



## ADMINISTRATIVE POLICY

### STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

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**TITLE:** EXEMPTION FROM MINIMUM  
WAGE ACT REQUIREMENTS  
FOR OUTSIDE SALESPERSONS

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**CHAPTER:** [RCW.49.46.010\(3\)\(c\)](#),  
[RCW 49.46.130\(2\)\(a\)](#),  
[WAC 296-128-540](#)

**SEE ALSO:** [ES.A.8.1](#),  
[ES.A.8.2](#), [ES.A.9.1 - 9](#),  
[ES.A.10.1](#), [ES.A.10.2](#),  
and [ES.A.10.3](#)

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#### ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

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#### **OUTSIDE SALESPERSON (WAC 296-128-540)**

This policy provides information on the outside sales exemption from minimum wage, overtime pay, and other employment protections under the Minimum Wage Act. Most workers in Washington are required by law to be paid at least minimum wage, earn overtime pay, receive paid sick leave, receive earned tips and service charges, and be protected from retaliation. However, state regulations provide an exemption from these requirements for workers employed as bona fide executive, administrative, professional, computer professional, and outside sales employees. This policy describes the specific outside sales exemption requirements. To qualify for this exemption, employees generally must meet certain tests regarding their job duties and be paid on a guaranteed salary, commission, or fee basis. Job titles and job descriptions do not determine exempt status. In order for an exemption to apply, an employee's actual job duties must meet all of the requirements of the state regulations. Employees are not exempt if they perform a combination of some duties from one exemption and some from another, but do not meet all the qualifications for any one, specific exemption.

There are also federal rules pertaining to minimum wage and overtime pay exemptions for bona fide executive, administrative, professional, computer professional, and outside sales employees. Employers must comply with both state and federal regulations. Where differences exist between Washington State and federal regulations, an employer must follow the regulation that is most favorable to the worker.

The following information is designed to provide a summary of the requirements of both state and federal regulations for the outside sales exemption. For more specific information on federal regulations, see CFR Title 29. Check with the U.S. Department of Labor at their toll free # 1-866-487-9243 or on their [website](#), or with a qualified consultant, to determine how federal overtime requirements apply in specific circumstances.

### **1. Outside Sales Job Duties Requirements.**

To qualify for the outside sales exemption, all of the following tests must be met:

- 1) The employee's primary duty must be:
  - a. making sales (including sales, exchanges, contract sales, consignment sales, shipment sales, or other similar sales): **or**
  - b. obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer;
- 2) The employee must be customarily and regularly engaged away from the employer's place or places of business;
- 3) The employee must be paid on a guaranteed salary, commission or fee basis; and
- 4) The employee must be informed of their status as an outside salesperson.

### **2. Compensation Requirements.**

To meet the state exemption requirements, the employee must meet the duties test requirements and must also be compensated on a guaranteed salary, commission, or fee basis. However, there is no minimum salary threshold outside sales employees must earn to qualify for the exemption.

### **3. Differences Between State and Federal Regulations.**

The Department intends to rely on the interpretations of the 2019 federal regulations where the regulations are identical to the Department's rules. However, there are some areas where state and federal requirements differ.

Federal regulations do not require outside sales employees be paid on a guaranteed salary, commission, or fee basis. State regulations, in contrast, do require outside sales employees to be paid on a guaranteed salary, commission, or fee basis.

Federal regulations do not require outside sales employees to be informed of their status as an outside salesperson. State regulations, in contrast, do require that outside sales employees be informed of their status as an outside salesperson in order to meet the exemption requirements.

#### 4. How to Determine Primary Duty.

“Primary duty” means the principal, main, major, or most important duty that the employee performs. A determination of whether outside sales is a worker’s primary duty must be based on all the facts in a particular case. It is the employer’s burden to demonstrate that an employee meets the primary duty requirements.

The amount of time spent performing exempt outside sales duties can be a useful guide in determining whether outside sales is the primary duty of an employee. A good rule of thumb is outside sales is probably the employee’s primary duty if the employee spends more than 50 percent of the employee’s time performing exempt, outside sales.

Time alone, however, is not the sole test. An employee may still meet the primary duty requirements even if the employee does not regularly spend over 50 percent of the employee’s time performing exempt outside sales duties, if other relevant factors support that conclusion. Some of these other factors include the relative importance of the exempt outside sales duties, (compared to the other types of duties performed) and the relationship between the employee’s salary and the wages paid to other employees who perform the same kind of nonexempt work as the potentially-exempt employee in question.

In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee’s qualifying outside sales work may qualify as exempt work. This incidental work is work performed by outside sales employees in furtherance of their own outside sales and solicitations. Work such as incidental deliveries and collections may be considered part of the exempt outside sales work. Other examples include: writing sales reports, updating or revising the employee’s sales or display catalogue, planning itineraries, and attending sales conferences. In contrast, work that supports the employer’s operations rather than the employee’s own sales would not be considered exempt work.

**5. Outside Sales Activities.** An outside salesperson is someone who is customarily and regularly engaged in specific outside sales activities. Customarily and regularly means greater than occasional but less than constant. It includes work normally done every workweek, but does not include isolated or one-time tasks.

Outside sales activities are:

**5.1 Making Sales.** This includes sales, exchanges, contracts to sell, consignments for sale and shipments for sale or other disposition. It includes the transfer of title to tangible property.

**5.2 Obtaining Orders or Contracts for Services or for the Use of Facilities.** This means obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. Examples include: selling of time on the radio, soliciting advertising for newspapers and other periodicals, and obtaining freight contracts for railroads or other transportation businesses. This category also includes employees who sell or take orders for a service that is performed for the customer by other employees of the same business such as door-to-door sales of painting or lawn care services.

Employees whose primary duty is to perform a service (e.g., to repair appliances) do not qualify as exempt outside sales employees even if they sell their own or similar services. The sales of

these services by service technicians are incidental to the employees' primary duty, which is performing the service required.

Soliciting business through a dealer or merchant to offer a product or service to a customer also does not qualify as a sale or an exempt, outside sales duty.

## **6. Work Must be Performed Away From the Employer's Place of Business.**

Outside sales employees must customarily and regularly perform their duties away from their employer's place of business.

Characteristically, an outside salesperson makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Any fixed site used by a salesperson as a headquarters, whether at an office or at home, is considered the employer's place of business when determining whether the outside salesperson is working away from the employer's place of business. This is true even when the employer is not in any formal sense the owner or tenant of the property. However, hotel sample rooms are not considered an employer's place of business when an outside salesperson uses them to display samples while traveling to various cities.

Inside sales and related inside work is nonexempt and does not qualify for the outside sales exemption, except when it is purely incidental to an outside salesperson's outside sales duties. Outside sales does not include sales made by mail, telephone, or internet, unless such contact is merely in support of personal visits to the customer. For instance, calls made to set up an introduction or to finalize details of a sale made in-person are considered related to the outside sales activity, even though they may be made from an employer's place of business.

## **7. Employer Must Advise Outside Sales Employees of Their Exempt Status.**

In order to qualify for the outside sales exemption, an employer must advise its outside sales employees of their status as outside salespersons. Employers must specifically advise the employees that they will be exempt from Minimum Wage Act protections (including overtime, minimum wage, and other protections), because of their outside sales work. Merely informing employees that their job title or role is "outside sales" is not sufficient to meet this requirement.

## **8. Outside Salespersons Must be Compensated on a Guaranteed Salary, Commission, or Fee Basis.**

In order to qualify for the outside sales exemption, the employee must be paid on a guaranteed salary, commission, or fee basis. The compensation agreement may include any combination of these methods of payment. There is no minimum dollar amount required for the guaranteed salary or fee basis, and there is no minimum percentage or dollar amount required for the commission payment. The amount of compensation may be based primarily on the volume of sales attributable to the employee's efforts. Payment on an hourly or hourly-plus-commission basis does not meet this requirement.

## **9. Types of Outside Sales Employees.**

The outside sales exemption is intended to cover salespersons who primarily perform sales work at customer or client locations. The list below illustrates types of outside sales activities

that often fall into each category, rather than providing an exhaustive list, and each case must be examined individually to determine whether the job duties test is met:

### **9.1 Promotion Work.**

Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. However, promotion work that is incidental to sales that would be made by someone else is not exempt outside sales work.

A manufacturer's representative whose primary duty is to make sales or contracts is still exempt if they perform promotional activities in support of those sales, such as putting up displays or posters, removing damaged stock, or rearranging merchandise.

In contrast, a company representative who arranges, stocks, or replenishes merchandise, but does not customarily obtain contracts or commitment for the purchase of that merchandise, does not qualify for the exemption.

### **9.2 Driver Sales.**

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees if the employee's primary duty is making sales. In determining the primary duty of drivers who sell, work performed incidental to and in conjunction with the employee's own outside sales or solicitations is considered exempt outside sales work. This includes loading, driving, or delivering the products that the employee sells. A driver whose primary duty is to deliver products or goods, rather than selling products or goods, is not exempt.

Several factors should be considered to determine if a driver has a primary duty of making sales, including (but not limited to):

- Comparison of the driver's duties with those of other employees working as drivers and as salespersons;
- Presence or absence of customary or contractual arrangements concerning amounts of products to be delivered;
- Whether the driver possesses a selling or solicitor's license when required by law;
- The employer's requirements as to the qualifications for the position when hiring;
- Description of the employee's occupation in collective bargaining agreements;
- Sales training and attendance at sales conferences;
- Method of payment; and
- Proportion of earnings directly attributable to sales.

### **9.3 Employees Obtaining or Soliciting Mortgages for Banks, Finance Companies, or Other Lenders.**

An employee of a finance company may be exempt as an outside sales employee if the employee is customarily and regularly engaged away from the employer's place(s) of business in obtaining mortgages from individuals or brokers. The finance company must be engaged primarily in servicing mortgages and must take mortgages in its own name.

Work incidental to the employee's obtaining the mortgage, such as obtaining credit information from the mortgagor before and after the sale, qualifies as exempt work if done for the purpose of the employee's own sales. In contrast, telephone solicitation and obtaining credit and other information for use in sales made by others would not be exempt work. Any other work not incidental to the employee's own outside sales would also not be exempt work.

Mortgage loan officers may qualify for the outside sales exemption even though they may perform some activities at their employer's place of business, so long as the inside sales activity is incidental to and in conjunction with qualifying outside sales activity. Activities such as making phone calls, sending e-mails, and meeting with clients in the office are considered exempt if performed incidental to or in conjunction with the mortgage loan officer's own outside sales activities.

#### **9.4 Real Estate Sales.**

The outside sales exemption requires that an outside sales employee's primary duty is either making sales or obtaining certain orders or contracts for the use of facilities. Real estate sales employees will generally meet this test, since "sales" includes contracts to sell real estate.

An exempt outside sales employee also must be customarily and regularly engaged "away from the employer's place or places of business" in making such sales. Real estate sales employees typically are required, as a customary and regular part of their employment, to spend time as necessary at the site of property to be sold and in visiting prospective clients at the client's homes and offices as a part of their sales effort. Most of them must leave whatever place of business of the employer they use as headquarters in order to perform these tasks.

A real estate sales employee stationed in a model home on a tract from which parcels of real property are being sold, with or without improvements, may qualify for the outside sales exemption. If the employee customarily and regularly leaves the model home for sales work, that sales work would be considered exempt work performed away from the employer's place of business. This is true even though all of the property shown to prospects by the sales employee is within the tract on which the model home is located. Time spent in the model home to conclude a sales transaction or to continue the sales effort with the prospective customer would be deemed an incidental part of the sales employee's outside sales activity. However, a sales employee who does not customarily and regularly leave the model home or other office of their employer is not performing their primary duty away from the employer's place of business and does not qualify for the exemption.

Certain activities performed by real estate sales employees in the employer's place of business may be exempt work if the activities performed are in conjunction with and in furtherance of their outside sales work. For example, the employees may perform duties at their employer's place of business including:

- Bringing a multiple listing book up to date;
- Calling prospects with whom the sales employee has been dealing during outside sales activities;
- Dictating or writing letters to such prospects;

- Talking to such prospects in the office about their particular transactions;
- Calling a list of prospective buyers or sellers of homes with whom the sales employee has had no prior contact;
- Preparing a contract and other forms required for a sale negotiated during the sales employee's outside sales activity; and
- Talking to a walk-in prospect with whom the employee has had no prior contact and showing photographs and discussing terms on specific houses, if such activity results in subsequent outside sales activity with the prospect.

### **9.5 Timeshare Resort Sales Employees**

Employees whose primary duty is to promote and to sell timeshare interests in resorts owned or operated by their employers do not qualify for the outside sales exemption when they sell timeshares on site at the resorts because they are not engaged in sales away from their employer's place of business.

A resort is generally maintained on a permanent basis as a location of the employer and is staffed with the necessary personnel for maintaining the resort facilities. Although the employer sells timeshare interests in some of the properties on the resort, the employer also retains a continuing business interest in the remaining resort facilities, and in maintaining both the resort and the timeshare units that have been sold. Under these facts, the entire resort must be considered the employer's place of business.

Timeshare sales employees differ from real estate sales employees selling lots or homes from a model home on a subdivision because in the latter situation the employer does not maintain a continuing interest in the subdivision lots once they are sold, or in the other facilities in the subdivision. Thus, these other lots are not part of the employer's place of business.

Timeshare sales conducted away from the resort but still at an office that is a place of business of their employer would also not qualify as sales made away from the employer's place of business.

Timeshare sales employees may, however, meet the requirements of the outside sales exemption if they customarily and regularly make sales at locations that are not the employer's place of business.

### **9.6. Outside Solicitors of Charitable Donations.**

Persons employed to solicit contributions on behalf of various charitable organizations are not performing work within the scope of the outside sales exemption. Soliciting promises of future charitable donations or selling the concept of donating to a charity does not constitute sales for purposes of the outside sales exemption. Such solicitors do not obtain orders or contracts for services or for use of the charity's facilities for which a consideration will be paid. Furthermore, the exchange of a token gift for the promise of a charitable donation does not constitute a sale or selling for purposes of the outside sales exemption.

## **10. Sales Trainees Are Not Exempt.**

The exemption does not include employees training to become outside salespersons and not actually performing the duties of an exempt outside salesperson. For instance, trainees may be attending training classes or seminars or participating in practice sessions learning the company's products and policies, neither of which is exempt work.

When a trainee accompanies an outside salesperson to help transport goods or samples but is not directly involved in making the sale, it is not outside sales work. However, if trainees accompany an experienced outside salesperson while actually making sales, and the trainees and exempt outside salesperson make the sales jointly and both normally receive a salary, commission, or fee, the trainee would be considered to be an outside salesperson. Because both are engaged in making the sales, both are exempt.

An outside salesperson that is training a new employee is not engaged in exempt work unless the trainer is also performing exempt sales work in conjunction with training the new employee.