

FEB 14 2001

Dear Ms.

This letter is in response to your request for an opinion under the Fair Labor Standards Act (FLSA), regarding your client's settling out period of commissions for automobile salespersons who qualify for the overtime pay exemption contained in section 13(b)(10) of the Act.

The Act applies on a workweek basis, and in order to satisfy its minimum wage requirements, an employee must receive not less than the applicable statutory minimum wage for all hours worked in each workweek without regard to sales productivity. This amount must be paid free and clear. If employees receive a weekly draw or guarantee of at least the minimum wage for each hour worked, the minimum wage provisions of the Act will be satisfied. In such a situation, the employer can take credit for this draw or guarantee when settling out the amount due the employee as commissions earned. This may be done at the end of the period used to determine the total commissions earned for that period.

You indicate that these automobile salespersons are compensated on a commission basis and paid weekly with a commission settlement period of one month. Weekly draws against commission are computed to ensure compliance with the minimum wage requirements. Total sales commissions for each salesperson are computed at the end of each month, and the amount of each employee's weekly draw is deducted from the resultant sum. Excess unpaid commissions are then carried forward to the next settlement period.

It is our opinion that the proposed practice or policy of forwarding unpaid commissions on an indefinite basis would not violate the FLSA for those sales employees entitled to the exemption under section 13 (b) (10) of the Act, as long as the employees actually receive not less than the statutory minimum wage for all hours worked in each workweek. We note, however, that state laws or contractual arrangements between the employer and sales employees may require payment of their earned commissions within a specific period and that the settling out of earned commissions within a reasonable period should reduce potential employment disputes.

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 or firm 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.

We trust that the above information is responsive to your inquiry.

Sincerely,

Thomas M. Markey  
Acting Administrator