



Legal Alert: Department of Labor Reverses Position on Exemption of Service Advisors Working for Automobile Dealerships

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In a further attempt to add to the heavy regulatory burden already placed on car dealerships, the Wage and Hour Division of the U.S. Department of Labor announced on April 5, 2011, that a proposed clarification for overtime requirements for service advisors would not be adopted. Therefore, the Department of Labor will not regard service advisors as exempt from overtime.

Section 13(b)(10)(A) of the Fair Labor Standards Act (29 U.S.C. §213(b)(10)(A)) provides that "any salesman, parts man 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 or implements to the ultimate purchaser" is exempt from the Act's overtime requirements. Although the Department of Labor's current regulation which interprets this provision states that "a service manager, service writer, service advisor or service salesman who is not primarily engaged in the work of a salesman, partsman or mechanic is not exempt" (29 C.F.R. § 779.372(c)(4)), since 1987, the Department has adopted an enforcement position that it will not deny this exemption for service advisors. *Wage and Hour Division Field Operations Handbook*, Section 24L04(k). The agency took this position after numerous courts had rejected the Department's treatment of these persons as overtime eligible, concluding that the Department had misread the requirements of Section 13(b)(10)(A) of the Act. See generally *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 452 (4th Cir. 2004) (service advisors are "functionally similar to the mechanics and parts men who service the automobiles. All these work as an integrated unit, performing the services necessary . . . with the service salesmen coordinating these specialties.")

In 2008, the Department of Labor published for notice and comment a new set of regulations which in part decided to re-write its rule concerning service advisors to conform to this long-standing enforcement policy. However, on April 5, 2011, the Department abruptly changed course, and decided not to adopt the proposed changes to Section 779.372(c)(4). Instead, agreeing with the position of the AFL-CIO, the Department determined that service advisors should be treated as overtime eligible as stated in the current regulation, thus expressing its disagreement with the court's decision in *Greenbrier Ford*. The Department's announcement went on the say that "the Department has concluded that the current 779.372(c) sets forth the

'appropriate approach' to determining whether employees in such positions are subject to the exemption." 76 Federal Register 18838 (April 5, 2011).

What's next?

Most dealerships have considered their service advisors to fit within the commissioned salesmen exemption under the Fair Labor Standards Act. With the Department of Labor's new and significant change in its administrative enforcement policy, however, dealerships can anticipate a new round of Wage and Hour Division payroll audits, which most certainly will find "consistent with its new position, that service advisors are not exempt from overtime." The Department's position will surely be challenged by the first dealership found to be in violation of the Fair Labor Standards Act for non-payment of overtime to service advisors. Further, dealerships can anticipate litigation from plaintiffs' lawyers who will want to extract liquidated damages and attorneys' fees in these kinds of cases. Nonetheless, in the interim, in order to comply with this new policy, dealerships will have to take into account all earnings for service advisors during the relevant time period including salary plus any commissions to determine the appropriate amount of overtime pay which may be due.

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