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Employees Who Sell: Understanding the FLSA's Exemptions for Sales Employees

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Agenda

Overview of Sales Exemptions

Key Elements of the Exemptions

Structuring Compensation

Dealing with Misclassified Employees

Complying with Differing State Law

FLSA Generally

- FLSA covers most employers engaged in interstate commerce with revenue of \$500,000 annually or employees who engage in interstate commerce.
- Certain exemptions apply to both the minimum wage and overtime provisions while others extend only to the overtime provisions.
- Employer bears burden of proving exemption.
- Exemptions construed narrowly.

Categories of Sales Exemptions

Sales Exemptions to FLSA Minimum Wage and Overtime Requirements

- Outside Sales

Sales Exemptions to FLSA Overtime Requirements

- Employees Paid Commissions by Retail and Service Establishments
- Auto Dealership Salesmen, Partsmen and Mechanics

Outside Sales Exemption

No salary requirement

(1) “Primary duty” =

- Making sales; or
- Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client/customer; and

(2) Customarily and regularly engaged away from the employer’s place of business (i.e., outside sales).

Obtaining Orders or Contracts for Services or for the Use of Facilities

Services

- Selling or taking orders for a service, which may be performed for the customer by someone other than the person taking the order.

Use of Facilities

- Selling of time on radio or television.
- Solicitation of advertising for newspapers and other periodicals.
- Solicitation of freight for railroads and other transportation agencies.

Outside Sales v. Inside Sales

Customarily and Regularly Engaged

Away from an Employer's Place of Business

- At the customer's place of business or home.
- Any fixed site used as headquarters for telephonic solicitation of sales is considered the **employer's** place of business.

Promotion Work

Exempt

- Promotion work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations.

Nonexempt

- Promotion work that is incidental to sales made, or to be made, by someone else.

Pharmaceutical “Sales”

- Exemption encompasses pharmaceutical sales representatives whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employer’s prescription drugs in appropriate cases.
- Pharmaceutical companies often argued, with some success, that administrative exemption also applied.
- Compare – “Brand Advocates”

Drivers Who Sell

- Drivers who deliver and sell products
- Exempt only if the employee's primary duty is making sales
- Factors:
 1. Comparison of the driver's duties with those of other employees engaged as drivers and as salespersons
 2. Possession of a selling/solicitor's license when one is required by law
 3. The presence or absence of customary or contractual arrangements concerning the amounts of products to be delivered
 4. The description of the employee's occupation in bargaining agreements
 5. The employer's specifications as to the qualifications for hiring
 6. Sales training or attendance at sales conferences
 7. Method of payment
 8. Proportion of earnings directly attributable to sales

Drivers Who May Qualify as Exempt

1. A driver who:
 - provides the only sales contact between the employer and the customers visited;
 - calls on customers and takes orders for products;
 - delivers products from stock in his vehicle or delivers the product on a later trip; and
 - receives compensation commensurate with the volume of products sold.
2. A driver who obtains or solicits orders for the employer's products from persons who have authority to commit the customer for purchases.
3. A driver who calls on new prospects for customers along his route and attempts to convince them of the desirability of accepting regular delivery of goods.
4. A driver who calls on established customers along his route and persuades them to accept delivery of more or new products, even though someone else made the initial sale or agreement for delivery.

Drivers Who Would Not Qualify as Exempt

1. A route driver whose primary duty is to:
 - transport products sold by the employer through vending machines; and
 - keep those machines:
 - stocked;
 - in good operating condition; and
 - in good locations.
2. A driver who calls on established customers day after day or week after week, delivering a quantity of the employer's products at each call when:
 - the sale is not significantly affected by the driver's solicitations; or
 - the amount of the sale is determined by the customer's sales volume since the previous delivery.
3. A driver primarily engaged in making deliveries to customers and performing activities intended to promote sales by customers unless such work is in furtherance of the driver's own sales efforts.

Auto Dealership Salesmen

Overtime exemption provision in FLSA:

- 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.

Similar overtime exemption for salesmen of trailers, boats, and aircrafts

Auto Dealership Service Advisors

Service advisors **are** exempt under provision because their duties and pay structure are functionally similar to those of salesmen, partsmen, and mechanics

- Fourth Circuit, Fifth Circuit, district courts

Service advisors **are not** exempt under provision because they do not personally sell or service automobiles

- Department of Labor
- Ninth Circuit (Jan. 9, 2017)
 - Congress did not intend for the exemption to encompass service advisors

*May also be exempt under Section 7(i) if all conditions are met

Commissioned Employees at a Retail or Service Establishments

Section 7(i) overtime exemption

- (1) Employed by a retail or service establishment;*
- (2) Regular rate of pay must exceed 1 ½ times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked; and
- (3) More than half the employee's total earnings in a representative period must consist of commissions earned from the sales of goods or services.

*Employee does not have to be a salesperson

(1) Employed by a “Retail or Service Establishment”

75% of annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry.

Generally employees employed in “big ticket” departments and establishments where commission methods of payment traditionally have been used.

Examples of Retail or Service Establishments	Establishments That Do Not Qualify as Retail or Service
Grocery Stores	Insurance Companies
Furniture Stores	Electric Power Companies
Barber Shops	Broadcasting Companies
Hotels	Banks
Restaurants	Doctors' and Dentists' Offices
Window Washing Companies	Educational Institutions
Automobile Repair Shops	Labor Unions
Department Stores	Lawyers' Offices
Funeral Homes	Security Dealers
Parking Lots or Garages	Tax Services
Theatres	Trade Associations

29 CFR § 779.317; 779.320.

(2) Regular Rate of Pay Exceeds 1 ½ Times Minimum Wage

Divide employee's total earnings attributed to the pay period by the employee's total hours worked.

Generally use the federal minimum wage but be aware of state or local law.

Methods of Compensation

- (1) Straight salary or hourly rate
- (2) Salary plus commission
- (3) Quota bonus
- (4) Straight commission without advances
- (5) Straight commission with “advances,” “guarantees,” or “draws”

(3) More Than Half of Total Earnings in Representative Period Are Commissions

Representative period may be as short as one month, but may not be more than one year.

Condition met if employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than the salary or hourly amounts paid.

- If not, separately total the employee's commissions and other compensation paid during representative period.
 - → Total commission paid must exceed the total of other compensation paid.

Structuring Compensation Representing Commissions

Advances, draws, or guarantees

- Represents commission if sum is not paid as salary and functions as an integral part of a true commission basis of payment.

Bona fide commission rate

- Must establish some proportionality between the compensation to the employees and the amount charged to the customer.
- A commission can be tied to a retail or service establishment's profit, rather than sales.

Misclassified Employees

Exposure

- Liable for unpaid overtime compensation plus an equal amount as liquidated damages.

Common Mistakes

- Misclassifying employees as exempt based on job title and/or job description.
- Misclassifying all salaried employees as exempt.
- Misclassifying all employees with sales-related responsibilities as exempt without due consideration of exemption criteria.

Dealing with Misclassified Employees

Do Nothing

- Type of employer
- How many employees may be misclassified?
- Risks
 - Financial exposure
 - Negative publicity

Reclassify Employees

- Risks
 - Triggering a lawsuit
 - Employee morale
- Communicating the reclassification to the employee
- Converting to an hourly rate
- Salary non-exempt
- Commissions – note that the “regular rate” may need to be recalculated for overtime purposes.

Tips for Reclassification

Timekeeping / Recordkeeping policies

Restrictions on work hours

Mobile devices and remote access

Update offer letters, handbooks, and job descriptions, including by:

- making hours expectations clear; and
- documenting if salary is for all hours worked.

Tips for Reclassification

Compliance with meal and rest periods

Telecommuting

Travel time

Overtime restrictions – require approval

Consider timing of implementation

Consider timing of “annual” pay increases

Conduct audit after initial period to test compliance

Complying with Differing State Law

Most states follow current federal rules for sales exemptions.

Some states have their own tests for outside salesperson exemptions or for exemptions for other sales/commissioned employees.

- California
 - Has its own commissioned employee exemption for workers in the mercantile (retail) industry and for workers in professional, technical, clerical, mechanical, and other similar occupations.
 - Earnings must exceed 1 ½ times the *California* minimum wage.
 - Also has its own state test for outside salesperson exemption.
- Colorado
 - Requires outside sales employees to spend a minimum of 80% of the workweek in activities directly related to their own outside sales to qualify for exemption to state minimum wage law (federal law has no such requirement).
 - Other states have similar percentage of time requirements.

Complying with Differing State Law

See differing tests in the following states:

- Alaska, California, Colorado, Hawaii, Maine, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania, Washington, West Virginia, Wisconsin

Michigan does not exempt outside salespersons.

Relevant Practical Law Resources

Practice Note, Sales Exemptions Under the FLSA

Standard Document, Questionnaire to Determine Exempt Status Under the FLSA

These relevant resources are available with a free, no-obligation trial to Practical Law.
Visit [Practicallaw.com](https://www.practicallaw.com) and request your free trial today.

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About the Speakers

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please visit <http://whdi.litcounsel.org/>.

About the Speakers



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Paul Bittner is a partner and vice chair of the Firm's Labor and Employment Group. He has been practicing law since 1993 with an emphasis on labor and employment law and has extensive experience representing employers.

Paul has represented both public and private sector employers in union negotiations, labor arbitrations, unfair labor practice proceedings, representation elections, and other related matters in front of the National Labor Relations Board and state agencies. Paul is a member of the Wage and Hour Defense Institute, providing counsel to employers on all aspects of wage and hour compliance. He has tried both individual and collective actions under the Fair Labor Standards Act.

Paul is a frequent lecturer on a variety of employment law topics including traditional labor law, ADA, FMLA, wage and hour and sexual harassment. He has successfully represented employers in jury trials, bench trials, arbitrations and administrative hearings.

Paul regularly counsels employers on union relations and union avoidance, Title VII, Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act (FLSA) and other wage and hour laws, Family and Medical Leave Act (FMLA), the Fair Credit Reporting Act (FCRA), and compliance with Occupational Safety and Health Administration (OSHA). Paul has also defended employers in various employment law claims pursuant to employment practice liability insurance policies.

About the Speakers



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Lawrence Peikes is a partner in the firm's Stamford and New York City offices where he represents management in all aspects of labor and employment law. His practice encompasses federal and state court litigation, arbitration and mediation of employment discrimination claims, wrongful discharge claims, wage and hour claims, disputes over the enforcement of covenants not to compete, trade secret protection, and other employment related controversies. Larry also represents employers in administrative proceedings before such agencies as the U.S. Equal Employment Opportunity Commission, the Connecticut Commission on Human Rights and Opportunities, the National Labor Relations Board, the U.S. and Connecticut Departments of Labor, and other administrative bodies charged with the enforcement of federal and state labor laws. In addition, Larry regularly counsels employers with respect to all aspects of the employment relationship, including employee terminations and discipline, collective bargaining, employment contracts, workplace discrimination issues, and alternative dispute resolution.

Larry frequently lectures and writes on employment law issues, ranging from sexual harassment and developments under the federal civil rights laws to wage and hour laws to restrictive covenants. Larry is a Senior Editor and member of the Editorial Board for the Fair Labor Standards Act treatise published by BNA, a contributor to BNA's treatise on The Family and Medical Leave Act, and co-editor of the Employment Law volume of the Connecticut Practice Series. In addition, Larry is a founding member of the Wage & Hour Defense Institute of the Litigation Counsel of America, a nationwide network of experienced and carefully screened wage and hour defense attorneys.

Chambers USA has ranked Larry in the Labor & Employment category since 2012 and notes that he continues to be recognized for his handling of employment law matters such as wage and hour claims, trade secret protection and discrimination claims. (For more about the standards of inclusion in Chambers, please see www.chambersandpartners.com/methodology.)

Larry graduated with a B.A. from the University of Maryland and received his J.D. with honors from The George Washington University, National Law Center.

About the Speakers



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Suzanne K. Brown joined Practical Law from Epstein Becker & Green, P.C., where she was a litigation associate in the labor and employment group, concentrating on wage and hour litigation and compliance. Previously Suzanne was a labor and employment associate with Gibbons, P.C., McElroy Deutsch Mulvaney & Carpenter, LLP, and the Law Department of the Port Authority of New York and New Jersey.