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DEFENDER

The National Association of Dealer Counsel Newsletter OCTOBER 2012

In this Issue:

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Congress Tells DOL to Stand Down, Dealership Service Writers Still Exempt From Overtime

Douglas I. Greenhaus, *Chief Regulatory Counsel, Environment, Health and Safety,* National Automobile Dealers Association

A rider in the Department of Labor Appropriations Act of 2012 orders the DOL not to act contrary to its long-standing position that "service writers, service advisors, service managers, and service salesmen" are exempt from overtime as "salesmen" under Section 13(b)(10) of the FLSA. 29 USC §213(b)(10). A continuing resolution passed by the House of Representatives on September 14, 2012, will extend the rider until March 2013 when enacted into law as expected.

This past year, NADA assisted several dealers involved in wage and hour audits by letting overly-aggressive federal inspectors know of the rider's existence. To be sure, it's hard to stay on top of the many federal, state, and local rules dealerships must comply with…even when paid to administer and enforce them. Moral of the story: dealerships (and their counsel) should never hesitate to contact NADA when faced with compliance investigations, inspections or audits involving federal matters. Yeah, we advocate and educate, but we also happily assist when we can. And, as with all dealership compliance matters, the NADC community benefits when we avoid bad outcomes bred from ignorance or a lack of experience.

So why was the rider needed in the first place? A history lesson:

Until 1966: Section 13(a)(19) of the FLSA, which exempts from overtime all employees of retail and service establishments primarily engaged in selling automobiles truck and farm implements, is repealed and replaced with the narrower Section 13(b)(10) overtime exemption for any "salesman, partsman, or mechanic" employed by a dealership.

1967: Two new DOL Wage and Hour Division (Division) Administrator Opinions essentially state that service managers, service writers, service advisors or service salesmen not themselves primarily engaged in the work of a salesman, partsmen, or mechanic would not qualify for exemption under Section 13(b)(10).

1970: Reflecting its 1967 Opinions, the Division promulgates 29 CFR §779.372(c)(4):

> Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described above are not exempt under section 13(b)(10). This is true despite the fact that such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customers, assigning the work to various employees and directing and checking on the work of mechanics.

1971: Congress considers but does not eliminate Section 13(b)(10).

1973: *Brennan v. Deel Motors, Inc.,* 475 F.2d 452 (5th Cir. 1973) upholds a district court finding that dealership service writers are exempt as Section 13(b)(10) salesmen, contrary to 29 CFR §779.372(c)(4). Ignoring *Deel,* the Division issues two new Opinion letters suggesting that service writers are not exempt under Section 13(b)(10). 1974: Congress amends Section 13(b)(10) but makes no attempt to reverse *Deel*.

1975-1977: The following decisions all follow *Deel: Dept of Labor v. North Brothers Ford,* No. 40344 (E.D.Mich. Apr 17, 1975), *Brennan v. Import Volkswagen, Inc.,* No. W-4982 (D.Kan. Oct. 21, 1975), *Dunlop v. North Bros. Ford, Inc.,* 529 F.2d 524 (6th Cir. 1976), *Yenny v. Cass County Motors,* No. 76-0-294 (D.Neb. Feb. 8, 1977).

1978: A new Administrator Opinion concludes that employees described as "service writers, service advisors, service managers, or service salesmen" qualify as "salesmen," and are exempt from overtime provided the majority (over 50%) of their sales in dollar volume is for non-warranty work. It follows the case law, effectively reversing prior Administrator Opinions and 29 CFR §779.372(c)(4). The DOL's Wage and Hour Field Operations Handbook (FOH) is revised to reflect the new Administrator Opinion.

1987: FOH 24L04(k) is amended, restating the1978 Opinion letter and citing two of the appellate and two of the district court cases noted above. Affirming that the exemption will no longer be denied for such employees, it notes that 29 CFR §779.372(c)(4) will be revised to that effect "as soon as is practicable."

1988-2004: Additional decisions following *Deel* include *Dayton v. Coral Oldsmobile, Inc.,* 684 F. Supp. 290 (S.D.Fla. 1988), *Clark & Day v. Palmen Motors,* No. 98 C-0548 (E.D.Wisc. 1999), *Walton v. Greenbrier Ford,* 370 F3rd 446 (4th Cir. 2004).

2008: The Division proposes to correct 29 CFR 779.372(c)(4) to codify its consistent long-standing position that "service writers, service advisors, service managers, and service salesmen" are exempt as "salesmen" under Section 13(b)(10).

2011: The Division issues a notice stating that it no longer intends to amend 29 CFR 779.372(c)(4) as it proposed in 2008, expressly rejecting the consistent and uncontroverted history of federal case law cited above. Neither the 1978 Administrator Opinion nor the enforcement language set out in FOH 24L04(k) is "repealed." Repeated attempts to get DOL to reconsider its position are rejected, leading Congress to issue the appropriations rider, which reads:

> None of the funds made available by this Act may be used by the Secretary to administer or enforce 29 CFR 779.372(c)(4).

Thus, for now (and I expect until at least March 2013), service writers generally are exempt from overtime under Section 13(b)(10). Of course, as with all wage and hour overtime exemptions, states may have different rules. ■

Questions?
I can be reached at dgreenhaus@nada.org or 703-821-7040.

Greenhaus represents dealer interests before federal agencies such as the EPA, DOT and DOL. He also advises and counsels NADA members and staff on regulatory matters, has authored numerous trade publication articles and association educational guides, and speaks frequently at industry engagements.

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Executive Director's Message

Erin H. Murphy
NADC Executive Director

The NADC Fall Conference held October 7th and 8th in Chicago was by all accounts a great success! Attendees of the Fall Conference enjoyed a beautiful venue at the Trump International Hotel & Tower and seven informative, timely educational sessions. The program also included a very entertaining lunch session on the ethics of social media! There were an outstanding 106 members in attendance . . . record breaking numbers for the Fall Conference!

NADC members who were not in attendance can benefit from the conference materials that will be uploaded to our website at www.dealercounsel.com. Please look under the Conference, Workshop and Webinar Handouts section in the eLibrary (NADC Fall Conference – October 2012) section of the website.

All NADC educational programs rely on members' suggestions for topics and speakers. If you have a suggested session and/or topic you think should be covered at future meetings please email me at emurphy@dealercounsel.com. If you are interested in speaking at future conferences please send me a presentation proposal to include session topic, session title, proposed speakers, proposed length of time and a brief description of the session. I encourage you to submit your suggestions soon as we will begin planning for the April Conference this November.

I would like to thank all of our event sponsors for their contributions to the Fall Conference. Many thanks to Anderson Economic Group, Auto Dealer Law, Counselor Library.com, LLC, Dixon Hughes Goodman LLP, The Fontana Group, Inc., Johnson DeLuca Kurisky & Gould, P.C., Newton, O'Connor, Turner & Ketchum, P.C. and Rosenfield and Company PLLC. It is with the help of our sponsors that we are able to elevate the quality of the conference while keeping the cost low for members.

I would also like to thank the Program Planning Committee for putting together an excellent line up of sessions. Thank you to Patty Covington, Chris Floyd, Shawn Mercer, Paul Metrey, Scott Silverman and Tim Sparks. Well done all!

Please make sure to save the date for the 9th Annual Member Conference being held April 28 – 20, 2013 at The Montage Resort in Laguna Beach, CA. You can make your hotel reservations today by calling 866-271-6953. Please reference the NADC Annual Conference to receive our discounted rate of $275 a night plus tax. See you on the West Coast! ■

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Join nationally recognized expert/consultant on manufacturer incentive audits, Sherralyn Peterson, and NADC attorney-member, Ron Smith, *Stewart & Irwin, P.C.,* for a discussion involving the recent rise in incentive audits, what manufacturers are looking for, "preventative maintenance" for your clients, how audits are conducted, legal parameters, and guidelines. Manufacturer's incentives amount to billions of dollars per year. They have become important cash flow mechanisms for dealers and resulting audits and charge-backs can be devastating to a dealer's business.

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THE CLOSING PROCESS

Part III – Post-Closing

Feature Article

By Erin Tenner, *TennerJohnson LLP*

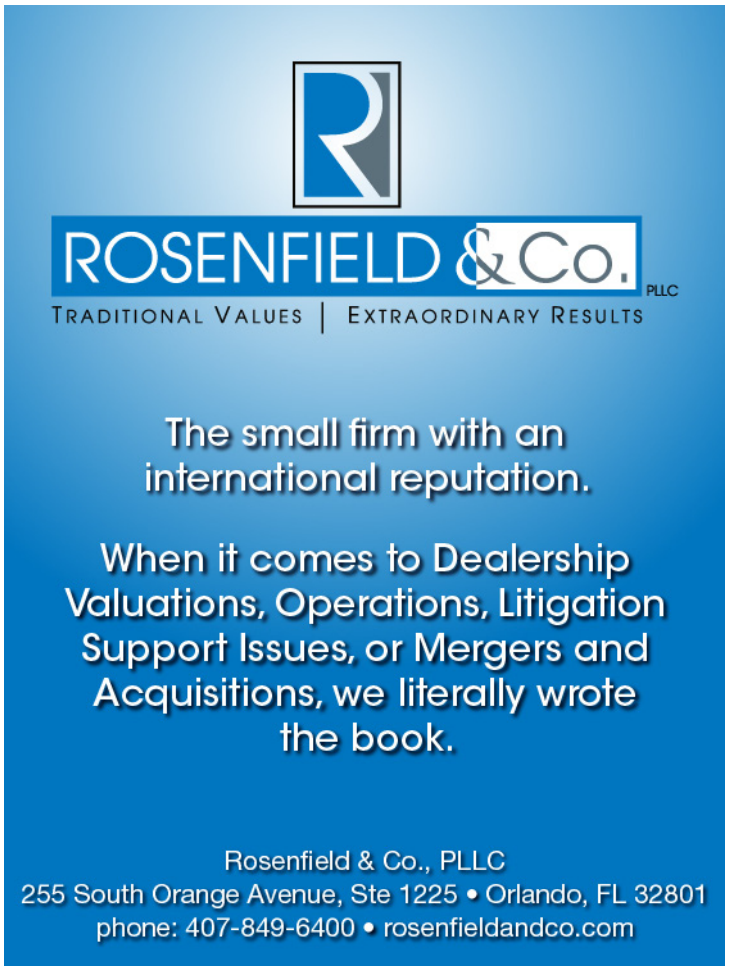
The last two issues of Defender addressed the pre-closing process and closing process. This issue will address what you and your client need to be doing and thinking about after the closing.

This is when much of the legal work for which the buyer and seller paid pays off. Warding off claims after closing will be easy if your purchase agreement is drafted to protect your client.

Here are some situations your client may face starting with the buyer: After closing, the buyer may get phone calls from the seller's creditors saying that money is due for obligations the buyer did not assume. Make sure that your client knows to call you if any such thing comes up. If your purchase agreement is drafted properly, you will be able to point to the relevant provision and documentation to put the matter to rest. If the creditor is an unsecured creditor, you will be able to point to the provision of the purchase agreement stating that the parties will comply with the bulk sales laws and deliver a copy of the bulk sales notice. Compliance with the bulk sales laws cuts off claims of unsecured creditors. If the creditor cannot produce evidence that it made a clam in escrow during the bulk sale period, and you can show that you complied with the bulk sales notice requirements by producing the bulk sale notice, proof of publication, and the bill of sale showing the closing date, no attorney representing a creditor will pursue the matter. All secured creditors should have been researched and addressed prior to closing so they should not be an issue unless they failed to record notice of their security interest. If a creditor failed to record notice of its security interest it will have no claim or right against a buyer who knew nothing about it. If the creditor is a state taxing authority and your state laws provide that taxes follow the assets whether or not a lien appears of record, then you should have obtained a tax clearance certificate prior to closing or withheld money in escrow to cover any such claims (and your purchase agreement should provide for that).

The purchase agreement should provide you with similar protection if a claim is made after closing based on employment termination. The purchase agreement should make clear that the seller is terminating all employees as of closing. If the buyer did not hire or terminate the employee, you will be able call the attorney for the employee and point out the terms of the agreement and the law on point and make the claim go away, often with one phone call, saving the dealer tens of thousands of dollars in litigation costs.

You will also need to make sure your client knows which records to take and which records to leave at the dealership after Closing. Employee records should not be left for the buyer unless employees have consented. The Seller's financial records should also be removed from the dealership after closing even if they pertain to customers. Sales and service records, records pertaining to assets



purchased, and other customer records not having to do with receivables owed the seller will be left at the dealership after closing. The buyer will need to make sure those records are insured for the benefit of the buyer and seller.

The seller will also need to deal with assets that were not sold. The seller must remove any assets from the dealership that the buyer did not purchase (unless the purchase agreement specifically provides that the assets will remain at the dealership). This includes used vehicles and equipment not purchased and records not purchased. Customer lists are purchased by the buyer. Sales and service records will usually stay at the dealership even though they were not purchased by the buyer, because the agreement will typically give the buyer the right to maintain those records after closing. The seller will continue to need access to those records and the purchase agreement should provide for that access. All other records, including banking records, customer receivable records, factory receivable records, tax records, and records regarding holdbacks and warranty claims will be retained by the seller and removed from the dealership. If the purchase agreement gives the seller the right to keep an office at the dealership to wind down its business, (and it typically does) the seller's records can be removed over time. If not, they will need to be removed shortly after closing.

A few other things the seller needs to be thinking about after closing are insurance, taxes, and winding down the business. The seller may be inclined to cancel its insurance after closing. However, the buyer is not likely to have assumed the obligations for any lawsuits that might arise out of sales or repairs completed by the seller prior to closing. If a claim is made after closing, the seller will need to make sure it has insurance coverage for these claims. The same is true with respect to employment claims if the seller has employment practices coverage.

If the seller's insurance is an "occurrence" policy, there will be coverage if the facts out of which the claim arose occurred when the policy was in effect. If the policy, on the other hand, is a "claims made" policy, then the coverage only kicks in if the policy coverage period includes the date on which the claim was made (i.e. the date the lawsuit was filed or the date notice was first given to the insurance company, if earlier.)

The seller will also need to pay taxes on the sale. LIFO recapture and recapture of depreciation need to be considered. In an asset sale some of the purchase price will be taxable at capital gains rates and some will be taxed at ordinary income tax rates. In a stock sale the entire purchase price will be taxed at capital gains rates. If the seller is selling an S corporation, any AAA account earnings (retained earnings) will have already been taxed and should be pulled out by the seller before closing and should not be included in the purchase price paid by buyer. The purchase agreement will need to give the seller the right to pull the money out, otherwise a dispute could arise over it.

If your client doesn't know to call you after closing if issues arise, your client may needlessly spend money paying creditors or other claimants who the client owed nothing. Make sure your client understands that if any issues come up after closing they should call you so they get the full benefit of your good work. ■

Erin Tenner is a partner at TennerJohnson LLP and a member of NADC. She has handled hundreds of buy/sell transactions for auto dealers. In addition to her transactional practice she is also available as a private mediator and expert witness. She can be reached at 818-707-8410 or toll free at 888-501-0040. Web: www.erinktenner.com

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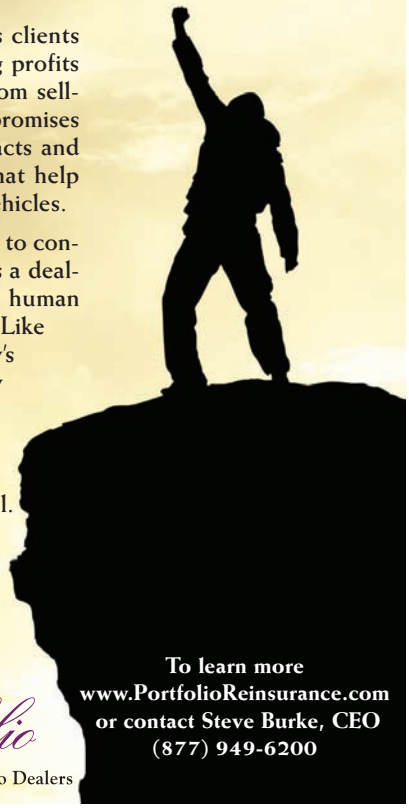

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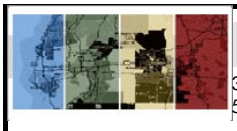

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