



**FLSA2007-2**

January 25, 2007

Dear **Name\***:

This is in response to your request for an opinion concerning whether sales employees employed by members of your trade association qualify for the outside sales exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).<sup>1</sup> Based on a review of the information you provided, it is our opinion that the sales employees discussed below are exempt as outside sales employees.

You state that the sales employee's primary duty is to sell newly-constructed homes. Sales employees usually work out of temporary sales facilities, such as model homes or trailers, that are located in or near the community where the builder is selling homes. The model home or trailer is open only during the time the builder is selling homes in the community and usually contains a temporary sales office that serves as a place to meet potential home buyers. Typically, the garage in the model home is transformed into a temporary sales office and has a desk, a telephone, and a fax machine, but few of the other accoutrements of a typical business office. The builder usually maintains a separate, permanent office location from which other day-to-day operations are conducted, and to which the sales employees report. Once the sales activity in the new home community is complete, the temporary sales office in a model home is restored to a garage, and the model home is returned to a residence and sold.

Sales employees generally leave the model home or trailer for one or two hours a day, one or two times a week, to engage in selling or sales-related activities. These activities include meeting with prospects, real estate sales employees,<sup>2</sup> or others involved in the home buying process; showing properties and communities to prospects; touring and demonstrating model homes and home sites; engaging in a wide variety of marketing efforts; and meeting with customers, real estate sales employees, construction personnel, and others to ensure customer satisfaction throughout the sale and construction of the new home. An indispensable component of the sales employee's sales effort is to take the customer out to the various home-sites within the community. The sales employee helps the customer understand where a house will be built, where the property lines begin and end, and where the neighboring houses to be built will be situated. In many cases, it will be crucial for customers to understand whether they will be surrounded by other houses or vacant land, how close to road-noise the house will be, and where the location of any land-use restrictions (such as a septic tank) will be on that specific parcel of land. The sales employee also may take customers to view homes under construction or recently-completed homes.

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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).

<sup>2</sup> This letter has been edited to reflect the substitution of the term "real estate sales employees" in place of "realtors".

The remainder of the sales employee's week is typically spent with customers inside the temporary sales office in the model home or trailer performing activities in support of the sales employee's sales efforts, such as completing paperwork; prospecting customers; creating customer contact cards and promotional materials; following up with customers; scheduling appointments; calling real estate sales employees to generate interest in the homes, including occasionally visiting real estate sales employee offices for this purpose; learning about the homes; and other similar sales-related tasks. Most, if not all, of a sales employee's time is spent on sales or these sales-related activities. Sales employees spend at most one or two hours a week performing work that is not otherwise incidental to and in conjunction with their own sales or solicitations.

FLSA section 13(a)(1), 29 U.S.C. § 213(a)(1), provides an exemption from the minimum wage and overtime provisions for "any employee employed . . . in the capacity of outside salesman." The Department has issued regulations, contained in 29 C.F.R. Part 541, that set forth the requirements for this exemption. These regulations were revised effective August 23, 2004 (69 Fed. Reg. 22,122 (Apr. 23, 2004)).

Under 29 C.F.R. § 541.500(a), "[t]he term 'employee employed in the capacity of outside salesman' in section 13(a)(1) of the Act" means "any employee":

- (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.

As described in 29 C.F.R. § 541.700(a),

an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

As for determining the primary duty for the outside sales exemption, the regulations state that the

work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

29 C.F.R. § 541.500(b).

To qualify for the outside sales exemption,

[a]n outside sales employee must be customarily and regularly engaged “away from the employer’s place or places of business.” 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. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.

29 C.F.R. § 541.502.

The Wage and Hour Division has long recognized that

[r]eal estate salesmen stationed in a model home on a tract from which parcels of real property are being sold with or without improvements, leaving the model home for such purposes, customarily and regularly, would meet the requirement of the definition, so far as making sales “away from” the employer’s place of business is concerned. This is true even though all of the property shown to prospects by the salesmen is within the tract on which the model home is located.

Field Operations Handbook (FOH) § 22e06(c). In short, “[s]o long as a salesman customarily and regularly goes to the site of the property or to prospects as a part of making his sales, this requirement for ‘outside’ sales work would be met.” *Id.* “The 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.” 29 C.F.R. § 541.701. However, “[n]othing in [29 C.F.R. § 541.701] requires that, to meet the definition of ‘customarily and regularly,’ a task be performed more than once a week or that a task be performed each and every workweek.” 69 Fed. Reg. at 22,187.

Please note that under 29 C.F.R. § 541.500(c), “[t]he requirements of Subpart G (salary requirements) of this part do not apply to the outside sales employees.”

After reviewing the information provided, we believe that the sales employees in this case qualify for the outside sales exemption under section 13(a)(1) of the FLSA. First, the sales employees meet the requirement that the primary duty must be making sales within the meaning of section 3(k) of the FLSA because the sales employee’s primary duty is to sell newly-constructed homes. “Real estate salesmen will generally meet this test, since ‘sales’ under Sec. 3(k) of the Act include contracts to sell.” FOH § 22e06(a). As you state, most, if not all, of a sales employee’s time is spent on sales or sales-related activities. Sales employees spend at most one or two hours a week performing non-exempt work. Other duties of the sales employees such as meeting with prospects, real estate sales employees, or others involved in the home buying process; showing properties and communities to prospects; touring and

demonstrating model homes and home sites; and meeting with customers, real estate sales employees, construction personnel, and others to ensure customer satisfaction throughout the sale and construction of the new home, are examples of work performed incidental to and in conjunction with the sales employee's own outside sales or solicitations. In addition, such tasks as completing sales-related paperwork, prospecting customers, engaging in a wide variety of marketing efforts including creating customer contact cards and promotional materials, following up with customers, scheduling appointments, calling real estate sales employees to generate interest in the homes, and learning about the homes are also considered the type of duties that further the employee's sales efforts and, therefore, are regarded as exempt work. *See* 29 C.F.R. §§ 541.500(b), -.503; Wage and Hour Opinion Letters December 21, 1967 and April 21, 1964 (copies enclosed); FOH § 22e06(e).

Second, the sales employees meet the requirement that they be customarily and regularly engaged away from the employer's place or places of business in performing their primary duty of selling newly-constructed homes. As you describe, sales employees generally leave the model home or trailer one or two hours a day, one or two times a week, to engage in the selling or sales-related activities described above. As you further note, "an indispensable component" of the sales employee's sales effort is to take the customer out to the various home-sites within the community so that the sales employee is able to help the customer understand where a house will be built, where the property lines begin and end, and where the neighboring houses to be built will be situated. In addition, the sales employee also may take customers to view homes under construction or recently-completed. All these types of activities are certainly critical, or as you state "indispensable components" of the overall sales effort, and would almost always have to occur away from the model home. Accordingly, the described activities qualify as being "customarily and regularly engaged away from the employer's place . . . of business."<sup>3</sup> Therefore, the sales employees in question are exempt outside salespersons.

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 issues 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.

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<sup>3</sup> It is the nature of the time spent outside the model home, rather than the amount of time, that drives our conclusion. Virtually all of the indispensable components of the sales effort are concentrated in the outside period.

We trust that this letter 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).