



NATIONAL AUTOMOBILE DEALERS ASSOCIATION  
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Legal & Regulatory Group

September 26, 2008

Wage and Hour Division (Rm. S-3506)  
Employment Standards Administration (ESA)  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

RE: Updating Regulations Issued Under the Fair Labor Standards  
Act (FLSA); 29 CFR Parts 4, 531, 553, 778-80; 785-6, and 790;  
RIN 1215-AB13

Ladies and Gentlemen:

The National Automobile Dealers Association (NADA) represents 19,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair and parts sales. Together they employ in excess of 1,100,000 people nationwide, yet a significant number are small businesses as defined by the Small Business Administration.

Last summer, the ESA proposed certain updates to its FLSA rules. 73 Fed. Reg. 43654, *et seq.* (July 28, 2008). Among other things, the ESA seeks to codify long standing interpretations governing service advisors, and to clarify when certain uses of employer-provided vehicles is not compensable.

## **I. Service Advisors**

Section 13 (b)(10)(A) of the FLSA provides for an overtime exemption for salesmen primarily engaged in selling and servicing automobiles. 29 U.S.C. §213(b)(10)(A). One of the existing regulations interpreting this provision mistakenly states that employees variously described as service managers, services advisors, or service salesmen are *not* exempt under section 13(b)(10)(A).

The proposal artfully outlines the history of consistent court interpretations, dating back at least to 1973, that hold that service advisors are indeed exempt from overtime under section 13(b)(10)(A) as “salesmen” primarily engaged in “servicing” automobiles. Moreover, the proposal refers to the fact that, since at least 1987, section 24L04(k) of the Wage and Hour Division Field Operations Handbook has stated that the section 13 (b)(10)(A) overtime exemption applies to service advisors. In addition, the retail automobile and truck dealership industry has long relied on a consistent 1978 interpretation letter (WH-467), issued by then Wage and Hour Division Administrator Vela, a copy of which is found attached.

NADA supports the proposed correction to 29 CFR §779.372(c)(4) clarifying that service managers, services advisors, or service salesmen are indeed exempt under section 13(b)(10)(A).

## **II. Commuting Employees**

The Employee Commuting Flexibility Act 1996 defined circumstances under which pay is not required for employees who use employer vehicles for home-to-work commuting and for related incidental activities. 29 U.S.C. §254(a). It is not unusual for dealership employees to be assigned “demonstrator” vehicles, pursuant to an agreement with their employer, which they use for commuting travel and for related incidental activities. Consistent with the above, dealerships routinely do not count such commuting time and related incidental time as “hours worked” for purposes of calculating an employee’s compensation. Thus, NADA supports the clarifying language being proposed for 29 CFR §§785.34, 785.50, and 790.3

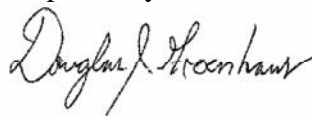
## **III. Other Proposed Regulatory Clarifications**

In addition to the above, NADA supports the following proposals:

1. The addition of a new subpart G of 29 CFR Part 786 providing for a youth opportunity wage allowing employers to pay employees less than 20 years-old a sub-minimum wage for up to 90 consecutive calendar days after hire, under certain limited circumstances.
2. Modifications to 29 CFR §778.114 designed to clarify how bonus and premium payments should be treated under the fluctuating workweek method of computing overtime compensation for salaried nonexempt employees.

On behalf of NADA, I thank the ESA for the opportunity to comment on this matter.

Respectfully submitted,



Douglas I. Greenhaus  
Director, Environmental, Health and Safety

U.S. DEPARTMENT OF LABOR  
EMPLOYMENT STANDARDS ADMINISTRATION  
Wage and Hour Division  
WASHINGTON, D.C. 20210

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21 BJ 971.32  
21 BJ 971.33



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This is in further reference to your letter regarding the application of section 13(b)(10) of the Fair Labor Standards Act to certain service employees of automobile dealerships.

Section 13(b)(10)(A) of the Act provides a complete overtime pay exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers". This section provides an individual employee exemption to employees employed in the specified occupations. Our present position is that employees variously described as service writer, service advisor, service manager, or service salesman whose primary duty is to record the condition of a vehicle and write up a report indicating the parts and mechanical work needed for restoration may qualify for this exemption provided the majority of their sales in dollar volume (over 50%) is for non-warranty work. The exemption would not apply to any such service writer where the majority of his or her service sales is for warranty work.

This position represents a change from the position set forth in section 779.372(c)(4) of our Interpretative Bulletin, Part 779, where it is stated that service writers are not exempt under section 13(b)(10). We recognize, however, that service writers in certain circumstances can be properly regarded as engaged in selling activities. This would not be true in the case of warranty work, since the selling of the warranty is done by the vehicle salesman when the vehicle is sold, not by the service writer.

The employee pay plan you present, if the employee meets the non-warranty sales test for exemption from section 7 of the Act, appears to meet the minimum wage requirements of section 6. You state that these employees are paid on a commission basis and that the pay period and commission computation period cover 1 month. You will multiply the commission payment by 12 and divide by 52 to get the amount of commission allocable to a single week. The commission for a single week is divided by the total number of hours worked in that week. If this figure is less than the minimum wage, the difference is made up at this point--thus assuring that the employee receives at least the statutory minimum for each hour worked during each week of the monthly pay period.

Sincerely,

/s/ Xavier M. Vela

Xavier M. Vela  
Administrator