



Automobile Dealers Association of Indiana, Inc.

BULLETIN

Bulletin #1106 – April 27, 2011

SERVICE WRITERS

DEPARTMENT OF LABOR IGNORES COURTS – CHANGES POSITION ON SERVICE WRITERS' EXEMPTION

By: Ronald C. Smith

For several years, the U.S. Department of Labor has acquiesced in several court decisions that granted service writers an exemption from the overtime requirements of the Fair Labor Standards Act. While cases involving service writers have reached three United States' Circuit Courts of Appeal, the Department of Labor has never appealed the question to the Supreme Court of the United States. Courts took the position that service writers qualified for the specific exemption in the statute exempting servicemen, partsmen and mechanics employed by establishments regularly engaged in the sale of new vehicles. Some cases took the position they were service salesmen; some took the position that they were an extension of the service department in "assisting and were functionally similar to the mechanics and partsmen".

At the insistence of the AFL-CIO (labor unions), on April 5th the Department abruptly issued a new directive essentially saying that, effective May 5, 2011, the Department is going to ignore the courts and assess overtime liability on service writers' pay. This is not particularly a surprise out of a Department of Labor that has been filled during the past two years with pro-labor activists, administrators and bureaucrats beginning with the Secretary of Labor's strong affiliation with numerous labor organizations, including the Industrial Workers of the World (the Wobblies).

WHAT TO DO?

As with many issues under the Fair Labor Standards Act, it's not necessarily the amount of pay that is a problem for employers but rather the method by which employees are paid. Such is really the case here. Many service writers are paid on a base salary plus a commission. If you do not change that method of pay, the Department of Labor will claim that you owe overtime based upon the following formula: the base salary plus the commission must be added together for the work week and divided by the total number of hours worked in the work week to come up with an hourly rate. You will then be responsible for the payment of half-time on all hours worked over 40. I FIRMLY BELIEVE THAT THIS POSITION WILL BE IMMEDIATELY CHALLENGED IN COURT AND WITH THE ASSISTANCE OF AUTO TRADE ASSOCIATIONS' LEGAL DEFENSE FUNDS, DEALERS WILL ULTIMATELY PREVAIL. HOWEVER, THE FIGHT WILL PROBABLY BE TAKEN TO THE SUPREME COURT UNLESS THE DEPARTMENT OF LABOR CHANGES POLITICAL HANDS AGAIN AS A RESULT OF THE 2012 ELECTIONS.

(continued)

Here are two possible alternatives that should work:

1. Section 7(I) of the Act exempts from overtime any employee who is paid strictly on a commission basis, as long as the gross compensation for the week equals one and one-half times the minimum wage liability, or \$10.88 per hour. Change the service writer's pay plan to a wholly commissioned basis but give a draw equal to the minimum wage liability (\$7.25) times the number of hours worked in the week, or simply establish a draw at 45 or 50 hours per week, whatever is appropriate. You will probably find that the amount of gross compensation paid to service writers will not change much, but again, it is the method by which the employee is paid, not the amount. Many of you will recognize that this is similar to how you pay sales people that are specifically exempt from overtime. An employer must still provide pay equivalent to the minimum wage liability for all hours worked in a particular work week; therefore, our suggestion is that the draw be set high enough to cover all anticipated hours worked or calculated by 7.25 times hours off the timecard. Should there be a work week in which the commissions do not meet or exceed the draw, then the employer must make up the difference but could recoup some from future weeks' earnings, pursuant to a written pay plan. We seriously doubt that that would be the case on service writers but there might be an occasional odd week in which that occurs.

2. If appropriate, designate the service writer as an assistant service manager. This would mean rewriting the job description. The service writer would have to perform some supervisory duties such as delegation and direction of work or similar activities. They need not have the authority to hire and fire if they were to have the ability to supervise groups of mechanics or run the shop in the absence of the service manager. You would need to adjust the salary to a minimum of \$455.00 per week guaranteed. You would adjust commissions so that the gross compensation would remain roughly the same. You must take care in designing this program in order to assure that the employee has the appropriate supervisory characteristics.

If you are ever audited or questioned by the Department of Labor, seek help immediately. Don't try to talk to them on your own. Don't agree to any self-audits. Make sure on the service writer's personnel file that this change in pay plan is noted. Also, have the employee sign a copy of the pay plan. If you are asked as to why there is a change, you can simply respond that the government has changed its position on how service writers should be paid, hence the change in pay plan.

For further information, please contact Ron Smith or Jeff Halbert at Stewart & Irwin, 317-639-5454.