occur either at the sales office or at the resort property, both of which qualify as the employer's places of business. Therefore, it is our opinion that the Group One employees do not satisfy the outside sales exemption because they do not engage in sales away from the employer's place or places of business.

Analysis of the Group Two and Three employees is similar. While you do not indicate where the Group Two and Three employees start their sales presentations, we presume that there is a sales office or area from which the tours regularly start that is analogous to the model home. Therefore, as with the Group One employees, Group Two and Three salespeople never leave the employer's place of business, namely, the resort, and therefore do not qualify for the outside sales exemption.

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.

We trust that the above is responsive to your inquiry.

Sincerely,

Paul DeCamp  
Administrator

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