



FLSA2018-21

August 28, 2018

Dear **Name***:

This letter responds to your request for an opinion letter concerning whether the Fair Labor Standards Act (FLSA)'s "retail or service establishment" exemption applies to sales representatives at your client's business. The opinion below is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

BACKGROUND

Your letter states that your client "sells a technology platform to merchants that enables online and retail merchants to accept credit card payments from their customers from a mobile device, online, or in-person." Your client operates in a highly competitive industry and employs sales representatives to promote its platform to merchant-customers. Your client's technology payment platform "cannot be resold, as the platform is designed for each specific merchant," and the sale of this platform constitutes 100 percent of your client's sales.

GENERAL LEGAL PRINCIPLES

The FLSA exempts from its overtime pay requirements certain employees of "retail or service establishment[s]." 29 U.S.C. § 207(i). The exemption applies to any employee for whom the following three requirements are satisfied:

- the employee works at a retail or service establishment,
- the employee's regular rate of pay exceeds one and one-half times the applicable minimum wage in the workweek in which he or she works overtime, and
- more than half of the employee's earnings in a representative period consist of commissions.

Id.

The United States Supreme Court recently held that exemptions under the FLSA deserve a "fair (rather than narrow) interpretation" because the exemptions are "as much a part of the FLSA's purpose as the overtime-pay requirement." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks and citation omitted). Accordingly, WHD must apply a "fair reading" standard to all exemptions to the FLSA—including the Section 7(i) exemption addressed in this letter.

OPINION

Your letter focuses primarily on the first requirement under Section 7(i), that is, whether your client qualifies as a “retail or service establishment.” To qualify as a “retail or service establishment,” (1) your client must “engage in the making of sales of goods or services”; (2) “75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry”; and (3) “not over 25 percent of its sales of goods or services, or of both, may be sales for resale.” 29 C.F.R. § 779.313.

A business typically satisfies the first requirement if it “sells goods or services to the general public,” “serves the everyday needs of the community,” “is at the very end of the stream of distribution,” disposes its products in “small quantities,” and “does not take part in the manufacturing process.” 29 C.F.R. § 779.318(a). The information you have provided indicates that your client satisfies these criteria, in part because your client sells its platform to a variety of purchasers, the platform serves their everyday needs, the platform is not distributed further once sold, and your client does not sell large quantities of the platform to any single customer. The fact that your client sells its platform to commercial entities does not change this conclusion; indeed, a business may qualify for the exemption even if it sells “certain products almost never purchased for family or noncommercial use.” 29 C.F.R. § 779.318(b) (a “precise line... cannot be drawn”); *see also Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 200-03 (1965) (sale to a business purchaser can be a retail sale).

Courts have confirmed that businesses may qualify as retail or service establishments when their customers and end-users, like those of your client, are predominantly commercial entities. *See, e.g., Alvarado v. Corporate Cleaning Servs., Inc.*, 782 F.3d 365, 369-71 (7th Cir. 2015) (window-cleaning business that provided services to various businesses and entities constituted a retail or service establishment for purposes of the Section 7(i) exemption); *Charlot v. Ecolab, Inc.*, 136 F. Supp. 3d 433, 468-69 (E.D.N.Y. 2015) (business that sold cleaning supplies and related products to other businesses qualified as a retail or service establishment for purposes of the Section 7(i) exemption) (citing 29 C.F.R. § 779.318(b); *Wirtz*, 383 U.S. at 203); *Schwind v. EW & Assocs., Inc.*, 371 F. Supp. 2d 560, 565-67 (S.D.N.Y. 2005) (business that provided computer training to commercial businesses constituted a retail or service establishment for purposes of the Section 7(i) exemption). Notably, courts have also confirmed that “case law does not require a physical location accessed by the public” for the sales to be made to the general public. *See Selz v. Investools, Inc.*, 2011 WL 285801, at *6 (D. Utah Jan. 27, 2011); *see also* 29 C.F.R. § 779.319 (a business “is available and open to the general public even if it receives all its orders on the telephone”). Thus, your client may still qualify for the retail or services exemption even if it sells its platform primarily online.

As to the second requirement, the information you have provided indicates that your client’s sales of its platform are retail sales, not wholesale sales. *See* 29 C.F.R. §§ 779.327, 779.328 (distinguishing between retail and wholesale sales). Your client does not sell large quantities of the platform to individual purchasers. Further, as noted in *Alvarado*, a business does not engage in wholesale merely because purchasers of its product use the product, in turn, to serve their own customers and may even raise prices to recover the cost of the purchase. *See* 782 F.2d at 369 (“It would be absurd to suggest that a dealer in motor vehicles, when it sells a truck to a moving company, is ‘wholesaling’ the truck because the buyer will doubtless try to recover the cost of

the purchase in the price he charges for his moving services, which utilize the truck.”). Please note, however, that although WHD has “considerable discretion” when making determinations regarding whether sales are recognized as retail in a particular industry, the “responsibility for making final decisions... rests with the courts.” 29 C.F.R. § 779.325.

Your client also satisfies the third requirement because its payment platform is not resold. “The common meaning of ‘resale’ is the act of ‘selling again.’ A sale is made for resale where the seller knows or has reasonable cause to believe that the goods or services will be resold.” 29 C.F.R. § 779.331. As you have indicated, your client’s platforms “cannot be resold” because they are “designed for each specific merchant.”

Given these considerations and the specific facts you provided, your client constitutes a retail or service establishment under 29 U.S.C. § 207(i). Consequently, the FLSA’s retail or service establishment exemption will apply to any of your client’s employees whose regular rate of pay exceeds one and one-half times the applicable minimum wage for workweeks in which they work overtime, and whose commissions constitute more than half of their earnings.¹

We trust that this letter is responsive to your inquiry.

Sincerely,



Bryan Jarrett
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

¹ You have indicated that your client’s platform essentially acts as an intermediary between the merchant, customer, and credit card company. To the extent that your client is functioning as a bank or providing loan services to its merchant-customers aside from the payment platform, your client may not qualify for the exemption and should be aware of relevant precedent in this area. *See, e.g., Mitchell v. Kentucky Finance Corp.*, 359 U.S. 290, 292-95 (1959). Your letter does not indicate this is the case, and for purposes of this letter, we assume that it is not.