



"Outside Salesman": Two Simple Words Make for One Complex Exemption

Insights

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Two recent opinion letters from the U.S Department of Labor (USDOL) examine the contours of the federal Fair Labor Standards Act's (FLSA) "outside salesman" exemption, which exempts covered employees from the FLSA's minimum wage and overtime requirements. This exemption applies to employees if they meet two primary requirements. First, the employee's primary duty must be "making sales" to, or "obtaining orders or contracts" from, customers. 29 C.F.R. 541.500(a), 541.501. Second, the employee must be "customarily and regularly engaged" in performing that duty "away from the employer's place of business." 29 CFR 541.500(a), 541.502.

FLSA2020-6: Is a company vehicle an "employer's place of business"?

FLSA2020-6 is notable principally for its examination of whether company vehicles driven from site to site could be considered the employer's "place of business." The employees in question drive company trucks to "high-population areas" where they mingle with customers, demonstrate products and make sales. The trucks are "stocked with merchandise, marketing displays and demonstration units."

Noting that a "place of business" must be a "fixed site...used by a salesperson as a headquarters," USDOL concluded that the trucks themselves did *not* constitute a "place of business." USDOL noted that the trucks are driven regularly from site to site with no "permanent...physical connection to a deployment site." Yet, even if the trucks could be considered a place of business under a narrow interpretation of the law, USDOL opined that the employees would nonetheless be customarily and regularly away from the employer's place of business (i.e. the truck) because the employees walked about and mingled with customers rather than remaining "stationary in their trucks." After noting that the employees spend 80% of their workweek working in and outside of the trucks and only 20% in the office, USDOL concluded that the employees were "customarily and regularly" away from the employer's place of business.

The main takeaway for employers here is that the exemption is not lost for salespeople who use their employer's vehicle as a staging ground for their sales activities. However, this general principle depends on the employer demonstrating either that the vehicle is driven from site to site or, if it is not, that the salespeople do not simply "remain stationary" in the vehicle and instead walk about the vehicle "to mingle with customers" when making sales.

FLSA2020-8: Making sales at a trade show vs. a third-party retailer.

FLSA2020-8 is instructive for its analysis of the “primary duty” requirement of the exemption. USDOL concluded that when salespeople display their employer’s products at “home and garden shows, trade shows, and fairs,” and where they sell directly to customers, the primary duty requirement is satisfied. The opinion letter noted that these employees were paid commissions and bonuses based on the specific purchases at these shows which is a “hallmark activity” of the exemption.

However, USDOL would *not* definitively state that employees working at “big box stores” or other third-party retailers satisfied the primary duty requirement. That is because the opinion letter request did not include facts showing whether or how the employee “obtains a commitment from the customer to buy the employer’s products.” Similarly, while the third-party retailer passed along an agreed-upon portion of all sales of the employer’s products to the employer, it was unclear if the employees were given credit for the sales that were “consummated specifically through their efforts.” Lacking this information, USDOL could not state whether the employees were “generally stimulating the employer’s sales or making their own specific sales.” Notably, USDOL concluded that the employees in both scenarios were “customarily and regularly away from the employer’s place of business.” The employees working at the trade shows stayed at a location no more than 21 days and usually 10 days on average before moving to a new location. The employees working at the big box retailers also rotated between different retail locations.

The main takeaway for employers here is that when assigning employees to engage in sales activities at a third-party retailer, it is important to ensure there is documentation showing that employees receive compensation that is specifically based on the individual employee’s efforts. This could be accomplished, for example, by the salesperson giving a ticket to a customer for a product that the customer takes to the cashier. If the ticket contains a number unique to the salesperson, the employer would then be able to ensure that the employee is credited for that specific sale.

The Bottom Line

These opinion letters provide helpful information to employers with a salesforce working outside of the office. While the “outside salesman” exemption may appear simple and straightforward at first glance, there are actually many factors that must be considered in order to ensure compliance. For one, for over a decade there has been no 20% limitation (the analysis of the employee’s activities is far more nuanced) and there never has been a pay-based requirement with respect to this federal exemption. For another, as with all white-collar exemptions, there is no strict requirement that the employee perform the supporting activities on a workweek-by-workweek basis.

Nevertheless, these authorities demonstrate that, as with all of these exemptions, an employer seeking to establish the outside-sales exemption would be well-served to take care to minimize (or eliminate) practices that are, or even *appear*, inconsistent with the exemption and maximize those that generally are recognized as supporting the exemption. At bottom, if you believe your facts are less favorable on the whole, or arguably so during the pandemic because your salesforce is working

in a somewhat different manner, we strongly recommend that you work with counsel to better weigh the relevance of each before upending your practices.

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