



# Assessing The Risk:

## Wage and Hour Tip Of The Week

### Outside v. Inside Sales -- Who Is Exempt?

**TIP: Evaluate how and where your sales employees are working to ensure proper classification.**

Otto travels regularly to his customers' offices to sell business management services. You pay him on a commission basis. Irene calls her customers from her office to sell the same services. You also pay her on a commission basis. Under federal law, Irene is entitled to overtime, but Otto is not. Why?

The outside sales exemption -- which applies to workers whose *primary duty* is selling goods or services by making personal visits to customers' homes or places of business -- was created at a time when vacuum cleaner salesmen (and other outside sales people; think Fuller Brush Man) were rampant. Their workdays were irregular and it was difficult to track their time. Employers were able to convince Congress to create an exemption that excused them from the onerous, if not impossible, task of recording their time and paying them overtime. The flexibility of these jobs, and the potential for relatively high earnings associated with a burgeoning sales-based market, benefited the employees sufficiently to justify their ineligibility for minimum wage and overtime. Hence, the outside sales exemption.

By contrast, inside sales people -- who theoretically worked regular hours under the watchful eyes of their supervisors -- did not raise the same difficulties. Their hours could easily be tracked and, in an age when face-to-face contact was prized over the impersonality of a telephone call, their potential earnings were not as great. Congress could not justify an inside sales exemption.

Certainly, times have changed. Most would now agree that inside sales people are now much more prevalent than traveling, outside sales personnel. In many cases, inside sales create much greater potential for earnings. Yet, to this day, Congress has refused to create an inside sales exemption.

This means that, unless she qualifies for another exemption, if Irene is making sales from her office, even if you are paying her hefty commissions for doing so, you must record her working time, pay her at least minimum wage, and pay her overtime when she works more than forty hours in a workweek.

The answer for Irene, as an inside sales person, could be different if she works in a *retail or service establishment*, earns more than 1-1/2 times the minimum wage, and more than half of her compensation is from commissions. In that case, under Section 7(i) of the federal Fair Labor Standards Act and accompanying U.S. Department of Labor regulations, she would be exempt from overtime, but not minimum wage. Beware, however, of states (such as California) that have their own versions of the exemption that may differ from the FLSA in material respects.

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