

MEMORANDUM

State of Alaska Department of Law

TO: Randy Carr, Chief
Wage & Hour Section
Division of Labor Standards and Safety
Department of Labor

DATE: March 16, 1995

FILE NO.: 661-95-0380

TELEPHONE NO.: 269-5151

SUBJECT: Request for Attorney General's
Opinion - Automotive Service
Advisors

FROM: Robert A. Royce
Assistant Attorney General
Governmental Affairs - Anchorage

You have requested our opinion as to whether an automotive service advisor may be considered a "salesman employed on a straight commission basis" as that term is defined in 8 AAC 15.910(12). It is my understanding that the Department of Labor's Wage & Hour Section is investigating several wage claims involving service advisors. You have informed me that these service advisors are paid on a straight commission basis and that their duties include obtaining orders for automobile repairs and service. Based upon the information you have provided, these service advisors are within the meaning of a "salesman employed on a straight commission basis" under 8 AAC 15.910(12).

Alaska's Wage and Hour Act, AS 23.10.050 - 23.10.150 ("the Act") requires that certain employees who work more than 40 hours a week or more than 8 hours a day be paid overtime at a rate of one and one-half times their regular rate of pay. AS 23.10.060. However, the overtime provisions do not apply to "a salesman who is employed on a straight commission basis." AS 23.10.055(9).

According to Department of Labor regulations, a "salesman who is employed on a straight commission basis" means a person:

- (A) who is regularly employed on the business premises of the employer;
- (B) who is compensated on a straight commission basis for the purpose of making sales, contracts for sales, consignments, or shipments for sale or for obtaining orders for services or the use of facilities for which a consideration will be paid by the client or customer; and

(C) whose hours of work of a nature other than that described in this paragraph or in (10)¹ of this subsection do not exceed 20 percent of the hours worked in the workweek[.]

8 AAC 15.910(12) (emphasis added).

The regulations define "straight commission basis" as a "fixed percentage of each dollar of sales an employee makes." 8 AAC 15.910(16).

Accordingly, if an automotive service advisor (1) worked on the business premises of the employer; (2) was paid on a "straight commission basis" for the purpose of "obtaining orders for services," and (3) did not spend more than 20 percent of his or her workweek on non-exempt duties, then such an employee would be exempt from the overtime provisions of the Act.

You should be aware that several courts have held that service advisors are exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq. (1988), although for different reasons. *See, e.g., Brennan v. Deel Motors*, 475 F.2d 1095 (5th Cir. 1973); *Yenney v. Cass County Motors*, 23 Wage & Hour Cas. (BNA) 59 (D. Neb. 1977); *Brennan v. North Bros. Ford, Inc.*, 22 Wage & Hour Cas. (BNA) 265 (E.D. Mich. 1975). This is because there is a specific exemption under the FLSA for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles . . . if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles" 29 U.S.C. § 213(b)(10)(A). Despite a federal regulation providing that service advisors are not exempt,² federal courts uniformly hold that an advisor must be considered a "salesman, partsman, or mechanic" within the scope of exemption contained in 29 U.S.C. § 213(b)(10)(A). *Id.* In addition, the court in *Brennan v. North Bros. Ford, Inc.* described the job of a service advisor:

¹ 8 AAC 15.910(10) pertains to duties of an "outside salesman."

² 29 C.F.R. § 779.372(c)(4) provides:

"[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described above are not exempt under section 13(b)(10). This is true despite the fact that such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics."

The service [advisor] receives the customers at the service department counter, makes at least a preliminary diagnosis of problems if necessary, and then prepares a work order detailing the required services or repairs.

22 Wage & Hour Cas. (BNA) at 265.

Federal precedent under the FLSA is not controlling here because the Act does not contain the same exemption found in 29 U.S.C. § 213(b)(10)(A). Nevertheless, the federal authority does show that the duties of service advisors include obtaining orders for service and that they are primarily engaged in the selling or servicing of automobiles.

The analysis under the Act is therefore straightforward. Service advisors who are compensated on a straight commission basis for obtaining orders for services are exempt under the plain terms of 8 AAC 15.910(12). This memorandum of advice is limited to the facts presented in your request. A different result would be reached if service advisors were paid on an hourly or salary basis. We hope this memorandum answers your question.

RAR:fgf