U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

WHD-OL-1971-0015

*** FLSA-489 ***

May 27, 1971

This is in further reference to your letter of May 4, 1971, asking whether the proposed method of compensation by your client, a retail employer, satisfies the requirements of section 7(i)(1) of the act with respect to salesmen who are to be paid solely by commission.

You state in your letter that your client plans to use a quarter-year representative period in determining the regular rate of pay of these salesmen for the purpose of applying the test of section 7(i)(1). This would be done by dividing the total earnings for the period by the total hours worked in the quarter. Should the quarterly hourly rate for an employee exceed $2.41 an hour, your client would consider the section 7(i)(1) requirement (the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him) to have been met in each and every week of that quarter.

This method of pay would, in our opinion, be invalid as it does not satisfy the requirements of section 7(i)(1) of the act. Since the salesman would be paid entirely by commissions, they would in any representative period chosen which in your client’s case would be a quarter-year, meet the requirement of section 7(i)(2) that more than half their compensation represents commissions. However, unlike the commissions test in 7(i)(2) which is applied over a representative period, it is the Division’s position that 7(i)(1) applies on a workweek basis. The hourly rate averaged over the entire representative period may not be used to satisfy the requirements of section 7(i)(1) (see section 779.419(b) of the enclosed bulletin on Retailers).

Your letter further indicates that your client has difficulty in ascribing specific sales to specific weeks. In situations where it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned each week, some other reasonable and equitable method may be used. Section 778.120(a) and (b) describes acceptable methods which may be used in allocating deferred commission payments in appropriate situations. However, once the amount of earnings applicable to a particular workweek is determined, this amount is divided by the hours worked that week to obtain the regular rate of pay. If the rate so obtained is $2.41 or more, the condition set out in section 7(i)(1) of the act is met.

We are also enclosing for your information copies of 29 CFR 778 and 29 CFR 516A & B. Your particular attention is directed to section 516.16 which pertains to employees paid pursuant to section 7(i), and to section 516.2(a)(7) which is included in the data required by section 516.16.

Sincerely,

Francis J. Costello
Assistant Administrator
Wage and Hour Division

Horace E. Menasco
Administrator