

# Pandemic Raises Sales Worker Classification Concerns

By **Timothy Long and Ellen Bandel** (October 20, 2020)

It's safe to say that every worker or employer in America has been impacted in some way by COVID-19. For those fortunate enough to remain employed, work looks a lot different now.

This may be particularly true for those who are used to being on the road for most or all of their workweek. COVID-19 has not only affected their typical monthly gas budget or their frequent-flyer status — it may also have affected their status as exempt employees.

## **The Outside Salesperson Exemption Under Federal and California Law**

Outside salespersons are generally exempt from minimum wage and overtime requirements, including the weekly salary requirements that apply to other exemptions. Given the COVID-19 pandemic, however, satisfying the requirements of the outside salesperson exemption may prove more challenging than before.

Under federal law, the outside sales exemption is available for an employee:

- Whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- Who is customarily and regularly engaged away from the employer's place or places of business.[1]

There is no hard-and-fast quantitative requirement associated with the primary duty requirement, as long as the sales-related activities are the "principal, main, major, or most important duty that the employee performs." [2]

"Customarily and regularly" is not defined in the Fair Labor Standards Act, but according to the U.S. Department of Labor, it is an amount "greater than occasional but less than constant." [3] In other words, the work must be "normally and recurrently done every workweek" without being "isolated or one-time tasks." [4]

California's version of the exemption is similar, but with notable differences. First, according to California's "purely quantitative approach," [5] an outside salesperson must customarily and regularly work more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities. [6]

Stated differently, more than half of a California outside salesperson's working hours must be spent (1) engaged in "exempt sales activity" while (2) outside the employer's place of business. So, if an employee is at home 30 or more hours per week generating sales, but only leaves the house for sales-related work once a week, is that employee's exempt status in jeopardy?



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With the onset of COVID-19 and the circumstances that stay-at-home orders necessitated, establishing that an employee is engaged away from the employer's place of business may prove challenging if pre-COVID-19 interpretations continue to apply. This is because under both federal and California law, "the employer's place of business" has historically been a broader concept than one might think.

Pre-COVID-19 federal regulations provide "any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property." [7] Similarly, the California labor commissioner has previously opined that employees who work out of their employer's temporary trailers or model homes at a development likely do not meet the exemption since those locations are deemed an extension of the company's place of business. [8]

### **The Impact of COVID-19**

When millions of Americans were ordered to stay at home in mid-March, businesses whose employees could effectively work from home were directed to do so, and many have not been back to their offices since.

For employees in outside sales roles, the problem that COVID-19 has created is not necessarily that they can no longer report to an office — as discussed above, the less time spent in their employer's office or their home office, the better. Rather, the problem is that in many cases, prospective and current clients/customers cannot report to their offices. Or if they can, many companies currently are not allowing visitors (e.g., salespersons) on the premises.

Nevertheless, to maintain relationships and perhaps also to generate new business, many outside salespersons have done whatever they can, including meeting clients and making deals on the phone, by email, or over FaceTime, Zoom or another virtual meeting platform. Although using these alternatives may help customer relationships and sales, some may take the position they do not assist with qualifying for the outside salesperson exemption.

### **What Now?**

Absent a legislative or administrative fix, some employers may consider reclassifying employees who were classified as outside salespeople, even if just on a temporary basis, until we return to some sense of normalcy. One option — for eligible employers, and particularly in California — would be to reclassify these employees as inside salespersons.

Under federal law, employers of retail or service establishments [9] may be able to avail themselves of the inside sales exemption (from overtime) for any employee if: (1) the employee's regular rate of pay averages more than one and one-half times the applicable minimum wage for each hour worked in a workweek (in which overtime hours are worked); and (2) more than half of the employee's total compensation in a representative period comes from commissions. [10]

In California, the overtime exemption is similar in that it applies to employees whose "earnings exceed one and one-half times the minimum wage if more than half of that employee's compensation represents commissions," [11] but has broader applicability than the federal exemption.

The inside sales exemption, however, does carry a heavy administrative burden for employers. For example, in California, employees must track their time and employers must comply with meal and rest break requirements, among others. Although employers may be responsible for paying overtime, it may turn out that the cost of doing so is less than the costs associated with business travel.

Needless to say, these are challenging times. Wage and hour compliance does not make things any easier.

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[1] 29 CFR § 541.500.

[2] Fact Sheet #17F: Exemption for Outside Sales Employees Under the Fair Labor Standards Act (FLSA), revised September 2019, available at <https://www.dol.gov/agencies/whd/fact-sheets/17f-overtime-outside-sales>.

[3] Id.

[4] DOL Field Operations Handbook, Chapter 22, available at [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH\\_Ch22.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch22.pdf).

[5] Ramirez v. Yosemite Water, 20 Cal. 4th 785, 797 (1999).

[6] See, e.g., IWC Wage Order 4-2001, subd. 2(M).

[7] 29 C.F.R. § 541.502.

[8] DLSE Opinion Letter 1998.09.08.

[9] <https://www.federalregister.gov/documents/2020/05/19/2020-10250/partial-lists-of-establishments-that-lack-or-may-have-a-retail-concept-under-the-fair-labor>.

[10] 29 C.F.R. § 779.300 et seq.

[11] IWC Wage Order 4-2001, subd. 3(D); IWC Wage Order 7-2001, subd. 3(D).