

FLSA - THE OUTSIDE SALES EXEMPTION

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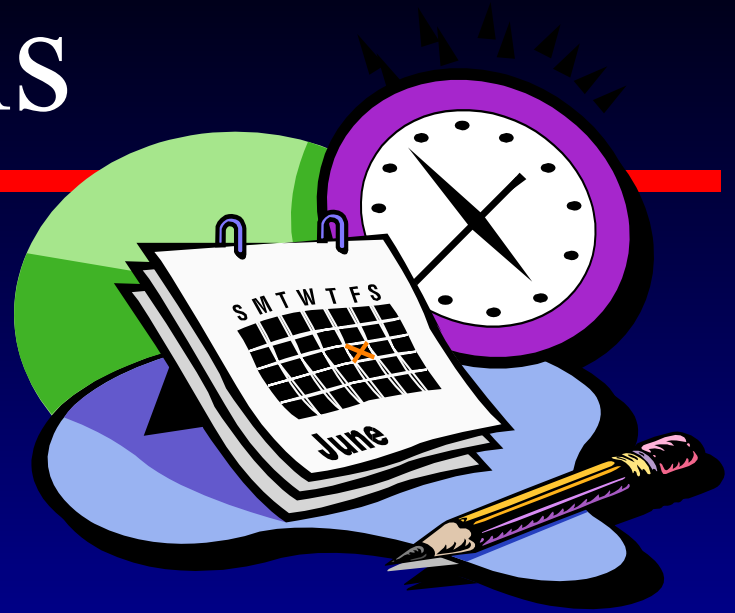
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Final Regulations



- ▶ Published April 23, 2004
- ▶ **Effective** August 23, 2004

Outside Sales Exemption

- ▶ **Primary duty** must be making sales, or obtaining orders or contracts for service or for the use of facilities for which a consideration will be paid by the client or customer; and
- ▶ The employee must be customarily and regularly engaged *away* from the employer's place of business.

Outside Sales Exemption

- ▶ The **salary requirements** of the regulation *do not apply* to the outside sales exemption.

Primary Duty

- ▶ Primary duty means the **principal, main, major** or **most important duty** that the employee performs.
- ▶ Determination of the primary duty must be based on all the facts in a particular case.

Making Sales

- ▶ Sales include any **sale, exchange, contract to sell, consignment** for sales, **shipment** for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

Obtaining Orders or Contracts

- ▶ Obtaining orders for “**the use of facilities**” includes the selling of time on radio or TV, the solicitation of advertising for newspapers and other periodicals and the solicitation of freight for railroads and other transportation agencies.

Obtaining Orders or Contracts

- ▶ The word “**services**” extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

Customarily and Regularly

- ▶ **“Customarily and regularly”** means more than occasional but less than constant;
- ▶ It includes work normally done every workweek, but *does not* include isolated or one-time tasks.

Away from Employer's Place of Business

- ▶ An outside sales employee makes **sales at the customer's place of business**, or if selling door-to-door, at the customer's home.
- ▶ Outside sales **does not** include sales made by **mail, telephone** or the **Internet**.

Away from Employer's Place of Business

- ▶ Any **fixed site (home or office)** used by a salesperson as headquarters or for telephone solicitation is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

Promotion Work

- ▶ Promotion work **may or may** not be exempt outside sales work, depending upon the circumstances.
- ▶ Promotional work that is performed **incidental** to and **in conjunction** with an employee's outside sales is exempt work.
- ▶ Promotion work that is incidental to sales made by **someone else is not outside sales work.**

Drivers Who Sell

- ▶ Drivers who deliver products and also sell the products **may qualify** as exempt outside employees ***only if*** the employee has a primary duty of making sales.

Drivers Who Sell

- ▶ Factors to be considered:
 - ▷ Comparison of driver's duties with other employees engaged as drivers and as salespersons;
 - ▷ Contractual arrangements on **amount of products to be delivered;**

Drivers Who Sell

- ▶ Factors to be considered:
 - ▷ Whether or not driver has a **selling or solicitor's license** when required by law;
 - ▷ Employee's **job description**.

Fact Sheet

- ▶ Department of Labor's Fact sheet –
 - ▷ <http://www.dol.gov/esa/regs/compliance/whd/fairpay>

Commentary

- ▶ AFL-CIO says final regs will strip overtime from inside sales employees and drivers who sell.

Commentary

- ▶ DOL responded that it does not have **“statutory authority” to exempt inside sales employees** from the FLSA minimum wage and overtime requirements under the outside sales exemption.
- ▶ **No substantive changes** from the current rule were made to rules concerning **drivers** who sell.

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