

FLSA-1049

November 26, 1984

This is in further reply to your letters of January 26 and August 7 concerning the application of section 7(i) of the Fair Labor Standards Act (FLSA) to certain convenience store/gas station managers paid on a commission basis. We regret the delay in responding to your inquiry.

The managers are compensated in accordance with your client's "Store Manager Compensation Agreement." The compensation paid to the store managers under this agreement is calculated and paid weekly. Convenience store commissions, and gasoline and diesel commissions are added together each week to arrive at the manager's gross commission." Upon determination of the gross commissions, shortages are deducted and workweek adjustments are made to arrive at the "net commissions." For the workweek, the manager is paid either the net commissions or the guarantee amount provided in the contract, whichever is greater. If the net commissions fall below the guarantee amount because of the deductions for shortages, the amount of the shortages which cannot be subtracted from the commissions in that week due to the guarantee is subtracted in subsequent weeks.

Section 7(i) of FLSA provides an overtime pay exemption for any employee of a retail or service establishment if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate of \$3.35 per hour (\$5.03 per hour) and (2) more than half the employee's compensation for a representative period (not less than one month) represents commissions on goods or services.

You state that your client calculated each manager's regular rate of pay each week to be sure that it is in excess of \$5.03 an hour. If it falls below that amount, the employee is treated as nonexempt for the week and is paid overtime compensation. The manager is normally compensated on a 100 percent commission basis so that the second requirement that at least half the employee's compensation over a representative period represents commissions on goods or services is met.

At issue is the part of the manager's compensation which is not based strictly on commissions. This is the "workweek adjustment to commissions." The agreement provides that managers are expected to be present at the store to cover the "cashier" duties for an equivalent of 40 hours each workweek. If the manager is required, due to staffing problems, to be available as a cashier for more than 40 hours, he or she is compensated for this extra time by an increase to his or her commissions equal to the amount which would have been paid to the hourly employee whom the manager replaced. If the manager misses some of the time he or she is supposed to be available, amounts paid to replacement employees to cover that time are deducted in the same way as shortages.

We have concluded that the compensation system you present appears to be in general accordance with the requirements of section 7(i) of FLSA. As long as an employee receives more than one and one-half times the applicable minimum wage in any workweek where overtime is worked, the fact that the employer chooses to increase or decrease the employee's commissions by an amount equal to the "workweek adjustment to commissions" in a subsequent workweek does not defeat the exemption.

This approval is conditioned on the requirements of section 7(i)(2) being met. In those workweeks when the employee's commissions do not exceed one and one-half times the minimum hourly rate of \$3.35 per hour, the difference between the commissions and the guarantee amount provided in the contract and those amounts paid as overtime premium pay would not be considered commissions under section 7(i) of FLSA. Such amounts would have to be included in determining whether or not more than half the employee's compensation for a representative period represents commissions on goods or services. In addition, we would question whether the commission plan is a bona fide one for purposes of section 7(i), if the employee's compensation never or almost never exceeds the guarantee amount provided in the contract.

We hope this response to your inquiry is of assistance to you. However, if you have any further questions please do not hesitate to let us know.

Sincerely,

William M. Otter
Administrator