

FLSA-876

July 13, 1982

This is in response to your letter in which you request an opinion as to whether your client's proposed compensation system meets the requirements for exemption under section 7(i) of the Fair Labor Standards Act. We regret any inconvenience the delay in this response may have caused you.

We have concluded, after consultation with the Office of the Solicitor, that the compensation system you present appears to be in general accordance with the requirements of section 7(i). The assumptions you also make in items 1, 2, and 3 of your letter appear to be correct. With regard to supplemental payments, so long as an employee receives, free and clear, more than one and one-half times the applicable minimum wage in any week when overtime is worked, the fact that the employer chooses to reduce the employee's commissions by the supplemental amount in a subsequent week within the commission calculation period does not defeat the exemption.

Specifically, you state that the requirements of section 7(i)(2), which include a representative period of not less than one month, are met in each of the four compensation plans you present. Each plan has a one month pay period; and each plan has either a weekly or monthly draw or guarantee which is equal to at least the minimum wage for each hour worked. Plan 1 would calculate and attribute the commissions to the workweek in which they were earned and plan 2 would attribute the commissions equally to each hour worked in the pay period. If necessary, plan 1 would make a supplemental payment in any overtime workweek, and plan 2 would make such a payment in any overtime workweeks in the event the regular rate for the pay period as a whole fails to exceed one and one-half times the minimum wage. Plan 3 would provide a weekly draw and supplemental payment in overtime workweeks. At the end of the pay period, the employee would receive net commissions after the draw and any supplemental payment were deducted. Plan 4 provides for calculating the commissions weekly. If net commission is not sufficient to bring the employee's regular rate above one and one-half times the minimum wage in an overtime workweek, a supplemental payment is made in that week.

We caution that our opinion with regard to your client's proposed compensation system is conditioned upon the company's adoption of a consistent method of allocating commissions during the monthly pay period for each employee in computing his regular rate of pay for purposes of section 7(i). You will note that section 778.120 of 29 CFR Part 778 permits a choice of allocating equal amounts of commission either to each workweek or to each hour worked. Once the choice has been made, the method of allocation may not be changed in a way which has the intent or effect of evading the regular rate requirements of section 7(i).

With regard to your last question, it is essential that an employer's company meet the definition of a retail or service establishment stated in section 13(a)(2) in order to qualify

for the section 7(i) exemption. Such an employer is eligible to claim the exemption with respect to those employees whose compensation is primarily on a commission basis.

If you have any further questions, please feel free to contact this office.

Sincerely,

William M. Otter
Administrator

Enclosures: (FLSA & 778)

cc: Philadelphia/RO