

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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H. THOMAS CADELL, JR., *Chief Counsel*

February 7, 1994

Ned A. Fine, Esq.
Fisher & Phillips
Three Lagoon Drive, Suite 345
Redwood City, CA 94065-1567

Re: **Overtime Exemption For Service Advisors**

Dear Mr. Fine:

Thank you for your letter of January 17, 1994, seeking an opinion regarding the appropriateness of utilizing the overtime exemption for commissioned salespeople available in IWC Orders 4 and 9.

As we discussed many times in the past, it is not possible for this office to grant a blanket exemption based upon the "facts" set out in a letter. However, I can tell you that it has been my experience that, by and large, individuals who are employed as service advisors and devote most of their time to that occupation, may be considered for the exemption for commissioned employees if all of the other criteria are met.

In your letter you also request guidance in regard to "sample commission pay plans" which you attached. The sample programs are:

1. \$2,500.00 monthly draw (against commissions - payable half on 15th and half at end of month), with commission based on 4% of labor and parts gross profit on orders taken by service advisor. You explain that this program provides commissions on labor gross profit (which equals labor charge to customer less sum paid to mechanic¹) and parts gross profit (which equals the dollar price of the parts sold by the service advisor less the dealer cost of

¹This is not exactly the way you describe the program but this is what I think you mean. If I have misunderstood the program, please get in touch with me.

1994.02.07

parts²).

Based upon the above, you present the following scenario:

Service Advisor writes up repair orders which reflect 2,000 hours of labor charges @ \$65.00 per hour or \$130,000 in the month. The same 2,000 hours cost 2,000 times \$22.50 (the average³ hourly pay rate of the mechanics) or \$45,000. This leaves gross labor profit of \$130,000 minus \$45,000 equals \$85,000. \$85,000 times 4% equals \$3,400. Parts sales prices [attributable to the service advisor⁴] total \$75,000 in the month, less cost of parts (\$40,000) equals \$35,000. 4% times \$35,000 equals \$1,400. Total commission therefore equals \$3,400 (on labor) plus \$1,400 (on parts) or \$4,800. Service advisor is paid \$4,800 less \$2,500 draw against commissions, or additional commission check of \$2,300.

You add that we are to assume that the service advisor worked 10 hours of overtime each week for a total of hours worked in the month of 210 hours.

2. Same draw as above, except service advisors are paid a percentage of the gross cost of all labor sales (and sometimes including parts sales), as opposed to gross profit.
3. Service advisor is paid a salary plus commission. The commission plan could be either of the above approaches, perhaps with smaller percentages. A typical salary under your scenario might be \$1,200.00 per month.
4. Service advisor is paid a "guarantee" (say \$2,500.00) of a certain level of commissions. If the commission calculation does not meet or exceed the guarantee, the service advisor receives the guarantee. In your scenario, if actual commissions equal \$2,100.00 in a particular month and employee

²You don't explain how your program calculates the "dealer cost" but assuming that this figure is properly computed (see, for instance, *Quillian v. Lion Oil* (1979) 96 Cal.App.3d 156; 157 Cal.Rptr. 740), this method of calculation is acceptable.

³We don't understand this statement. Do the figures represent the actual cost to the employer of the wages of the mechanics, or is this an "average" cost?

Bracketed material has been added. If this is incorrect, please contact me.

therefore receives the \$2,500.00 guarantee, the employee would be exempt from the overtime requirements provided the \$2,500.00 would represent at least \$6.375 for each hour the employee worked.

Employment arrangements which provide for a commission on goods or services to be paid to an employee may also provide for the payment to the employee at a regular pay period (not less than twice a month under California law) of a fixed sum of money, which may bear a more or less fixed relationship to the commission earnings which could be expected, on the basis of experience, for an average period of the same length (not to exceed one month under the provisions of Labor Code §204.1). Such periodic payments, which are variously described as "advances," "draws," or "guarantees," are keyed to a time base and are usually paid at weekly or other fixed intervals which may in some instances be different from and more frequent than, the intervals for payment of any earnings computed exclusively on a commission basis. They are normally smaller in amount than the commission earnings expected for such a period and if they prove to be greater, a deduction of the excess amount from commission earnings for a subsequent period, (not more than one month in the case of commissioned employees of an automobile dealership) is customary under the employment arrangement.

A determination of whether or to what extent such periodic payments can be considered to represent commissions may be required in those situations where the employment arrangement is that the employee will be paid the stipulated sum, or the commission earnings allocable to the same period, whichever is the greater amount. The stipulated sum can never represent commissions, of course, if it is actually paid as a salary. If, however, it appears from all the facts and circumstances of the employment that the stipulated sum is not so paid and that it actually functions as an integral part of a true commission basis of payment, then such compensation may qualify as compensation which represents commissions.

In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate are deemed commissions without regard to whether the computed commissions exceed the draw or guarantee which may be paid to the employee. Thus an employee who is paid a guarantee or draw against commissions computed in accordance with a bona fide commission payment plan or formula under which the computed commissions vary in accordance with the employee's sales will qualify for exemption provided the employee's regular rate of pay for such workweek is more than one and one-half times the applicable minimum wage. Under a bona fide commission plan all of the

Ned A. Fine, Esq.
February 7, 1994
Page 4

computed commissions will be counted as compensation representing commissions even though the amount of commissions may not equal or exceed the guarantee or draw in some workweeks.

The exemption will also apply in the case of an employee who is paid a fixed salary plus an additional amount of earned commissions if the amount of commission payments exceeds the total amount of salary payments for the representative period.

A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek (as would be the case where the computed commissions seldom or never equal or exceed the amount of the draw or guarantee). Another example of a commission plan which would not be considered as bona fide is one in which the employee receives a regular payment constituting nearly his entire earnings which is expressed in terms of a percentage of the sales which the establishment or department can always be expected to make with only a slight addition to his wages based upon a greatly reduced percentage applied to the sales above the expected quota.

I hope this adequately addresses the issues you raised in your letter of January 17, 1994. I should advise you that the ordinary turn around time for responding to letters of inquiry such as yours is less than thirty days. The normal turn around time is currently in excess of forty days. Repeated phone calls to this office regarding the status of the inquiry generally results in more delays because of the additional time necessary to respond to the phone inquiries. Please consider this axiom when seeking opinions in the future.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw

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