



**U.S. Department of Labor**  
Employment Standards Administration  
Wage and Hour Division  
Washington, D.C. 20210

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March 2, 2009

Dear **Name\***:

Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator Alexander J. Passantino on January 14, 2009 and designated as Wage and Hour Opinion Letter FLSA2009-8. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

The enclosed opinion letter, and this withdrawal, are issued as official rulings of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. *See* [29 C.F.R. §§ 790.17\(d\), 790.19](#); *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990). Wage and Hour Opinion Letter FLSA2009-8 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon  
Deputy Administrator for Enforcement



**U.S. Department of Labor**  
Employment Standards Administration  
Wage and Hour Division  
Washington, D.C. 20210

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**FLSA2009-8**

**This Opinion Letter is withdrawn.**

January 14, 2009

Dear **Name\***:

This is in response to your request for an opinion regarding the application of section 7(i) of the Fair Labor Standards Act (FLSA)\* to your client's sales/service technicians. You inquire whether your client's business qualifies as a retail or service establishment and whether the wage payment plan qualifies as commission compensation within the meaning of section 7(i).

You state that your client's company primarily engages in drain cleaning and other minor plumbing repair and replacement services involving such items as water heaters, disposals, and toilets. Such services and sales are provided principally to residential homeowners; some services and sales, however, are provided to retail stores and restaurants. The company's sales/service technicians meet with the customers, diagnose the problem, price the job based on published prices of the company, and perform the services. Every two weeks, the technicians receive 23% of the revenues attributable to their labor and 5% of the revenue attributable to their parts sales. Additionally, they are paid a monthly commission bonus (between 0% and 10%) based on their gross sales for the previous calendar month. These employees are guaranteed a wage greater than 1½ times the minimum wage, but they typically earn three to six times the minimum wage. In a telephone conversation with a member of my staff, you indicated that 80 to 90 percent of your client's annual income is derived from retail sales or services to private homeowners. The company does not engage in new construction plumbing work under contract with general contractors.

Section 7(i) of the FLSA provides an exemption from the overtime pay requirement of the FLSA for any employee of a retail or service establishment, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum wage, and (2) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. A "retail or service establishment" is defined as "an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry." See [29 C.F.R. § 779.411](#); and Wage and Hour Opinion Letter [FLSA2004-20 \(Nov. 9, 2004\)](#).

The case law and the legislative history of the exemption for retail or service establishments confirms that the "retail" concept does not apply to all types of businesses. See *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290 (1959). In particular,

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\* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at [www.wagehour.dol.gov](http://www.wagehour.dol.gov).

the retail concept does not apply to construction contractors. See [29 C.F.R. §§ 779.317 and .321\(c\)](#). The retail concept does apply, however, to businesses that supply the general public with household appliances, including those that perform incidental services on such goods when necessary, such as a refrigerator repair shop. See [29 C.F.R. §§ 779.318-.320](#). The retail concept similarly applies to establishments that engage in the retail sale to the general public of plumbing and heating equipment, including the incidental installation of such goods at an additional charge. See Wage and Hour Opinion Letter [FLSA2006-22 \(June 23, 2006\)](#). Based on the information provided, it is our opinion that the retail concept applies to your client's business, which provides drain cleaning and minor plumbing repair and replacement services. Your client qualifies as a "retail or service establishment" within the meaning of section 7(i) because more than 75 percent of its annual dollar volume of sales of goods and services is not for resale.

With regard to your second question, your client's wage payment plan of computing employees' compensation on the basis of a percentage of the charge to the customer, such as the charge for labor and/or the charge for service and parts used in repair, would "represent commissions on goods and services" for purposes of applying section 7(i). See [FOH § 21h04\(a\)](#). Please be aware that in order for the exemption to apply, the total amount of commission payments must be more than one-half the employee's total compensation for a representative period (not less than one month). See [29 C.F.R. §§ 779.415-.417](#).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino  
Acting Administrator

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