

## FLSA-1044

April 2, 1982

This is in reply to your letter of January 25, 1982, concerning whether certain employees compensated on a commission basis may be exempt from overtime pay under section 7(i) of the Fair Labor Standards Act. Specifically, you ask whether a painter in the body shop of an automobile dealership, which qualifies as a retail establishment under the Act, could be exempt under section 7(i) based on the facts given.

You indicate that the painter spends a majority of his total working time painting cars. The painter is paid a draw of \$100 per week against commissions, which are determined on a monthly basis. On the last day of the month, the painter is paid total commissions due him less the weekly draws. Total monthly commissions divided by monthly hours average \$5.04 an hour, which is in excess of one and one-half times the minimum wage. You further indicate that the painter regularly works 47 1/2 hours per week.

You indicate that more than half of the compensation of the employee in question for a representative period of not less than one month is based upon commissions - in fact the employee's total income is based upon commissions. However, one additional condition must be met in order for the employee to be exempt under section 7(i) from the overtime pay requirement of section 7(a) of the Act in a workweek when the employee's hours exceed 40. This additional condition is that the employee's regular rate of pay for such workweek must be more than one and one-half times the minimum hourly rate applicable under section 6 of the Act. If it is not more than one and one-half times such minimum rate, there is no overtime pay exemption for the employee in that particular workweek. See section 779.419 of Regulations, 29 CFR Part 779. Based on the facts in your letter, the painter could not qualify for the exemption in the workweeks in which his only compensation is the \$100 per week draw.

Our letter of June 9, 1981, to which you refer, was concerned with automobile salespersons exempt from overtime under section 13(b)(10) of the Act, not under section 7(i). The principles therein could be applied to salespersons, partspersons and mechanics employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to the ultimate purchaser. As indicated in section 779.372(c)(3), get ready mechanics may qualify for exemption under section 13(b)(10), but employees primarily performing such functions as painting cannot be exempt under section 13(b)(10). Thus, the painter in question may be exempt from overtime, but only under the more stringent requirements specified under section 7(i) of the Act. Likewise, finance and insurance personnel who are commissioned and otherwise meet the requirements under section 7(i) could be exempt under that section, as explained above, but such employees could not qualify for exemption under section 13(b)(10).

We hope that the above has been responsive to your inquiry. Please let us know if you have further questions.

Sincerely,

William M. Otter  
Administrator