

## FLSA-1332

November 19, 1996

This is in response to your letter to Mr. Hap Perry in our Atlanta office concerning the possible application of the partial overtime exemption in Section 7(i) of the Fair Labor Standards Act, 29 U.S.C. 201, 207(i), to dancers in a club. In order to coordinate the Department's response to your letter with responses to other inquiries of a similar nature, your letter was sent to this office for a response.

The situation you describe would have the dancers compensated principally from a mandatory \$5.00 charge for each dance performed, to be collected by the dancer for the benefit of the club. The dancers would receive more than 50 percent of their compensation from the service charge they collect, minus a "shift fee" and other miscellaneous charges allocated by the club to the dancer. The shift fee is not expected to exceed \$100 per day per dancer. You have expressed the opinion that payment in this fashion constitutes payment of commission basis for purposes of Section 7(i).

The term "commissions" is not defined in the statute or regulations. It is defined in Webster's Third New International Dictionary, 1971 ED., page 457, as "a fee paid to an agent or employee for transacting a piece of business or performing a service; esp: a percentage of the money received from a total paid to the agent responsible for the business." The Department has always considered that commissions normally constitute a percentage of the charge to the customer. In contrast, a flat fee paid without regard to the value of the service performed does not constitute a bona fide commission payment plan.

Section 7(i) is designed to exempt those employees who can increase their productivity, and hence, their earning, by applying their ingenuity, skill and experience to tasks which will vary in difficulty from job to job. These types of employees perform a service that has an identifiable monetary value to the customer, but the amount of time and effort required to complete the service and the complexity of the task performed may often vary from job to job.

The dancers do not appear to fall into this category. While arguably the value of the service performed by the dancers is the amount of service charge, there has been no showing that the dances vary in any significant degree as to time and effort required or that the dancers can through expertise increase their productivity and earnings by performing dances in an expedited or more efficient manner. Rather, it appears that the dancers, like most piece-rate workers, are limited primarily by time and demand as to the amount of dances they perform, and accordingly, the amount of money they can earn. They are paid a flat fee for each dance they perform, and therefore are not considered to be compensated on the basis of commissions within the meaning of Section 7(i).

I trust that this information is responsive to your inquiry.

Sincerely,

Maria Echaveste  
Administrator