U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2021-6

January 19, 2021

Stephen C. Dwyer
American Staffing Association
277 South Washington Street
Suite 200
Alexandria, VA 22314-3675

Dear **Stephen C. Dwyer**:

This letter responds to your request, on behalf of a trade association composed of member staffing firms, for an opinion concerning whether the Fair Labor Standards Act's (FLSA's) "retail or service establishment" exemption applies to staffing firms that recruit, hire, and place employees on temporary assignments with clients.[1] This opinion is based exclusively on the facts you have presented. You represent that the association is not being investigated by the Wage and Hour Division (WHD) and has no pending FLSA litigation regarding the exemption as of your request.

BACKGROUND

You state in your letter that the association's member staffing firms recruit, hire, and place employees on temporary assignments with clients to supplement their workforces for various reasons. You describe temporary and contract staffing as "one of America's largest service industries" and state that temporary employees "work in virtually every job category." The staffing firms sometimes recruit and place workers in "temp-to-hire positions" with clients. In those cases, the staffing firm assigns a worker to a client and employs the worker for a trial period during which the staffing firm pays wages, benefits, and statutory insurance coverages. If the client and the worker agree to enter a permanent employment relationship, the worker and the staffing firm terminate their relationship.

You state that the FLSA's retail or service exemption could "affect staffing company employees who are engaged in various activities involved in operating the business, including recruiting, sales, and other internal functions, and who otherwise satisfy the FLSA requirements for [the exemption]." You further state that, on the other hand, the exemption "would not affect the great majority of a staffing company's employees—temporary workers assigned to perform services for staffing firm clients who are paid on an hourly basis" and thus would not otherwise satisfy the exemption.

[1] Your letter specifically asks whether Opinion Letter FLSA2018-21 (Aug. 28, 2018) applies to staffing firms. Because our opinion letters apply only to the facts presented by the requesting parties, we interpret your letter to ask whether the exemption discussed in Opinion Letter FLSA2018-21 applies to staffing firms.

GENERAL LEGAL PRINCIPLES

The FLSA exempts from its overtime pay requirements certain employees of "retail or service establishment[s]." 29 U.S.C. § 207(i). The exemption applies to any employee (1) who works at a retail or service establishment; (2) whose regular rate of pay exceeds one and one-half times the applicable minimum wage; and (3) whose earnings in a representative period are composed of more than fifty percent commissions. *Id.*

The United States Supreme Court recently held that exemptions under the FLSA deserve a "fair (rather than narrow) interpretation" because the exemptions are "as much a part of the FLSA's purpose as the overtime-pay requirement." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks and citation omitted). Accordingly, WHD applies a "fair reading" standard to all exemptions to the FLSA, including the Section 7(i) exemption addressed in this letter.

OPINION

Your letter focuses primarily on the first requirement under the Section 7(i) exemption, whether a staffing firm may qualify as a "retail or service establishment." To qualify as a "retail or service establishment," the following must apply: (1) a business must "engage in the making of sales of goods or services"; (2) "75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry"; and (3) "not over 25 percent of its sales of goods or services, or of both, may be sales for resale." 29 C.F.R. § 779.313.[2] A staffing firm that operates as described in your letter may satisfy all three requirements and thereby qualify as a "retail or service establishment" that is eligible for the Section 7(i) exemption. As discussed later, whether a particular employee of a specific staffing firm actually satisfies the exemption still requires a case-by-case analysis.

(1) "Engaged in the making of sales of goods or services"

As your letter indicates, a staffing firm provides temporary staffing and permanent recruitment services, which satisfies the "sales of goods or services" requirement. That staffing firms typically sell services to commercial entities does not change this conclusion. *See Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 200–03 (1965) (sale to a business purchaser can be a retail sale). As we have previously noted, courts have repeatedly held that businesses may qualify as retail or service establishments when their customers are predominantly commercial entities. *See* WHD Opinion Letter FLSA2018-21, 2018 WL 4562931, at *1–2 (Aug. 28, 2018) (citing *Alvarado v. Corporate Cleaning Servs., Inc*., 782 F.3d 365, 369–71 (7th Cir. 2015);

[2] WHD recognizes that some courts have interpreted the Section 7(i) exemption as requiring an inquiry only into whether an establishment is either a retail establishment or a services establishment, and examined WHD's § 779.313 definition only in the alternative. *See, e.g.*, *Alvarado v. Corp. Cleaning Servs., Inc*., 782 F.3d 365, 369 (7th Cir. 2015) ("As a service establishment CCS meets the 'retail *or* service establishment' requirement in section 207(i)."); *Dyal v. PirTano Constr., Inc*., No. 12 C 9687, 2018 WL 1508487, at *3 & n.5 (N.D. Ill. Mar. 27, 2018) ("Installment Professionals easily satisfies the 'retail *or* service establishment' prong of the Section 7(i) exemption. Installment Professionals sells cable installation services and therefore is a 'service establishment.'" *Id.* at *3.); *Matrai v. DirecTV, LLC*, 168 F. Supp. 3d 1347, 1360 (D. Kan. 2016) ("DirecTV meets § 7(i)'s requirement of a 'retail or service establishment' as it was understood and applied in *Alvarado*.").

Charlot v. Ecolab, Inc., 136 F. Supp. 3d 433, 468–69 (E.D.N.Y. 2015); *Schwind v. EW & Assocs., Inc*., 371 F. Supp. 2d 560, 565–67 (S.D.N.Y. 2005)).

(2) "75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry"

The second requirement for a "retail or service requirement" has two components: first, 75 percent of the establishment's sales must be recognized by the industry as retail; and second, the establishment must have a retail concept. *See* 29 C.F.R. § 779.316. As to this first requirement, your letter does not explicitly state whether the staffing industry currently recognizes the staffing and recruitment services that it provides as retail. As a trade association representing staffing firms, your clients may be in a position to determine whether these services are recognized as retail within the industry.[3] However, as explained above, such a determination, by itself, is not controlling; to satisfy the second requirement, an establishment must also have a "retail concept" in order to qualify as a "retail or service establishment." *See* 29 C.F.R. § 779.316; *Idaho Sheet*, 383 U.S. at 199–200 (disapproving of a "literal reading" that would "give the industry self-determination as to whether the exemption applies").[4]

Indicia of a "retail concept" are set forth in 29 C.F.R. § 779.318(a), which states that a retail or services establishment typically meets these criteria:

- "sells goods or services to the general public,"
- "serves the everyday needs of the community,"
- "is at the very end of the stream of distribution,"
- "dispos[es] in small quantities [its] products or skills," and
- "does not take part in the manufacturing process."

Until recently, the Department's regulations (former 29 C.F.R. § 779.317) listed "employment agencies" among a list of establishments that categorically could not qualify as a "retail or service establishment" under any circumstance because they lacked a retail concept. Courts relied on this "non-retail" list to hold that staffing agencies are not "retail or service establishments" that may qualify for the Section 7(i) exemption. *See, e.g., Brennan v. Great Am. Discount & Credit Co*., 477 F.2d 292, 295–97 (5th Cir. 1973); *Sierra v. New England Pers. of Hartford, LLC*, No. 3:15-cv-1520 (JAM), 2017 WL 3711579, at *6 (D. Conn. Aug. 28, 2017); *Kelly v. A1 Tech*., No. 09 Civ. 962(LAK)(MHD), 2010 WL 1541585, at *15 (S.D.N.Y. Apr. 12, 2010).

[3] *See, e.g., Reich v. Cruises Only, Inc.,* No. 95-660-CIV-ORL-19, 1997 WL 1507504, at *5 (M.D. Fla. June 5, 1997) (relying on affidavits from industry experts to conclude that services provided by a travel agency were recognized as retail in its particular industry).

[4] Notably, in reaching this conclusion now reflected in 29 C.F.R. 779.316, the *Idaho Sheet* Court acknowledged that "the most literal reading of the statute" at 29 U.S.C. § 213(a)(2) "lends itself well to an inquiry into how the businessmen concerned term their dealings." *Id*. at 199. However, in considering the legal and legislative history and the provision's purpose, the Court ultimately concluded that "[o]n balance . . . the arguments against this literal reading are more persuasive," so that industry usage should not be the "single touchstone" of the inquiry. 383 U.S. at 199–202.

On May 19, 2020, the Department withdrew that list, *see* 85 FR 29867, in part because numerous courts have questioned its reasoning. For instance, one court of appeals criticized the list as an "incomplete, arbitrary, and essentially mindless catalog." *Alvarado*, 782 F.3d at 371. Another noted that the list "does not appear to flow from any cohesive criteria." *Martin v. The Refrigeration Sch., Inc.*, 968 F.2d 3, 7 n.2 (9th Cir. 1992). With the withdrawal of the list, WHD now applies the same analysis to all establishments to determine their "retail concept," thus reading the Section 7(i) exemption more consistently. *See* 85 FR 29868.

On August 31, 2020, WHD issued an opinion letter explaining that employers that remove liquid waste may be recognized as retail if they possess characteristics listed in 29 C.F.R. § 779.318(a), even though "waste removal contractors" were on the (withdrawn) "non-retail" list. WHD Opinion Letter FLSA2020-11 (Aug. 31, 2020). For the same reason, other types of establishments, such as staffing firms, that had been listed as lacking a retail concept may also be recognized as retail if they possess characteristic set forth in 29 C.F.R. § 779.318(a).[5] Moreover, courts have found that a variety of establishments that provide services to commercial clients may qualify as "retail or service" establishments within the meaning of Section 7(i), including providers of commercial window-washing services,[6] commercial pest-elimination services,[7] and commercial computer-training services.[8] WHD sees no reason why staffing firms cannot also qualify.

In light of the Department's new practice of affording the same analysis to all establishments in order to determine the presence of a "retail concept" under Section 7(i), the information you have provided indicates that typical staffing firms may satisfy the criteria listed above in Section 779.318. First, as you indicate, staffing firms may provide recruitment services to businesses in the general public, which may serve the employment needs of the community in which the businesses are located. In addition, you state that the placement of a worker with a business is the "end of the stream of distribution" for recruitment services. Your letter further indicates that staffing firms do not typically place workers "in bulk," thus seemingly satisfying the "small quantities" criterion. And finally, staffing firms do not engage in manufacturing. Thus, under the facts as outlined in your letter, a typical staffing firm may have a retail concept, and its sales of recruitment and staffing services may be properly recognized as retail by the staffing industry.

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[5] The cited decisions holding that staffing firms are not "retail or service establishments" also relied on the principle that exemptions to the FLSA should be construed narrowly. *See Brennan*, 477 F.2d at 297; *Sierra*, 2017 WL 3711579, at *3; *Kelly*, 2010 WL 1541585, at *14. The Supreme Court has since explained that the "narrow-construction principle relies on the flawed premise that the FLSA pursues its remedial purpose at all costs" and directed that exemptions under the FLSA must instead be given a "fair reading." *Encino*, 138 S. Ct. at 1142 (internal quotations omitted). These decisions thus rely on two bases that no longer support them: a withdrawn regulation and a rejected canon of statutory interpretation.

[6] *Alvarado*, 782 F.3d at 371 ("Judged by the unit of sale recognized in the industry, then, [defendant] is a retailer.").

[7] *English v. Ecolab, Inc.*, No. 6 Civ. 5672 (PAC), 2008 WL 878456, at *15 (S.D.N.Y. 2008) ("[A]t least 75% of Ecolab's sales are recognized as retail sales in the pest elimination industry").

[8] *Schwind v. EW & Assocs., Inc.*, 371 F. Supp. 2d 560, 566–67 (S.D.N.Y. 2005) ("[W]e conclude that EWA is a 'retail or service' establishment within the meaning of the exemption.").

(3) "Not over 25 percent of its sales of goods or services, or of both, may be sales for resale."

Finally, according to your letter, staffing and recruitment services are "rarely, if ever, 're-sold' to other businesses." "The common meaning of 'resale' is the act of 'selling again.' A sale is made for resale where the seller knows or has reasonable cause to believe that the goods or services will be resold." 29 C.F.R. § 779.331. In the staffing context, "resale" may occur where one staffing firm refers a worker (for a fee) to a second staffing firm that ultimately assigns the worker to a business. But according to the information you provide, staffing services cannot typically be resold by the business at which the worker is placed to work. Thus, so long as resale services constitute 25 percent or less of a staffing firm's overall sales, the third requirement for retail or service establishment likely would be met.

CONCLUSION

A typical staffing firm that you describe may qualify as a "retail or service establishment" and meet the first criterion under the Section 7(i) exemption. Of course, whether specific staffing firms actually qualify still requires a case-by-case analysis. For instance, a staffing firm that specializes in referring candidates to other staffing firms may be engaged in "resale" that exceeds the 25 percent threshold. Furthermore, qualification as a "retail or service establishment" does not necessarily mean that any employee of a staffing firm satisfies the other two criteria of the Section 7(i) exemption. For an employee to be exempt, his or her regular rate of pay must be at least one and one-half times the minimum wage and more than half of the employee's earnings in a representative period must consist of commissions.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id*.

We trust that this letter is responsive to your inquiry.

Sincerely,

Cheryl M. Stanton
Administrator