

FLSA-173

July 18, 1986

This is in response to your letter of December 11, 1985, and subsequent telephone conversation with a member of my staff on behalf of *** (your client), concerning the application of the minimum wage provisions of the Fair Labor Standards Act (FLSA) to sales trainees. We regret the delay in responding to your inquiry.

You state that your client is in the business of selling and installing windows for residential homeowners. The client uses the services of outside salespersons to effect the sales. The outside salespersons are paid on a straight commission basis.

You further state that your client conducts a two-week training program for prospective salespersons. Those who participate in the training program are considered trainees rather than salespersons. During this training period, the trainees are instructed in all aspects of residential sales, including the handling of credit applications, proper presentations in a residential setting, sales "closing" techniques, and so forth. While a trainee in the program is permitted to accompany a salesperson on a residential visit, he or she is not permitted to participate in the sales presentation. You also advised the member of my staff that the sales trainees do not engage in any productive work while on the premises of the employer.

After completion of the two-week training program, the trainees are given a sales training test. If the trainees elect not to take the sales training test or if they fail the test, they are not engaged as salespersons. The trainees are not led to believe that they will be engaged as salespersons and be entitled to any of the commission draws unless they pass the sales training test. The training which they receive is not limited to window sales. It can be used for other residential sales, and it is the same as the training which would be provided by a vocational school.

You request an opinion as to whether your client is obligated under FLSA to pay the sales trainees for the hours that they spend participating in the two-week training program. We have considered your inquiry under the provisions of FLSA, the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of \$3.35 an hour for all hours worked and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

In order for FLSA to apply to a person engaged in work which is covered by FLSA, an employer-employee relationship must exist. Section 3(g) of FLSA defines the term "employ" as including "to suffer or permit to work." However, the U.S. Supreme Court has held that persons who, without any expressed or implied compensation agreement, may work for their own advantage on the premises of another are not necessarily employees. (See Walling v. Portland Terminal Company 330 U.S. 148 (1974).) Whether trainees are employees under FLSA will depend upon all of the circumstances

surrounding their activities on the premises of the employer. If all six of the following criteria apply, the trainees are not employees with the meaning of FLSA:

1. the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. the training is for the benefit of the trainees;
3. the trainees do not displace regular employees, but work under their close observation;
4. the employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion the employer's operations may actually be impeded;
5. the trainees are not necessarily entitled to a job at the conclusion of the training period; and
6. the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Based on the information contained in your letter and that provided by you in a telephone conversation with a member of my staff on March 24, it is our opinion that the above criteria are met and that the participants in your client's sales training program would not be employees within the meaning of FLSA. Thus, no compensation would be due to them for the time they spend participating in your client's two-week training program for prospective salespersons.

We wish to point out that section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as these terms are defined and delimited in Regulations, 29 CFR Part 541 (copy enclosed). An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary as stipulated in the applicable section of the regulations.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosure