

AUG - 4 1993

This is in response to your letter in which you request an opinion as to whether your client, a telemarketing establishment, qualifies as a retail establishment for purposes of the application of section 7(i) of the Fair Labor Standards Act (FLSA).

The Wage and Hour Division of the Department of Labor administers and enforces the FLSA, the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid a minimum wage of \$4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

In your letter, you state that your client's business is engaged in the sale of weight loss programs and employs weight loss advisors who deal directly with, and sell to, the firm's customers by telephone throughout the United States. The company offices, support and clerical staff, accounting and recordkeeping departments, advertising department, telephone sales department and shipping department are located at the single establishment. The manufacturing of the diet products which are sold by the company is done by an independent company at another location.

You also state that members of the general public throughout the United States call an in-WATS number in a state different from that in which the establishment is located. These orders are recorded and transmitted by computer to the firm's establishment. The advisors call the customer to confirm the order, attempt to upgrade the order by selling additional products, determine if the individual has any health problems which would result in a change in the order, or cancellation of the order. If there is no change in the original order or if the order is changed or canceled, this is tape recorded and the customer is provided with an order number and the establishment's services telephone number for any further contact about the final order. The purchased products are then shipped to the customer from the establishment.

As you indicated, on occasion the customers visit the establishment to place orders, but most transactions are handled by telephone.

Section 7(i) of the FLSA provides an exemption from the overtime pay requirement of the FLSA 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 wage (currently \$4.25 an hour) and (2) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. A "retail service establishment" is defined to mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. Since the sales of your client's telemarketing establishment, as described in your letter, may be considered retail sales in the particular industry, and since you indicate that these sales are not for resale because the sales are made to the individual customer or consumer, it is our opinion that your client's establishment may qualify as a retail or service establishment for the purpose of applying section 7(i) of the FLSA. We assume, for the purposes of making this determination, that these sales constitute at least 75 per centum of the company's annual dollar volume of sales. In addition, it should be noted that this response expresses no opinion on whether or not the remaining requirements of section 7(i) are met.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

Sincerely,

Maria Echaveste  
Administrator