

No. 06-1516

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTRACOMM, INC.; BABACK HABIBI,

Plaintiffs-Appellants,

v.

KEN S. BAJAJ, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*

By order dated March 19, 2007, this Court asked the Department of Labor ("Department" or "DOL") to file an amicus brief addressing the Department's interpretation of its regulation at 29 C.F.R. 541.708 (2006), which describes "combination exemptions." Specifically, the court asked the following questions:

Can an employee qualify for the combination exemption without independently qualifying for any other exemption? If so, what standards guide the determination of whether the requirements of such an exemption are met? For example, if the administrative or executive employee exemptions are at issue, must an employee satisfy the salary basis test to qualify for a combination exemption when the characteristics of other exemptions (e.g., the outside sales exemption) are considered?

The Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in response to the Court's order.

ARGUMENT

THE DEPARTMENT'S COMBINATION EXEMPTION REGULATION PERMITS CONSIDERING TOGETHER FLSA-EXEMPT DUTIES OF INDIVIDUAL EXEMPTIONS FOR THE PURPOSE OF ESTABLISHING A PRIMARY DUTY, BUT IT DOES NOT RELIEVE EMPLOYERS OF THEIR BURDEN TO ESTABLISH THE OTHER REQUIREMENTS OF EACH INDIVIDUAL EXEMPTION BEING COMBINED

1. The Fair Labor Standards Act of 1938 ("FLSA" or "Act") generally requires employers to pay a minimum wage to covered employees, see 29 U.S.C. 206(a), and compensate these employees at one and one-half times their regular rate of pay for all hours worked in excess of forty hours in a workweek. See 29 U.S.C. 207(a)(1). Section 13(a)(1) of the Act, however, exempts from these minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman[,] as such terms are defined and delimited from time to time by regulations of the Secretary[.]" 29 U.S.C. 213(a)(1).

The Secretary has "broad authority to 'defin[e] and delimi[t]' the scope of the exemption[s]" provided by Section 13(a)(1). *Auer v. Robbins*, 519 U.S. 452, 456 (1997). Pursuant to this authority, the Department has promulgated regulations at 29 C.F.R. Part 541 defining and delimiting the exemptions for executive, administrative, professional, outsides sales, and

computer employees ("Part 541 exemptions").¹ When applying the Department's FLSA regulations, courts must be guided by the principle that the Act's "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

2. The Department's regulation at 29 C.F.R. 541.708 states:

Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

29 C.F.R. 541.708 (2006). This regulation may come into play where an employee does not meet the primary duty requirement of any individual Part 541 exemption. See *Auer v. Robbins*, 65 F.3d 702, 722 (8th Cir. 1995) ("[A]n employee whose primary duty is neither management nor administration may fall under a combination exemption based upon his administrative and management responsibilities."), *aff'd on other grounds*, 519 U.S.

¹ The Department revised these regulations in 2004. See 69 Fed. Reg. 22,122, 22,126 (Apr. 23, 2004). The revised Part 541 regulations became effective on August 23, 2004. *Id.* These regulations apply to this case. See *IntraComm v. Bajaj*, No. 05-0955, slip op. at 3, 6-7 (E.D. Va. Apr. 19, 2006).

452 (1997).² In such cases, an employee may nonetheless be exempt from the FLSA's minimum wage and overtime pay requirements pursuant to the combination exemption, which permits considering together different exempt duties for purposes of meeting the primary duty test. See 29 C.F.R. 541.708 (2006) ("Employees who perform a combination of exempt duties . . . may qualify for exemption.").

The regulation's reference to "a combination of *exempt* duties" (emphasis added) makes clear that an employee must satisfy each "duties" element contained in the individual Part 541 exemptions being combined, except that the work need not be the employee's "primary duty." 29 C.F.R. 541.708 (2006). Similarly, the regulation's example of an employee whose primary duty involves "a combination of *exempt* administrative and *exempt* executive work" (emphasis added), and statement that "work that is exempt under one section of this part will not defeat the exemption under any other section," emphasize that an employee must satisfy the requirements, other than the primary duty requirement, of the individual Part 541 exemptions being combined (e.g., the salary tests contained in the executive,

² While *Auer* addresses the combination exemption as it existed prior to the 2004 revisions to the Part 541 regulations, see 29 C.F.R. 541.600 (2003) ("former" regulation), those revisions did not substantively change this exemption. See *infra*, pp. 9-10. Thus, cases and opinion letters interpreting the former regulation remain good law.

administrative, and professional exemptions). See 29 C.F.R. 541.702 (2006) ("The term 'exempt work' means all work described in §§ 541.100, 541.101, 541.200, 541.300, 541.301, 541.302, 541.303, 541.304, 541.400 and 541.500[.]").

Opinion letters from the Department's Wage and Hour Division show that DOL has consistently interpreted this exemption as allowing the combination of two or more sets of duties that separately would be exempt under an individual Part 541 exemption if they qualified as the employee's primary duty, to form a combined primary duty of exempt work. See Wage and Hour Opinion Letter dated July 31, 1951, at 2 (an employee who performs a combination of duties that, taken separately, would meet the requirements of an individual Part 541 exemption except that the work is not the employee's primary duty, will be exempt under the combination exemption regulation if the employee's duties, when combined, constitute her primary duty); Wage and Hour Opinion Letter dated Aug. 11, 1943, at 2 ("[I]n proper cases a combination exemption under two or more sections of Regulations, Part 541, may operate to exempt an employee performing some duties falling within more than one of these sections.").³ The Department's interpretation of its own regulation contained in these opinion letters is entitled to

³ Copies of the Wage and Hour Opinion Letters cited in this brief are included in the addendum. These copies are redacted to protect identifying information.

controlling deference. See *Auer*, 519 U.S. at 461-62 (deferring to DOL's interpretation of its own regulation in amicus brief); *Acs v. Detroit Edison, Co.*, 444 F.3d 763, 769 (6th Cir. 2006) (opinion letter interpreting DOL regulation entitled to controlling deference); *Belt v. EmCare, Inc.*, 444 F.3d 403, 415-16 (5th Cir.) (opinion letter, field operations handbook, and amicus brief interpreting DOL regulation entitled to controlling deference under *Auer*), *cert. denied*, 127 S. Ct. 349 (2006).

Thus, contrary to the employer's argument in this case, see Br. of Appellees/Cross Appellants at 24-25, the combination exemption cannot be used to avoid the other requirements of the Part 541 exemptions, including the salary basis test that applies to the exemptions for executive, administrative, and professional employees, 29 C.F.R. 541.100(a)(1), 541.200(a)(1), and 541.300(a)(1) (2006), respectively.⁴ See *Shockley v. City of Newport News*, 997 F.2d 18, 25 (4th Cir. 1993) (to successfully claim combination executive-administrative exemption, city had to prove *both* that police officers were salaried, and that each officer's primary duty was a combination of both management and administration); *Condren v. Sovereign Chemical Co.*, 142 F.3d

⁴ These salary tests generally require that: (1) an employee be paid on a salary basis, which is defined in 29 C.F.R. 541.602 (2006); and (2) that the employee receive at least \$455 per week. See, e.g., 29 C.F.R. 541.100(a)(1) (2006). The exemption for outside sales employees does not include a salary requirement. See 29 C.F.R. 541.500(c) (2006).

432, 1998 WL 165148, at *2, *6 (6th Cir. 1998) (unpub'd opinion) (employee must meet each requirement of exemption, including salary test, "either outright or through the combination exemption").⁵ As the Fifth Circuit has stated, the combination exemption applies only where "(1) an employee performs more than one type of work that would be exempt except that (2) neither type of work alone can be termed the employee's primary duty, but (3) all of the putatively exempt work taken together constitutes the employee's primary duty." *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1232 (5th Cir. 1990).

3. A number of courts have recognized that when an employer combines duties from an executive, administrative, or professional exemption with duties from the outside sales exemption to establish a combination exemption, the salary basis test that applies to the former exemptions also applies to the combination exemption. See *Condren*, 1998 WL 165148, at *2, *6; *Ballou v. DET Distributing Co.*, No. 3-03:1055, 2006 WL 2035729, at *17 (M.D. Tenn. July 17, 2006) (employees not paid on a salary basis cannot qualify for a combination executive-outside sales exemption); *Edwards v. Alta Colleges, Inc.*, No. CIVASA03CA05380G(NN), 2005 WL 578333, at *10 (W.D. Tex. Jan. 28, 2005) (applying administrative exemption's salary test in

⁵ The Sixth Circuit permits citation of its unpublished opinions without limitation. See 6th Cir. R. 28(g); cf. Fed. R. App. P. 32.1(a) (2007).

analyzing whether employee qualified as exempt under a combination administrative-outside sales exemption). These decisions are consistent with the Department's longstanding interpretation. See Wage and Hour Opinion Letter No. 298, 61-66 CCH-WH ¶30,901 (Sept. 25, 1964) (employee performing executive and outside sales duties must meet the salary test for executive employees in order to be exempt as a combination executive-outside sales employee under the Part 541 regulations); July 31, 1951 Opinion Letter, at 2 (employee must meet the salary requirements of the executive exemption to be exempt under a combination executive-outside sales exemption). These opinion letters are entitled to controlling deference under *Auer*. See *supra*, pp. 5-6.

Thus, there is no basis for applying the combination exemption differently, i.e., without a salary requirement, when an employer relies on an employee's outside sales duties to establish such an exemption. Indeed, because a combination exemption by definition requires reliance on at least two exemptions, it defies logic to conclude that including outside sales duties in a combination exemption should eliminate the compensation requirements that generally apply to the other exemptions. As discussed above, there is nothing in the language of the regulation to support this conclusion.

Interpreting the combination exemption regulation as relieving an employer of its burden to establish all of the requirements of each exemption being combined, with the exception of the primary duty element, and instead permitting resort to a new, hybrid exemption, would be inconsistent with Section 13(a)(1) of the FLSA, which expressly exempts only bona fide executive, administrative, professional, outside sales, and computer employees. See *Dalheim*, 918 F.2d at 1232 ("[A]n employer cannot tack various nonexempt duties and hope to create an exemption."). It also would allow employers effectively to usurp the Secretary's authority to define and delimit these exemptions, see 29 U.S.C. 213(a)(1).

4. Contrary to the employer's suggestion in this case, see Br. of Appellees/Cross Appellants at 30-31, the 2004 revisions to the Part 541 regulations did not substantively change the scope of the combination exemption. Rather, the Department expressly stated that it was not proposing any substantive changes to the combination exemption. See 68 Fed. Reg. 15,560, 15,573 (Mar. 31, 2003) (indicating in its Notice of Proposed Rulemaking that most of the proposed regulations in Subpart H, including the combination exemption regulation (proposed section 541.707), "have been moved from the existing regulations without substantial change, although some changes have been made to

simplify and update the current regulations").⁶ While the Department deleted some language included in the former version of the combination exemption regulation, such deletions were made throughout the revised rule and were "intended to consolidate and streamline the regulatory text, reduce unnecessary duplication and redundancies, [and] make the regulations easier to understand and decipher when applying them to particular factual situations." See 69 Fed. Reg. at 22,126. Thus, the 2004 revisions to the Part 541 regulations did not substantively change the combination exemption.

5. Here, the district court determined that Mr. Habibi could not qualify for a combination administrative-outside sales exemption because he was paid less than the salary required under the administrative exemption and did not customarily and regularly sell outside his employer's place of business. See *IntraComm v. Bajaj*, No. 05-0955, slip op. at 7-8 (E.D. Va. Apr.

⁶ The Department made only one change to the combination exemption between the proposed and final rules. Specifically, the Department revised an example in the proposed rule - stating that "an employee who works forty percent of the time performing exempt administrative duties and another forty percent of the time performing exempt executive duties may qualify for exemption," 68 Fed. Reg. at 15,596 - to avoid the suggestion that "an employee who works 40 percent of the time performing exempt administrative duties would be nonexempt absent the additional time spent on executive duties". 69 Fed. Reg. at 22,190. Because such a suggestion was contrary to the Department's revised regulation defining "primary duty," the Department removed the 40 percent reference and replaced it with language consistent with the revised regulation's definition of the term "primary duty." *Id.*


19, 2006) (concluding that Mr. Habibi could not qualify for a combination exemption because he did not perform any exempt work). Assuming the correctness of these underlying factual determinations,⁷ the district court properly denied the combination exemption.⁸

Respectfully submitted,

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⁷ For purposes of this amicus brief, the Secretary assumes the facts as set out by the district court.

⁸ In context, we do not believe that the district court's statement that "the combination exemption does not apply to Habibi because he does not qualify for either the outside salesman or administrative employee exemption," see *IntraComm*, No. 05-0955, slip op. at 8, should be interpreted as stating that the combination exemption only applies where an employee independently satisfies all of the requirements of an individual Part 541 exemption, including the requirement that the work be the employee's "primary duty." Such an interpretation would not be correct.

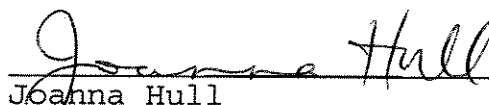
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c) (5) and (d), and 32(a) (7) (C), I certify the following with respect to the foregoing *Amicus* Brief for the Secretary of Labor:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) (7) (B) because this brief contains 2,333 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a) (7) (B) (iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) (5) and the type style requirements of Fed. R. App. P. 32(a) (6) because this brief has been prepared in a monospaced typeface with 10.5 characters per inch, using Microsoft Office Word 2003, Courier New font, 12 point type.

Date: April 23, 2007


Joanna Hull
Attorney

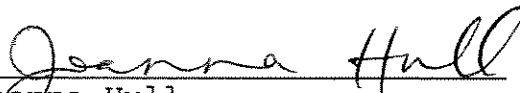
CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2007, I sent by Federal Express overnight delivery the original and 7 copies of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* to the Clerk of the United States Court of Appeals for the Fourth Circuit.

I also certify that 2 copies of this brief have been served on each of the following counsel of record by Federal Express overnight delivery this 23rd day of April, 2007:

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ADDENDUM

August 11, 1943

Dear .

This will reply to your letter of June 14, 1943 relative to the minimum wage to be paid to two of your employees. You state that you publish a weekly newspaper with a circulation of 3,200. I assume both of the employees in question are within the general coverage of the Fair Labor Standards Act by reason of their being engaged in interstate commerce or in the production of goods for interstate commerce.

One of the employees does secretarial, **bookkeeping**, and stenographic work while at the same time serving as society editor and copy reader. She would not seem to qualify for any applicable exemption from the provisions of the Act and would therefore seem to be entitled to the minimum wage benefits of the Act and the wage order for the Printing and Publishing and Allied Graphic Arts Industry, a copy of which is enclosed, which prescribes a minimum hourly rate of 40 cents, effective June 14, 1943.

The second employee is Editor-Publisher-Manager of the paper. He functions in an editorial capacity, collecting and writing news articles, headlines and editorials. He also acts as advertising manager, make-up editor and has charge of personnel. You inquire whether his salary should be at least \$50 a week since he is a professional and administrative, as well as an executive, employee. In connection with this employee, it should be noted that the highest minimum wage which may be required by the Wage and Hour Division under the Fair Labor Standards Act is 40 cents an hour.

I assume that what you have in mind is whether this employee must receive a minimum of \$50 a week or \$200 a month to qualify as an employee engaged in an executive, administrative or professional capacity in order to be exempt from the minimum wage and overtime provisions of the Act under section 13(a)(1) thereof. This is the minimum salary required to qualify your employee for the administrative or professional exemptions. The salary requirement for executive employees is a minimum of \$30. a week.

However, you will note from pages 18-19 of the enclosed manual that the salary requirement is only one of the conditions which must be satisfied in order that an employee may qualify for any of these three exemptions. The Editor-Publisher-Manager may perform some executive, some administrative and some professional duties. The Division has recognized that in proper cases a combination exemption under two or more sections of Regulations, Part 541, may operate to exempt an employee performing some duties falling within more than one of these sections. Your attention is directed to the fact that the 20 percent rule with respect to nonexempt work generally applicable under section 541.1(F) is inapplicable to an employee who is in sole charge of an independent establishment or a physically separated branch establishment. As to nonexempt work which defeats the professional exemption, see section 541.3(A)(4) of the Regulations.

For a combination exemption under two or more of sections 541.1, 541.2, or 541.3, an employee must receive the highest rate for any such exemption or at least \$50 a week.

You will note from the manual that some of the work performed by this employee is considered to be nonexempt work. On the basis of the facts presented, therefore, it is impossible for me to tell whether he qualifies for exemption. Since the application of the exemptions under consideration depends on all the facts in a particular case, you may not be able to determine whether the employee in question is exempt. Further help may be obtained from the regional office of the Division located at 4094 Main Post Office, West Third and Prospect Avenue, Cleveland 13, Ohio.

Very truly yours,

L. Metcalfe Walling
Administrator

Enclosures (2)

440051

July 31, 1951.

Dear

I regret that it has been impossible to reply earlier to your letter addressed to the attention of Assistant Solicitor Donald W. Murtha, in which you request information as to the application of the exemption provided in section 13(a)(1) of the Fair Labor Standards Act to an employee whose activities you describe.

You state that you represent a firm which is engaged in the business of purchasing, preparing and selling perishable farm products. These products are purchased from individual producers located outside of the State and sold to restaurants and food stores and other wholesalers within the State. You state that because of the nature of the merchandise handled it is the custom in the trade for retailers generally to place orders twice each week. Therefore, the person doing the selling supplements his calls on customers by using the telephone to solicit and take orders from many of the customers.

The firm is presently employing an employee on a salary basis of over \$100 per week to perform a combination of duties including selling and executive and possibly some administrative work. This employee will make no deliveries of merchandise and will make outside calls to solicit and obtain orders and will use the telephone for such sales work.

You do not describe the nature of the executive and administrative work performed by the employee nor do you indicate the amount of time spent in the various categories of the employee's work. You state, however, that you have studied the Regulations, Part 541 and the explanatory bulletin concerning these regulations. You note that section 541.600 of the explanatory bulletin permits the "tacking" of work which

is exempt under one section of the regulations to work which is exempt under another section for the purpose of determining the application of the exemption.

You point out, however, that the exemption provided by the regulations for executive employees requires that the primary duty of the employee shall consist of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof and the primary duty of an employee who is exempt as an administrative employee must consist of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers. You state that inasmuch as the various functions performed by the employee who is employed in a combination of duties may be of equal importance with each of the other functions performed, it could not be said with certainty that the combination of executive and administrative work and work as an outside salesman are his primary duties. You ask whether the use of the phrase "primary duty" in sections 541.1 and 541.2 of the regulations also includes the plural so that the employee may be exempt even though no one of his functions can be said to constitute a "primary duty." You ask whether or not the same rule is applicable to high-salaried employees receiving a salary in excess of \$100 per week.

It is the position of the Divisions that an employee who performs within a single workweek work which, if it were the only work performed, would meet the requirements of the regulations for exemption as executive, administrative, professional, local retailing or outside sales work, will be exempt provided that all of his time in the workweek is devoted to work which meets the requirements of the various sections of the regulations. Thus, in the situation you present, if the executive work performed by the employee is such that if it were the only work performed during the week it would meet the tests for exemption provided by section 541.1 of the regulations, including the requirement that management is his primary duty, it is immaterial that when viewed in the combination of duties management cannot be said to be his primary duty. This is true whether the employee meets the salary requirements of section 541.1(f) or the high-salaried employee proviso.

It is noted, however, that the employee in the situation described spends a substantial amount of time in using the telephone

to solicit and take orders. On the basis of the facts submitted I am unable to determine whether this inside work can be said to be directly in conjunction with, and incidental to, outside sales. If the telephone solicitation and order taking are a substitute for the performance of outside sales work, and if the employee devotes more than 20 percent of the hours worked in the workweek by nonexempt employees of the employer to nonexempt work, including the time spent in such inside sales work, he would not be exempt by section 15(a)(1) of the Act as an outside salesman. It is possible, however, that even though this is the case, the employee may be exempt as a combination executive and administrative employee. If, as you state, the employee is compensated on a salary basis of \$100 per week (exclusive of board, lodging, or other facilities) or more, and if the primary duty of the employee consists of executive work and administrative work as required by the regulations, it is not necessary that he meet the requirement provided by section 541.1(e) and 541.2(d) of the regulations.

In this event, however, the employee's duties involving executive and administrative work relating to management must add up in fact to constitute his primary duty or duties. Whether or not the combined executive and administrative work constitute the primary duty of the employee would be affected, in my opinion, by the amount of time spent by the employee in work related to sales work. The relative importance of the managerial duties as compared with other types of duties (including sales work), the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationships between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor are also pertinent factors. See in this connection section 541.103 of the bulletin.

I trust that this will provide the necessary information. If, however, you have further questions, I shall be glad to answer them, or you may find it more convenient to contact the Regional Office at 900 Parcel Post Building, 341 Ninth Avenue, New York 1, New York.

Very truly yours,

Wm. R. McComb
Administrator

OPIN-LTR, [WAGES-HOURS 61-66 CCH-WH ¶30,901] , Opinion Letter of Wage-Hour Administrator., (Sep. 25, 1964)

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[WAGES-HOURS 61-66 CCH-WH ¶30,901] Opinion Letter of Wage-Hour Administrator.

Opinion Letter

No. 298 September 25, 1964

"Fair Labor Standards Act

Exemption for Executive, Administrative and Professional Employees--Payment of Commissions and Bonus in Addition to Required Salary.--Payment of commissions and a bonus in addition to the salary required under the FLSA exemption for executive, administrative and professional employees does not jeopardize the exemption. FLSA, Section 13(a)(1).

Back reference.--¶25,210.043.

This is in further reply to your letter requesting an opinion as to the validity of a pay plan proposed by one of your clients to compensate an employee whose duties would qualify him for exemption under section 13(a)(1) of the Fair Labor Standards Act as a combination executive employee and outside salesman as outlined in sections 541.1 and 541.5 of Regulations, Part 541.

Under the proposed plan, your client would guarantee such an employee a salary of \$100 a week. Commissions would be computed and a fixed sum of \$50 per week would be deducted from commissions computed as due. At the end of the calendar year, the employee would be paid a bonus of \$2600 or a lesser amount depending upon whether the \$50 commission was earned in each week and upon business conditions. The employee would be paid a salary of \$100 each week regardless of commissions earned and he would not be required to return any part of this amount to the employer regardless of performance.

If, in fact, the employee is paid a guaranteed salary of at least \$100 (subject to the legal deductions discussed in section 541.118) in any week in which he performs any work, regardless of the quality or quantity of work performed, and the commissions and year-end bonus are, in actuality, payments in addition to the *bona fide* salary, the salary test of section 541.1 will be met. See in this connection section 541.118. Thus, if, as you assume, the employee's duties meet all the other tests of sections 541.1 and 541.5, he could be considered exempt from the minimum wage and overtime provisions of the act as a combination executive employee and outside salesman. In this respect, your attention is directed to section 541.600 of the regulations.

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