

Management Alert

DOL Issues Guidance for Classifying Home Salespersons As Exempt

In a recently issued opinion letter, the Department of Labor (DOL) reaffirmed its long-standing position that salespersons of newly-constructed homes who work out of temporary sales facilities may be exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). The DOL also provided guidance on the level of activities that must take place away from an employer's place of business in making sales in order to be considered exempt as an outside salesperson, what constitutes an "employer's place of business," and its position that activities "incidental" to sales activities should be included in making a determination of outside sales status. The opinion letter may help home construction and sales companies facing overtime claims by outside salespersons.

The salespersons at issue in the opinion letter sell newly-constructed homes and work out of offices in temporary sales facilities, such as model homes or trailers, which are located in or near the community where the builder is selling the new homes. This on-site location of the office facilitates the salesperson in meeting potential home buyers and showing them the new construction. Generally, the salespersons only leave the model home or trailer once or twice a week, for one to two hours at a time, to engage in sales and marketing efforts such as meetings with customers or realtors or to show empty parcels or new construction.

The FLSA and its regulations exempt "outside salespersons" from the statute's requirement that employees be paid an overtime premium for time worked in excess of 40 hours per workweek. To be an exempt outside salesperson, an employee must (1) have a primary duty of making sales; and (2) be customarily and regularly engaged away from the employer's place or places of business in making those sales. Work performed incidental to and in conjunction with the employee's own outside sales or solicitations is regarded as outside sales work. Nevertheless, any "fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business."

Consistent with a 1964 opinion letter and the DOL Wage and Hour Division's Field Operations Handbook, the agency found in its just-published opinion letter that the salespersons at issue clearly had a primary duty of "making sales" given that most of their time was spent meeting potential buyers, construction personnel, and realtors, showing properties, completing paperwork, scheduling appointments, and engaging in marketing efforts, which all qualified as exempt sales activity.

More significantly, regarding the question of whether the salespersons were "customarily and regularly engaged away from the employer's place of business," the DOL determined that the salespersons were indeed so engaged, although they spent all of their time inside

the model homes or trailers, except for sales activities outside the model home or trailer “one or two hours a day, one or two times a week.” The DOL reasoned that the salespersons’ activity of showing the new construction to the customers, which necessarily took place away from the office, was “critical” to the overall sales effort and an “indispensable component” of the salespersons’ sales activities. On this basis, the DOL found that the employees met both requirements of the outside sales exemption.

This ruling establishes a persuasive threshold under the federal FLSA for establishing that salespersons of new construction who work out of temporary sales facilities are customarily and regularly engaged away from the employer and may, therefore, qualify for the outside sales exemption (although some state laws may apply a different threshold). The DOL’s new opinion letter on this subject is particularly important because of a court ruling last year in *Billingslea v. Brayson Homes, Inc.*, 2006 U.S. Dist. LEXIS 11707 (N.D. Ga., March 7, 2006) rejecting the DOL’s previously stated position that home salespersons could qualify for the outside sales exemption even if their outside sales work was limited to the subdivision in which the employer’s office was located. In *Billingslea*, the Court viewed an entire subdivision as the “employer’s place of business” and, as a result, concluded that the sales agents at issue were not engaged in exempt outside sales duties when they left the model home to show parcels or model homes. *Billingslea* is likely to be appealed to the Eleventh Circuit. While not controlling authority for the Court of Appeals, or, for that matter, on other courts considering the issue, the fact that the DOL has so recently confirmed its long-standing view concerning the applicability of the

outside sales exemption to home salespersons should be of considerable importance to the outcome of that case. Seyfarth Shaw will, of course, keep informed of developments on this issue and report them to industry members as such developments occur.

Please contact your Seyfarth Shaw attorney or any member of the firm’s Wage & Hour Litigation Practice Group for further information on this subject. We invite you to visit Seyfarth Shaw’s website, www.seyfarth.com, for further information about our national Labor & Employment Department and Wage & Hour Litigation Practice Group.

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