

Blog Post

# Don't Sell Your Company Short: Properly Classify Sales Employees

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While certain sales employees are exempt from minimum wage and overtime requirements under federal and state laws, others are not. Getting it wrong can be a costly mistake, so employers are well advised to ensure their salespeople are properly classified.

The federal Fair Labor Standards Act (FLSA) provides that employees engaged in “outside sales” are exempt from overtime, but those engaged in “inside sales” are not – except when they fall under a separate exemption. But what constitutes “outside” vs. “inside” sales? If your employee doesn't have to come to the office and conducts sales from home, that's outside sales, right? Actually, wrong. What about an employee who delivers, stocks, solicits sales and obtains orders for baked goods at customer locations? It depends.

Let's take a look at the basics. And remember, in addition to federal law, other state laws may come into play.

## Outside Sales Employees

To qualify for the “outside sales” exemption under the FLSA, the employee must meet a two-pronged test: 1) the employee's *primary duty* must be making sales or obtaining orders or contracts for services or for the use of facilities; and 2) the employee must be

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customarily and regularly engaged away from the employer's place of business in performing such primary duty.

“Primary duty” means the principal, main, major, or most important duty that the employee performs. The regulations provide that the determination is fact-specific, “with the major emphasis on the character of the employee’s job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.”

The regulations further provide that “[i]n determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee’s own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work.”

So, what about workers who delivered baked goods, took inventory, stocked shelves, but also sold products, solicited accounts, participated in sales contests, and engaged in other activity related to sales? A court in North Carolina said the employer failed to show by clear and convincing evidence, as required, that sales were the plaintiffs’ principal, main, or most important duty, and allowed their wage claims to proceed to trial.

Even if the employee’s primary duty is sales, the sales duties also must be customarily and regularly performed “away from the employer’s place of business.” That means an employer must analyze the extent to which the employees engage in sales, solicitations, or related activities outside of the employer’s place of business. The regulations

specifically provide that “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, even though the employer is not in any formal sense the owner or tenant of the property.” Thus, making sales from an employee’s home does not make the sales “outside.” However, an employee who customarily meets clients face-to-face outside of the employer’s place of business in order to initiate sales, such as at the *client’s* home or business, or at a restaurant or club, would meet the “outside” requirement of the outside sales exemption. The fact that employees perform some limited activities at their employer’s place of business won’t necessarily disqualify them from the exemption, as long as the inside activities are incidental to and in conjunction with their outside sales activity, such as making phone calls or sending emails setting up meetings.

Keep in mind that the qualifying exempt outside sales activities must be normally and recurrently performed every workweek; isolated or one-time sales tasks are not sufficient.

### **Inside Sales Employees at Retail or Service Establishments**

The FLSA provides an overtime pay exemption – but, importantly, not a minimum wage exemption – for certain commissioned employees. However, only employers who operate “retail or service establishments” may take advantage of this exemption. To qualify as a “retail or service establishment,” 1) the business must engage in the making of sales of goods or services; 2) 75 percent of its sales of goods or services must be recognized as retail in the particular industry; and 3) not more than 25 percent of its sales of goods or services (or both) can be for resale.

If an employer qualifies as a retail or service establishment, the employer’s inside sales

employees may qualify for an overtime exemption under the FLSA if the following tests are met:

1. The employee's regular rate of pay is in excess of one and one-half of the minimum wage in the workweek in which he works overtime; and
2. More than half of the employee's earnings in a representative period of at least one month consists of commissions.

Employers can still qualify as "retail or service" establishments even if the primary channel of sale is online. Just last year, in an opinion letter acknowledging that technology has changed the workplace, the Department of Labor (DOL) recognized the exemption for sales representatives of a company that sells a technology platform to merchants that enables online and retail merchants to accept credit card payments from a mobile device, online or in person. In reaching its conclusion, the DOL expressly acknowledged a 2018 United States Supreme Court decision that held that exemptions under the FLSA deserve a "fair (rather than narrow) interpretation."

### **State Law Concerns**

Pay attention to your state's laws, as they may impact the analysis. In California, for example, there is a minimum wage and overtime exemption for outside salespersons, but the standard for determining who is a salesperson is *quantitative* rather than *qualitative* as it is under the FLSA – only persons who customarily and regularly work *more than half* the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities are exempt.

Another example: there is no "inside sales" exemption under New York state law.

### **Classify Correctly!**

The costs of misclassifying sales employees can be shocking for employers. Employees who were improperly classified as exempt may be entitled to payment not only of back pay for up to three years (if the violation is deemed willful), but also up to an equal amount in liquidated damages, injunctive relief, interest, attorneys' fees, and other penalties depending on the applicable law.

Akerman attorneys are available to help determine whether employees are properly classified.

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