The Outside Salesperson Exemption

The Fair Labor Standards Act (FLSA) is a set of laws that govern wages and hours. The FLSA sets the minimum wage for hours worked and has set overtime rates at one-and one-half times the base rate for hours worked over 40 per week. Employees who meet certain requirements are exempt from the provisions of the FLSA. One exception to these provisions is the outside sales exemption. If your company has outside sales positions, your employees may qualify for this exemption. Unlike the White-Collar Exemptions (Executive, Administrative and Professional), this exemption has no minimum salary requirement and allows outside sales representatives to be primarily compensated on commission. Outside sales people who meet this exemption are not required to be paid a minimum salary, are not eligible for overtime, are not required to be paid minimum wage, and are not be required to track their hours.

The Outside Sales Exemption is one of the simpler exemptions to understand and only has two requirements. First, outside sales people must be primarily in engaged in making sales or getting orders or contracts for services or facilities which will be paid by the customer. Secondly, they must be customarily and regularly engaged away from the employer's place of business. Outside sales does not include sales made by mail, telephone, or Internet, unless the contact is made in conjunction with a personal meeting. Pertinent terms are defined below.

- Primary Duty: The principal, main, major, or most important duty the employee performs must be sales.
- Sales: Any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. Sales tasks could include duties such as driving to and from a customer site for the purpose of a sales meeting, attempting to solicit new customers or increase the sales of an existing customer, meetings with a customer that take place at the customers business location, stocking a car with the products the sales person intends to present to the customer for purchase, and certain promotional work.
- Away: The sales person must make sales away from the employer's business. Sales by phone, online, or from a home or remote sales office do not count as away. Away locations would include the customer's place of business, the customer's home, or other location. Outside sales people are typically selling to their customers face to face.
- Customarily and Regularly: Greater than occasionally and less than constantly.

Any fixed site, whether home or office, used by a sales person as a headquarters is considered one of the owner's places of business, even when the employer is not the owner or tenant of the property. This means that sales people who work mostly from home, their employer's worksite, or a satellite sales office are still considered to be "in the office" and are not eligible for the exemption.

Promotional work may or may not qualify. Promotion work done in conjunction with an employee's own outside sales or solicitations is exempt. For example, if an outside sales person’s duties included setting up or refreshing a display or reorganizing merchandise as part of making sales to their customer, these duties would be considered exempt work. Promotional work that is incidental to sales is not exempt. Therefore, an employee who maintains store displays but has no direct responsibility for selling to the customer is performing nonexempt duties. Drivers who sell *and* deliver may qualify, if their primary duty is sales and not delivery.

Here are specific examples to illustrate when the exemption would apply.

- Yes: A sales person for a temporary staffing agency that canvases a business park, meeting with different business owners, would likely meet the outside sales exemption if this is the normal method they use to make sales. An employee who sells solar by going door to door in a neighborhood would also meet the exemption.
- No: An employee who works in a call center and sells computer support services primarily through phone and email communications with customers would not meet the outside sales exemption. A retail sales person who sells furniture in a home furnishing store would not be exempt under the outside sales requirements.

An employee who does not qualify for the outside sales exemption may qualify under a different exemption. A commission-based employee may qualify under Section 7(i) of the FLSA. Other possible exemptions that should be reviewed include the highly compensated exemption and the administrative exemption. Job titles do not determine exempt status.

Here are some guidelines to ensure your employee meets the outside sales person exemption criteria.

- Make sure your employee’s *primary* duty is selling and that advertisements for the position and job descriptions are focused on employee’s sales responsibilities.
- Provide sales training and emphasize sales methods to employees in the position. Reinforce the focus on sales activities.
- Require the employee to independently solicit new business.
- Limit administrative, clerical, and non-sales work.
- Emphasize having the work done at the customers location.
- Use a compensation structure that is commission-based.
- Minimize direct supervision of outside sales employees.
- Track sales goals versus hours worked.

- Minimize work from the office or a fixed location, including a home office. Ensure the work is done outside the employer's place of business and is done face to face with customers.
- Have promotional work done in conjunction with sales.
- Adhere to specific state and local regulations; especially regarding the amount of administrative work an employee may do. Several states have additional requirements for the outside sales exemption.

Sales people are frequently misclassified and treated as exempt employees. Sales methods have drastically evolved in recent decades. Sales agreements that previously required personal visits are now accomplished by phone, internet, video conferencing, text, and email exchanges. The percentage of sales people who customarily make sales away from the employer's place of business is low. Employers considering classifying employees as outside sales representatives to take advantage of this exemption should know the regulatory stipulations or risk penalties for misclassification, including years of back pay. If you have not audited your sales classifications lately, it may be time to review them.

This article is based on federal requirements under the FLSA. Many states have exemption requirements that are more stringent (including California). When state law differs from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at https://www.dol.gov/agencies/whd/state/contacts.

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