



THE STATE
of **ALASKA**

GOVERNOR SEAN PARNELL

**Department of Labor and
Workforce Development**

Office of the Commissioner

Post Office Box 111149

Juneau, Alaska 99811

Main: 907.465.2700

Fax: 907.465.2784

December 6, 2013

Marten Martensen, President
Alaska Auto Dealer Association
P.O. Box 201305
Anchorage, Alaska 99520-1305

Dear Mr. Martensen,

This letter responds to your letter dated October 31, 2013.

The Department of Labor and Workforce Development's (DOLWD) revising of 8 AAC 15.910(a)(16) was to clarify the definition of "straight commission" as used in AS 23.10.055(a)(9)(B) and AS 23.10.055(c)(4). The previous definition of straight commission required commissions to be based on a fixed percentage of each dollar of sales made. This narrow definition did not fit with the department's historical application of the straight commission sales exemption from overtime and minimum wage. The regulation was revised to provide a definition of straight commission more consistent with industry practice for straight commission salespeople.

With regard to the three examples listed in 8 AAC 15.910(a)(16)(A)(i-iii), DOLWD interprets this regulation to mean that an employer may calculate commissions based on any combination of the three examples listed.

DOLWD would also consider other methods of determining commission compensation to meet the straight commission definition, provided it is (1) based on making sales and (2) that it does not include payment of a minimum salary or a minimum hourly amount not required by federal law. However, the court may choose to impose a narrow view in applying the overtime pay exemption, so it is in an employer's best interest to carefully evaluate compensation plans with legal counsel.

You also asked how the department defines "net sales value." The definition of this term is subject to the written employment agreement in which an employer communicates the rate of pay to the employee. If a commission percentage is to be calculated on either "net sales value" or "gross sales value," either method should have their terms clearly defined. Failure to clearly communicate and follow the terms of the employment agreement may lead to contractual wage disputes.

You also raised concerns about the phrase, "an agreed-upon formula for the value of goods or services sold" as used in the regulatory definition of straight commission. This terminology was written with the goal of transparency, and would most likely be accomplished with a written employment agreement between the employer and employee that includes clear descriptions of all

Mr. Marten Martensen

December 6, 2013

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charges that will be deducted from the gross or net sales price (reconditioning, detailing, sublets, etc.). This methodology would also apply to all commissions earned by any additional employees who might also have been involved in the sales process, i.e., split deals with other salespersons, finance and insurance commissions, etc. The clearer the commission formula contract, the less likely future confusion and/or disagreements would occur.

We understand the complexity of the straight commission exemption from overtime and minimum wage and encourage members of your organization to take advantage of Wage and Hour's cost-free counseling services. Upon review of your specific commission compensation agreements and formulas, along with the nature of the work, Wage and Hour will have a stronger basis to assist employers with determinations about whether the straight commission sales exemption applies.

DOLWD provides interpretations regarding statutes, regulations and its related enforcement policies, but you are cautioned that these interpretations do not carry the force of law and the court is not bound to accept or follow the department's interpretations. It is advised that you seek adequate legal counsel.

I hope this information is responsive to your inquiry. Please contact Joe Dunham, Wage and Hour Statewide Supervisor, at 907-269-4909 if you have additional questions or concerns.

Sincerely,


Dianne Blumer
Commissioner

cc: Joe Dunham, Statewide Supervising Investigator, Labor Standards and Safety
Grey Mitchell, Assistant Commissioner/Director, Labor Standards and Safety

Plaintive's Position on DOLWD Regulatory Change on Commission Sales

we recently received a letter from Plaintiffs' counsel in the WFA/Clark & Springer Litigation. We are in the damages phase of that litigation and the Class wants payroll records and timecards from the date the suit was filed "until present." We responded by advising Class counsel that despite the Court's ruling based upon the old regulation, as of July 28, 2013 and the DOL's clarified definition of "straight commission" no overtime is owed after such date.

Plaintiffs' counsel responded as follows:

As for WFA's position that the class is not entitled to overtime after July 28, 2013, we disagree. DOL's recent "clarifying" regulation ignores the fact that the statute expressly exempts salespersons employed on a "straight commission" basis and that this term has a specific definition that predates the Alaska legislature's adoption of the exemption. That definition comes from 29 C.F.R. 779.413(a)(4), which defines "straight commission" as a "flat percentage of sales on each dollar of sales [the salesperson] makes." This definition has remained unchanged to the present. Despite numerous amendments to the AWhA including recent changes to the "straight commission" exemption, the legislature has in every case maintained the requirement that the employee be paid on a "straight commission" basis. Alaska Statute 44.62.030 provides that a "regulation adopted is not valid or effective unless consistent with the statute...." The recent regulation is therefore invalid because DOL's redefinition of "straight commission" is radically inconsistent with the long standing understanding of the statutory language. Consequently, we are unable to withdraw our request for production of time and payroll records to the present.

As I mentioned, I do not think Seaver has a colorable argument. But I also thought WFA's Sales Reps were exempt from overtime under the old regulation. It is important to note that the letter to the Commissioner was sent *prior to* receiving Plaintiffs' response regarding the "clarified" regulation.

Let me know if you have questions before Wednesday.

Thank you,
Natalie Cale

October 31, 2013

The Honorable Dianne Blumer
Commissioner
Department of Labor and Workforce Development
PO Box 111149
Juneau, Alaska 99811-1149

Re: Request for Clarification of 8 AAC 15.910(a)(16), effective July 28, 2013

Dear Commissioner Blumer:

The Alaska Auto Dealers Association very much appreciates the help you have given us in dealing with the definition of "straight commission." However, there is still a significant problem in interpreting the current regulation.

As you know, effective July 28, 2013, the Alaska Department of Labor ("DOL") clarified the definition of "straight commission" found at 8 AAC 15.910 (a)(16) by deleting the previous definition ("a fixed percentage of each dollar of sales an employee makes"), and replacing it in its entirety with the following:

(16) "straight commission"

(A) means any combination of compensation based on making sales, contracts for sales, consignments, orders, or shipments for goods or services, whether the compensation is calculated by using

- (i) a percentage of gross or net sales value;
- (ii) an agreed-upon formula for the value of goods or services sold; or
- (iii) a flat rate for reaching a particular level of sales volume, or the sale of a particular item;

(B) does not include compensation described in (A) of this paragraph that is accompanied by any type of a guaranteed payment of a minimum hourly

amounts not required by federal law or a minimum salary or base, separately or in combination with commission payments.

Initially members of the AADA believed that this clarification would resolve the issue of whether their commissioned sales representatives, service advisors, finance managers, etc. qualify as “salesmen employed on a straight commission” basis and thus exempt from the payment of overtime. Unfortunately, however, based upon the increased number of wage and hour cases being filed against employers, and the trial court’s recent decision in the *Clark & Springer v. Worthington Ford of Alaska, Inc.* (“WFA Litigation”), the AADA remains concerned about possible overtime claims and litigation exposure despite the DOL’s clarification of “straight commission.”

Specifically, as currently written, an employee and/or their attorney could easily argue that in order for the employee to be exempt from overtime an employer **must** calculate commissions based upon one of the following three methods enumerated in (16)(A)(i)-(iii):

- (i) a percentage of gross or net sales value;
- (ii) an agreed-upon formula for the value of goods or services sold; or
- (iii) a flat rate for reaching a particular level of sales volume, or the sale of a particular item.

However, for the following reasons the AADA is concerned about such methods. First, the DOL does not further define the phrase “net sales value.” Although the AADA interprets the phrase broadly, i.e., gross sales less *any* deductions, the trial court in the WFA Litigation interpreted the phrase very narrowly, i.e., gross sales less deductions *only* for actual costs incurred by the dealership in executing a sale. Without further guidance from the DOL as to how it interprets “net sales value,” it is impossible for Alaskan auto dealers to know whether they are paying their employees on a straight commission basis pursuant to (16)(A)(i).

Second, the phrase “an agreed-upon formula for the value of goods or services sold” is so factually sensitive, and thus subject to numerous interpretations, that it will undoubtedly result in lawsuits against Alaskan employers. Although the employer may ultimately prevail in any such litigation, it will incur significant legal fees and costs in defending against such suits. As a result, members of the AADA are reluctant to classify their employees as salesmen paid on a straight commission basis pursuant to (16)(A)(ii), even though a court

may ultimately find that they are in compliance with Alaska's Wage and Hour Act in doing so.

Finally, although the method of paying commissions set forth in (16)(a)(iii) is the most straightforward, AADA members do not pay their employees compensation based solely on "a flat rate for reaching a particular level of sales volume or the sale of a particular item." As a result, employers are left having to also satisfy (16)(a)(i) or (ii), which for the reasons explained above, raise concerns.

Therefore, on behalf of the AADA I am requesting that you please clarify what the DOL intended when it revised the definition of "straight commission." Specifically, *must* an employee's compensation be calculated pursuant to one of the three methods enumerated in (16)(a)(i)-(iii), or, are such methods intended merely as suggestions of possible ways for an employer to calculate commissions? If commissions must be calculated pursuant to (16)(a)(i), (ii) or (iii) in order for the "straight commission" exemption to apply, please clarify how the DOL defines "net sales value." Alternatively, if the DOL did not intend to limit the method for calculating commissions to (16)(i)-(iii), what other methods of calculating commissions are acceptable for purposes of complying with the "straight commission" exemption?

We appreciate your prompt attention to this matter. If you have any questions do not hesitate to contact me.

Very truly yours,

ALASKA AUTO DEALER ASSOCIATION

By _____
Marten Martensen
Its President



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Labor and
Workforce Development

Office of the Commissioner

Post Office Box 111149
Juneau, Alaska 99811
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September 18, 2012

Marten Martensen, President
Alaska Auto Dealers Association
P.O. Box 201305
Anchorage, Alaska 99520-1305

Dear Mr. Martensen:

Thank you for your letter of August 27, 2012, regarding the applicability of Alaska's overtime pay requirements to auto industry sales people.

You specifically asked whether commission payments must be calculated on gross sales volume in order to meet the exemption listed in AS 23.10.055(a)(9)(B). The Department of Labor and Workforce Development considers that a straight commission salesperson would maintain the exemption regardless of whether the commission amounts paid were calculated on the gross or net value sales made by an employee. Sales commission calculations should be clarified in a written agreement between the employer and employee.

Under AS 23.05.160, an employee is required to be notified in writing of the rate of pay. This written notification should clearly stipulate whether sales commission earnings will be calculated on net or gross sales amounts or on some other formula. Failure to provide a clear written notice of the rate of pay could lead to contractual disputes about an employee's earnings, but generally would not impact exemptions from requirements such as overtime and minimum wage under the Alaska Wage and Hour Act.

AS 23.10.055(a)(9)(B) provides in part that a person employed in the capacity of a "salesman who is employed on a straight commission basis" is exempt from overtime pay and minimum wage requirements. The Alaska Legislature provided the following additional definition in AS 23.10.055(c)(4):

- (4) "salesman who is employed on a straight commission basis" means an employee
- (A) who is customarily and regularly employed on the business premises of the employer;

(B) who is compensated on a straight commission basis for the purpose of making sales or contracts for sales, consignments, shipments, or obtaining orders for services or the use of facilities for which a consideration will be paid by the client or customer; and

(C) whose primary duty is making sales or contracts for sales, consignments, shipments, or obtaining orders for service or the use of facilities for which a consideration will be paid by the client or customer.

8 AAC 15.910(16) is designed to clarify the meaning of straight commission. To provide further clarification and ensure a more consistent application of the straight commission sales exemption, an internal policy memo has been issued to Wage and Hour staff (copy enclosed).

Thank you for bringing this matter to our attention.

Sincerely,


Dianne Blumer
Commissioner

Enclosure

MEMORANDUM
DEPARTMENT OF LABOR

STATE OF ALASKA
Labor Standards & Safety Division

TO: Regional Supervising Investigators
Juneau, Anchorage, Fairbanks
Wage & Hour Administration

DATE: September 17, 2012

FILE: WHPL 206

PHONE: 269-4900

FROM: Grey Mitchell
Director 

SUBJECT: Straight Commission Sales

This policy is intended to clarify application of the "straight commission salesman" exemption from overtime and minimum wage under AS 23.10.055(a)(9)(B) for internal purposes to ensure that Wage and Hour resources are utilized efficiently.

In many industries (real estate, jewelry stores and other retail stores, car dealers, investment managers, etc.), it is common practice for commission sales people to be paid a variety of commissions and incentive bonuses that are creatively designed to provide motivation and financial benefits to the employee for accomplishing particular sales or aspects of sales. A literal interpretation of the current regulatory language in 8 AAC 15.910(16) may cause an excessively narrow application of the statutory exemption that could lead to protracted litigation. Provided the statutory definition for a "salesman employed on a straight commission basis" listed in AS 23.10.055(c)(4) is met, then the type of straight commission payment should not void the exemption for the purposes of Wage and Hour enforcement activity.

To ensure that Wage and Hour resources are used efficiently and to maintain a consistent approach, Wage and Hour staff will consider any commission payment or combination of commission payments based on sales, contracts for sales, consignments, shipments or orders for services to meet the definition of "straight commission." This includes regular wage payments or bonuses that are based on sales volume (whether calculated on gross sales, net sales or as a percentage of a commission amount), flat rate commission payments for individual sales, percentage or flat rate commission payments made for reaching particular sales volume plateaus, or any other commission payment tied to sales volume. Payment of amounts that do not constitute a commission, such as a base hourly rate, daily rate or salary payment would not meet the straight commission payment aspect of the exemption. The rate of commission earnings and whether the commission earnings are calculated on net or gross sales or some other basis is contractual and should be clearly established in the employment agreement required under AS 23.05.160.

As straight commission salespersons are not necessarily exempt from federal minimum wage requirements, circumstances could arise when an employer would be obligated to pay an amount necessary to bring the employee's commission wages up to the federal minimum wage for each hour worked in a particular pay period. Consistent with past interpretations, any payment of federally required minimum wage to a commission salesperson will not affect the exempt status of the employee.

April 10, 2013

Re. Notice of proposed changes in the regulations of The Department of Labor and Workforce Development.

Dear Commissioner Blumer,

The Alaska Auto Dealers Association is in support of the regulatory changes proposed in Title 8 AAC 15.910(a)(16). The changes clarify the definition of "straight commission" giving auto dealers a reasonable definition of what constitutes a commissioned sales person.

Sincerely,

Marten Martensen
President,
Alaska Auto Dealers Association

8 AAC 15.910(a)(16) is amended to read:

(16) "straight commission" means any combination of compensation based on making sales, contracts for sales, consignments, orders or shipments for goods or services; whether calculated by using a percentage of gross or net sales value, an agreed-upon formula for the value of goods or services sold, a flat rate for reaching a particular level of sales volume, or the sale of a particular item. Payment of minimum hourly amounts not

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required by law or a minimum salary, separately or in combination with commission payments, eliminates the "straight commission" status of an employee [A FIXED PERCENTAGE OF EACH DOLLAR OF SALES AN EMPLOYEE MAKES];

29 C.F.R. 779.413(a)(4)

§ 779.413 Methods of compensation of retail store employees.

(a) Retail or service establishment employees are generally compensated (apart from any extra payments for overtime or other additional payments) by one of the following methods:

- (1) Straight salary or hourly rate: Under this method of compensation the employee receives a stipulated sum paid weekly, biweekly, semimonthly, or monthly or a fixed amount for each hour of work.
 - (2) Salary plus commission: Under this method of compensation the employee receives a commission on all sales in addition to a base salary (see paragraph (a)(1) of this section).
 - (3) Quota bonus: This method of compensation is similar to paragraph (a)(2) of this section except that the commission payment is paid on sales over and above a predetermined sales quota.
 - (4) Straight commission without advances: Under this method of compensation the employee is paid a flat percentage on each dollar of sales he makes.
 - (5) Straight commission with "advances," "guarantees," or "draws." This method of compensation is similar to paragraph (a)(4) of this section except that the employee is paid a fixed weekly, biweekly, semimonthly, or monthly "advance," "guarantee," or "draw." At periodic intervals a settlement is made at which time the payments already made are supplemented by any additional amount by which his commission earnings exceed the amounts previously paid.
- (b) The above listing in paragraph (a) of this section which reflects the typical methods of compensation **is not, of course, exhaustive** of the pay practices which may exist in retail or service establishments. Although typically in retail or service establishments commission payments are keyed to sales, the requirement of the exemption is that more than half the employee's compensation represent commissions "on goods or services," which would include all types of commissions customarily based on the goods or services which the establishment sells, and not exclusively those measured by "sales" of these goods or services.



ALASKA AUTO DEALERS ASSOCIATION

P.O. Box 201305, Anchorage, Alaska 99520-1305

August 27, 2012

Commissioner Dianne Blumer
Department of Labor & Workforce Development
PO Box 111149
Juneau, AK 99811-1149

Re: Request for Issuance of Opinion Re: Overtime Law Applicable to Auto Industry Salespeople

Dear Commissioner Blumer:

As you are aware, a question has arisen regarding the exemption of Alaska auto industry salespeople from certain state overtime laws. This question has major statewide significance for the auto industry as well as the Alaska economy. Accordingly, on behalf of the Alaska Auto Dealers Association ("Association") we respectfully request that your Department issue an opinion clarifying the appropriate law exempting motor vehicle salespersons from the payment of overtime.

Specifically, we request that you confirm that Alaskan salespeople are exempt from the state's overtime law if they are paid a "fixed percentage of each dollar of sales an employee makes," notwithstanding that they may be paid the percentage on the net sale after deduction for reasonable expenses. The Association firmly believes that the industry's current approach to the payment of commissions is consistent with Alaska law and that to hold otherwise would significantly cripple the Alaskan automobile industry. For your administrative convenience and to facilitate your prompt analysis and response, we review below the applicable statute and regulation which we believe governs this question, as well as propose regulatory *clarifications* for your consideration.

Applicable Law

The key Alaska laws which control this question are AS 23.10.055 and 8 AAC 15.910(16).

Alaska Statute 23.10.055 provides in relevant part that the Alaska overtime law does not apply to:

(9) an individual employed

...
(B) in the capacity of an outside salesman or a salesman who is employed on a straight commission basis;

(c) In (a)(9) of this section,

(4) "salesman who is employed on a straight commission basis" means an employee

(A) who is customarily and regularly employed on the business premises of the employer;

(B) who is compensated on a straight commission basis for the purpose of making sales or contracts for sales, consignments, shipments, or obtaining orders for services or the use of facilities for which a consideration will be paid by the client or customer; and

(C) whose primary duty is making sales or contracts for sales, consignments, shipments, or obtaining orders for service or the use of facilities for which a consideration will be paid by the client or customer.

The Association believes that AS 23.10.055 plainly exempts motor vehicle commissioned salespersons from overtime. However, some employees contend that the auto industry is not paying its salespeople on a "straight commission basis", as required by the statute. AS 23.10.055 (c)(4)(B) is at the heart of the dispute, raising the issue of what it means to be "compensated on a straight commission basis..." Administrative regulation 8 AAC 15.910(16) provides some guidance on the question.

Regulation 8 AAC 15.910(16) defines "straight commission" as "... a fixed percentage of each dollar of sales an employee makes." So far as we are aware, no case has interpreted this specific definition. However, the Association interprets the definition to permit a commissioned sales structure that includes deductions from the sales gross of the vehicle (payment on the net sales proceeds).

For example, a typical auto salesman pay plan might be 25% of the "commissionable gross" of the vehicle or the "net sales proceeds". In a simple illustration, the vehicle sells for \$10,000 but the car "costs" the dealership \$8,000 (dealer "costs" include, but are not limited to, inventory cost, dealer profit, bank fees, etc.), so the vehicle has a "commissionable gross" or "net sales gross" of \$2,000. Under this sample pay plan the salesman will receive 25% of \$2,000.

Certain employees have argued that this is not a "straight commission" because it was not predicated on the *gross sales price*, i.e., did not reflect a "fixed percentage of each dollar of sales" the employee made. However, the fact that the dealer chooses to frame the commission to reflect the percentage as against the *net* sales proceeds should not remove the salesman from the ambit of the overtime exemption, where the reality is that the commission still reflects a "fixed" percentage of the gross sales price.

Request for Clarification

Although the Association believes the law is clear and that dealers have acted in accordance with its requirements, as stated above, there are a few employees who are seeking to wreak havoc with the industry by attempting to exploit what they perceive as ambiguity in the statutory and administrative scheme. In an effort to avoid costly litigation and the prospect of erroneous judicial interpretations that would be devastating to the Alaska auto industry, the Association would appreciate your clarification that auto salespersons who are paid commissions off the net sales price of vehicles remain exempt from the overtime laws and meet the requirements of AS 23.10.055 and 8 AAC 15.910(16), as suggested above.

Regulatory Clarification

In our view, any claim that the law is ambiguous could be quelled in a number of different ways, including a simple revision to 8 AAC 15.910(16). Regulation 8 AAC 15.910(16) is drafted in an unduly curt and narrow manner in attempting to define "straight commission" as relating to "a fixed percentage of each dollar of sales an employee makes." This is not a clear definition of the auto industry's commonly understood concept of a "straight commission". We suggest the following:

8 AAC 15.910(16). "Straight commission" means a percentage of each dollar of sales an employee makes based on either a percentage of the gross *or* net sales as adjusted by the employer.

Conclusion

The foregoing analysis suggesting that commissioned automobile salespeople are exempt from the overtime law under the facts stated herein reflects *existing* law as we understand it. We urge that any regulatory changes by your office plainly state that they are *clarifying existing law*. Otherwise, litigants will argue that the fact of the clarification itself is evidence of a *change* in the law and that, therefore, dealers have been violating the law as it existed prior to the change. Thus, an inartful revision could inadvertently cost dealers millions of dollars, despite the good intentions of your office in seeking to *clarify* existing law.

Thank you for your consideration of this request. Please do not hesitate to contact me if we can be of help to you in further review of this matter.

Respectfully submitted,
Alaska Auto Dealers Association


Marten Martensen, Its President