

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
45 Fremont Street, Suite 3220
San Francisco, CA 94105
(415) 975-2060



MILES E. LOCKER, *Chief Counsel*

September 8, 1998

Dennis A. Gladwell
Gibson, Dunn & Crutcher
Jamboree Center
4 Park Plaza
Irvine, CA 92614-8557

Re: **Applicability of Outside Sales Exemption to Salespersons
Who Sell Tract Homes While Based in a Model Home or
Trailer**

Dear Mr. Gladwell:

This is in response to your letter dated July 25, 1998 in which you ask whether employees of a home builder or seller, who work "significant hours" each day selling newly constructed tract homes while based in a model home or temporary trailer, fall within the outside sales exemption from coverage of the orders of the Industrial Welfare Commission ("IWC"). You further state that the temporary trailers or model homes are "miles away from the employer's place of business."

Labor Code section 1171 exempts "any individual employed as an outside salesman" from IWC coverage. The term "outside salesperson" has been defined by the IWC to mean "any person, 18 years of age and over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services, or use of facilities." Title 8, Cal. Code of Regulations, section 11040, para. 2(J).

The "employer's place of business" is not limited, by the IWC definition, to a principal place of business or an administrative headquarters. In the construction of remedial wage and hour regulations, any exemption is to be construed narrowly, and is limited to those employees who fall plainly and unmistakably within its terms. Nordquist v. Mc-Graw Hill Broadcasting Co. (1995) 32 Cal.App.4th 555, 562; Corning Glassworks v. Brennan (1974) 417 U.S. 188, 196-197, Arnold v. Kanowsky, Inc. (1960) 361 U.S. 388, 391.

We therefore conclude that temporary trailers and model homes located at a tract housing site, although physically separate from the home builder's or seller's headquarters office, nonetheless constitute "the employer's place of business" within the meaning of the IWC's definition of "outside salespersons." Consequently, employees who work out of temporary trailers or model homes and who sell newly constructed tract homes would not fall within the "outside salesperson" exemption unless they are customarily and regularly engaged in sales work for more than half of their work time away from the temporary trailer or model home, or other property at the housing tract owned or controlled by their employer.

This analysis is consistent with the IWC's expressed intent concerning the scope of the outside salesperson exemption. Outside salesmen have historically been exempt "because it's very difficult to control their hours and working conditions. They set their own time, and they're on the road, they call on their customers. . . . [R]arely do you know what they're doing on an hour-to-hour basis." (Transcript of IWC Meeting 2/23/96, p. 148) An employer can more easily control and monitor the hours and working conditions of salespersons who perform their sales work on property that is owned or controlled by the employer. It would not, therefore, serve the purpose of the IWC's outside sales exemption to extend that exemption to employees who perform their sales activities on employer owned or controlled property.

The federal outside sales exemption is defined somewhat differently than its State counterpart. The Fair Labor Standards Act contains an exemption for "outside salesmen," a term that is defined at 29 CFR §541.5. Unlike the IWC definition, the federal regulations are not time driven, that is, there is no bright line test as to whether the employee is spending more than half his worktime away from the employer's place of business engaged in sales work. The IWC test requires that in order to be exempt, half of the employee's time must be spent engaged in sales work away from the employer's place of business. Time spent performing any work at the employer's place of business, even if it sales work, counts against the exemption. Likewise, any work other than "selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities" counts against the exemption, even if such other work is performed away from the employer's place of business, and even if it is somehow "incidental to" sales work. In contrast, the federal regulations provide that "work that is performed incidental to and in conjunction with the employee's own outside sales . . . shall not be regarded as nonexempt work." This

special treatment of "incidental work" is set forth in a proviso to the federal regulation, and overrides all of the other aspects of the federal test. 29 CFR §541.500. As such "incidental" work is not expressly included within the IWC's definition of outside sales, it would be improper to rely on the federal definition, and cases or opinions founded upon the federal definition, in our interpretation and enforcement of state law. See Aguilar v. Ass'n for Retarded Citizens (1991) 234 Cal.App.3d 21, 31-35; Skyline Homes v. Department of Industrial Relations (1985) 165 Cal.App.3d 239, 244.

In your letter, you assert that the Department of Labor ("DOL") considers the employees working under the conditions you have described to be exempt under the Fair Labor Standard Act's "outside salesman" exemption. That assertion somewhat misstates and oversimplifies the DOL's position, as expressed in an opinion letter issued by the Wage and Hour Administrator on April 21, 1964. More importantly, whatever conclusions may have been reached by the Wage and Hour Administrator as to the proper application of the federal "outside sales" exemption do not necessarily carry over to state law in view of the differences between the federal and state definitions. Finally, it appears that the reasoning upon which this 1964 opinion letter was based is at odds with the subsequent decision in Brennan v. Modern Chevrolet Co. (N.D. Tex. 1972) 363 F.Supp. 327.

In this opinion letter, the Administrator concluded that "where for purposes of convenience a 'model home' on a real estate development is maintained on a relatively permanent basis as an office of the employer, staffed with necessary personnel for making sales, salesmen who do not customarily and regularly leave this headquarters as part of their sales efforts would be 'inside' rather than 'outside' salesmen, just as they would be if confined to such inside work in any other office maintained by the employer." This, in itself, is not inconsistent with state law. However, the other conclusions reached by the Administrator are not consistent with the IWC's definition of "outside sales" for state law purposes. Specifically, the Administrator determined that "[t]ransitory assignments of salesmen permanently headquartered at an office of the employer who are sent to a 'model home' or other location at a tract where it will be their duty to engage in sales efforts with respect to real estate on the tract would not defeat the otherwise applicable exemption." There is no language in any IWC order that purports to limit the "employer's place of business" to a physical location that is maintained by the employer on "permanent", rather than a "transitory" basis, or that would look to whether the employee

Dennis A. Gladwell
September 8, 1998
Page 4

was "permanently" or "temporarily" assigned to that physical location as a basis for determining the applicability of the exemption.

The Administrator also opined that the requirement for outside sales work would be met "[s]o long as the salesman customarily and regularly goes to the site of the property or to prospects as a part of making his sales." In view of the subsequent case of Brennan v. Modern Chevrolet Co. (1972) 363 F.Supp. 327, we question the continued validity of the Administrator's view that an employee engaged in sales activities outside the model home, but within the housing tract on property that is owned or controlled by the employer, is "engaged away from the employer's place of business." In Modern Chevrolet, the court held that car salesmen who spend much of their time on their employer's car lot, away from the showroom, perform all of their sales work at the employer's place of business, and thus, are not covered by the outside sales exemption. Conceptually, we see no difference between Modern Chevrolet's car lot and a home builder's housing tract.

Finally, the Administrator's 1964 opinion letter provides that "time spent on return to the model home or other headquarters to conclude a sales transaction or to continue sales effort with the prospect would be deemed part of the salesman's outside sales activity." This analysis, while consistent with the federal regulation's special treatment of work performed "incidental to and in conjunction with the employee's own outside sales," cannot be applied to the IWC test which, as discussed above, contains no similar provision for such "incidental" work.

Please feel free to contact our Division with any other questions. Thank you for your interest in California wage and hour law.

Sincerely,



Miles E. Locker
Chief Counsel

cc: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen