DEPARTMENT OF LABOR

Wage and Hour Division

LEGAL FIELD LETTER

No. 9

Attached Opinions

Copies of recent opinions on subjects indicated below are furnished herewith for your information:

MEMORANDA

Date	To	From	Subject
2-28-40	Beverley R. Worrell	Joseph Rauh	M. F. Blankenbaker File No. 45-23 (Whether a manufacturer of coops who sells all of such coops to a whol sale dealer of poultry in Richmond for shipmen of live chickens in the coops to New York City is engaged in producing goods for interstate commerce.)
3-1-40	Llewellyn B. Duke	Joseph Rauh	Howard County Refining Co., Big Spring, Texas (Whether watchmen employed by retail jobbing business and selling locally is under Act-- when formerly company produced goods for inter state commerce.)

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(3891)

Date	To	From	Subject
3-13-40	Mrs. Kathleen J. Lowrie	Joseph Rauh	S. Loewenstein & Sons (Boner room men and dry cooler men engaged in manufacture of meat products)
3-14-40	Mr. A. L. Fletcher	Joseph Rauh	Curtis Publishing Co. 812 Hi-Long Building Columbus, Ohio 34-371 (Applicability of outside salesman exemption to employees soliciting business by telephone in company provided quarters)
3-19-40	John J. Smith	Joseph Rauh	Coverage of employees who work on the paving of streets and the laying of gutters and curbs
3-20-40	D. Lacy McBryde	Joseph Rauh	Sign Posts (As used on interstate highways)

LETTERS

2-28-40	Hon. Sam Hobbs Washington, D. C.	Harold D. Jacobs	(Garnishment of Wages)
2-28-40	G. W. Gambill, Esquire Cooper, Boyse, Gambill & Crawford Terre Haute, Indiana	Milton C. Denbo	(Deductions for Faulty Work)
2-29-40	Mr. Max Zuckerman United Infants' and Children Wear Ass'n New York, New York	Joseph Rauh	(Applicability of Millinery Wage Order to infants bonnets)
2-29-40	Mr. Francis Lincoln Munising, Michigan	Milton C. Denbo	(Coverage of certain employees in branches of lumber industry considere seasonal by findings)

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Date	To	From	Subject
3-1-40	Hon. Millard E. Tydings Washington, D. C.	Harold D. Jacobs	(Cold packing of strawberries under processing of area of production exemptions)
3-11-40	Mr. Joseph L. Miller National Association of Broadcasters Washington, D. C.	Milton C. Denbo	(Employer-employee relationship between radio announcer and sponsor of broadcasting company)
3-12-40	Mr. Adolf Hirsch G. Hirsch Sons, Inc. New York, New York	Joseph Rauh	(Applicability of Textile Wage Order to company engaged in importing textiles and jobbing domestic textile.)
3-13-40	Mr. Edmond J. Jane Merchants and Marine Bank of Pascagoula Pascagoula, Mississippi	Milton C. Denbo	(Deductions from wages for purchase of a "tenant dwelling")
3-13-40	Fred E. Campbell Feldman, Kittelle, Campbell and Ewing Washington, D. C.	Milton C. Denbo	(Coverage of persons engaged in labelling of ketchup under Section 7(c))
3-15-40	Mr. George A. Sherman Sherman Hat Company St. Louis, Missouri	Joseph Rauh	(Applicability of Millinery Wage Order to workers who make handbags to match hats)
3-16-40	Mr. Oscar D. Grimes Athens Manufacturing Co. Athens, Georgia	Joseph Rauh	(Applicability of Textile Wage Order to wool mixtures)
3-18-40	Mr. Harold Katzelnick Jersey City, New Jersey	Milton C. Denbo	(Nonprofessional employees of accounting firms--coverage under Act)
3-19-40	Victor W. Klein Butzel, Eaman, Long, Gust & Bills Detroit, Michigan	George A. McNulty	(Definition of term, "retail sales")
3-21-40	Miss Anne Bozduda New York, New York	Joseph Rauh	(Applicability of Textile Wage Order to sample cards showing samples of various materials)

(3891)

Date	To	From	Subject
3-21-40	Mr. R. H. Hopkins Beer Distributor Publishing Company Chicago, Illinois	Milton C. Donbo	(Interstate operations with respect to wholesaling operations)
3-23-40	Mr. E. C. Hillwog Chamber of Commerce of Minneapolis Minneapolis, Minnesota	Milton C. Donbo	(Segregation of exempt and non-exempt work of maintenance employees in buildings)

(Copy) March 1, 1940

In reply refer to:
LE:CRR:MM

Llewellyn B. Duke
Regional Attorney
Dallas, Texas

Joseph Rauh
Assistant General Counsel

Howard County Refining Company
Big Spring, Texas

I have before me your memorandum of February 19, together with a copy of a letter addressed to your office by the Howard County Refining Company. The problem is one as to the application of the Act in the case of a watchman employed in and about an establishment which ordinarily produces gasoline, oil and other goods for interstate commerce. At the present time, due to a lack of demand, the establishment has shut down its refinery operations and is not shipping any goods out of the state, nor is it manufacturing any petroleum or other products. It is conducting some sort of a retail jobbing business and selling locally.

Quite clearly, it would be our opinion that watchmen employed at this establishment while goods are being produced for commerce would be covered. Furthermore, we have consistently taken the position that a watchman employed during a temporary shutdown, for seasonal or other reasons, be described in the present tense as performing functions necessary to the production of goods for commerce, especially where future production is contemplated. On the other extreme, where the shutdown is pending a sale or other disposition of the property and no future production is contemplated, we have taken the position that the watchman during that period is not covered. In many cases it is almost impossible to draw a line since the question resolves itself into one of degree. Even from the limited statement of facts in this case, however, it would appear quite probable that this particular watchman should be regarded as covered.

It may also be that the "retail jobbing business in gasoline and oils," which the company appears to be carrying on during the shutdown period, in fact has some interstate aspects. It may be that the sales are not retail sales and it may also be that, although the sales are made locally, the goods are moved out of the state subsequently.

75597

(COPY)

In reply refer to:
LE:EBE:RH

February 28, 1940

Honorable Sam Hobbs
House of Representatives
Washington, D. C.

Dear Congressman Hobbs:

This is in further reply to your letter of February 19, 1940, in which you enclosed a letter from one of your constituents, Mr. H. A. Newbury, of Talladega, Alabama.

Mr. Newbury inquires about the application of the Fair Labor Standards Act of 1938 to deductions from wages of the employees of his pipe fittings and plumbing specialties business. He advises that frequently his employees "get involved with the butcher and the grocer and forget to pay their bills," whereupon the butcher and the grocer garnishee their wages under the law of the State of Alabama. Mr. Newbury inquires whether the employer, as a garnishee defendant, is required to pay wages directly to the employee under the provisions of the Fair Labor Standards Act or whether he must heed the local process and pay the money over to the tradesmen.

For your information we are enclosing copies of the Act, Part 531, of the Regulations and Interpretative Bulletin No. 3. These latter materials deal generally with the problem of deductions and the manner of payment under the Act. Although the particular problem raised by Mr. Newbury is not dealt with specifically, we think this material may be generally helpful to him.

As you know, the Act requires an employer to pay his employees engaged in interstate commerce or in the production of goods for interstate commerce who are generally subject to the wage and hour provisions of the law not less than 30 cents per hour nor less than one and one-half times the regular rate of pay for all hours in excess of 42 during any one workweek. It is the opinion of this Division that where an employer, pursuant to garnishment process of a state court, makes a payment to an independent third party for the benefit of his employees, such payment may legally be considered payment to the employee, since it is equivalent to an assignment by the employee to the third person. This, of course, assumes that the employer does not obtain an incidental profit in the transaction. Furthermore, it is assumed that the amount paid to the employee, plus the amount paid for his benefit to the third party, will be equal to or in excess of the minimum required by the Act.

(3891)

We trust that this information will enable you to answer the questions which Mr. Newbury asks, but if not we shall be glad to take this matter up further with him or yourself.

Mr. Newbury's letter to you is enclosed herewith.

Sincerely yours,

Harold D. Jacobs
Administrator

Enclosures (3)

#74289

(3891)

(COPY)

March 20, 1940

LE:HM:MA .

D. Lacy McBryde
Regional Attorney
Charlotte, North Carolina

Joseph Rauh
Assistant General Counsel

Sign Posts

In your communication of February 29, 1940, you ask if employees engaged in the production of wooden sign posts to be used on state highways are covered by the Act. It appears that these posts hold signs indicating curves, intersections and other road hazards, and in some cases the posts hold signs containing names of cities, counties, rivers, etc. The posts are used to replace decayed posts and for the erection of new signs and are generally used on existing roads.

Since your communication contains no reference to whether these posts move in commerce, it is probable that the question before you does not involve this aspect of coverage. However, we suggest that paragraphs 2, 4, 5 and 9 of Interpretative Bulletin No. 5 not be overlooked in this case if there is any probability that some of these goods do actually move outside the state.

In line with the statements contained in our treatment of "highway construction under the Fair Labor Standards Act" and in line with paragraph 13 of Interpretative Bulletin No. 5, it is our opinion that employees engaged in erecting sign posts on interstate highways are deemed to be engaged in commerce and subject to the Act. However, employees of a concern engaged merely in producing these posts would not seem to be in a different category than employees engaged in the production of any other materials which are used in the maintenance, repair, reconstruction or original construction of a highway. We do not believe such employees are subject to the Act if none of the posts go out of the state, but the employer's attention should be called to the inconclusiveness of this opinion and Section 16(b).

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(3891)

(COPY)

March 13, 1940

In reply refer to:
RE:EBE:RH

Mr. Edmond J. Jane'
President
Merchants & Marine Bank of Pascagoula
Pascagoula, Mississippi

Dear Mr. Jane':

In your letter of February 19, 1940, you inquire about the application of the provisions of the Fair Labor Standards Act of 1938 to a proposed arrangement between your bank and various employers and employees, whereby an employee interested in purchasing a "tenant dwelling" would authorize a weekly deduction from his pay check to be paid over to you to apply on the purchase price of such dwelling under a "deferred payment plan." You state that such arrangement would be pursuant to a signed order from the employee and would presumably be with the consent of both employee and employer.

For your information we are enclosing a copy of the Fair Labor Standards Act and copies of Part 531 of the Regulations, and Interpretative Bulletin No. 3, which latter materials deal with the general problem of payments and deductions under the act. As you indicate in your letter, the law requires that employees subject to the wage and hour provisions must receive not less than 30 cents per hour nor less than one and one-half times their regular rate of pay for hours worked in excess of 42 during any one workweek. Under Section 3(m) of the Act, provision is made for payment in "board, lodging, or other facilities." Where housing facilities are furnished by the employer or an affiliated person or firm, the provisions of Section 3(m) will apply. In such event lodging facilities must be valued at the actual cost to the employer. In the Regulations above referred to a formula for determination of such cost is set forth in Section 531.1(b).

On the other hand, if lodging facilities are furnished by an entirely independent and unaffiliated third person, and deduction for weekly installment payments is made by the employer simply as a convenience or service to the employee and the third party, pursuant to a valid assignment of a portion of the wage, it is the opinion of this division that even though such a payment brings the wage actually delivered to the employee below the minimum required in the Act, no violation of Section 6 has taken place. Payment to the third person for the benefit of the employee will be deemed the legal equivalent of payment directly to the employee. It is assumed, of course, that this transaction is wholly voluntary and that no opportunity for profit is afforded directly or indirectly to the employer or an affiliate.

(3891)

The facts disclosed in your letter do not enable us to make a definitive ruling on the plan which you propose. We trust that from this information and the enclosed materials you will be able to determine whether or not your proposal will be satisfactory and proper under the provisions of the Act. We suggest that you also communicate with your local state authorities to determine whether there are any restrictions on the power of an employee to assign wages for the purpose which you suggest.

If you wish to secure additional information regarding the subject discussed in this letter, you should address your inquiry to the signer of this letter. If you wish to secure information regarding other phases of the Fair Labor Standards Act, it will be appreciated if you will write direct to the regional office of the Wage and Hour Division at 818 Comer Building, Birmingham, Alabama.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (3)

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(3891)

(COPY)

March 12, 1940

In reply refer to:
LE:LS:MS

Mr. Adolf Hirsch
G. Hirsch Sons, Incorporated
119 West 40th Street
New York, New York

Dear Mr. Hirsch:

This is in reply to your letter requesting an opinion on whether the textile minimum wage order is applicable to the employees of your company.

It appears from your letter that your company is engaged in the importation of textiles and the jobbing of domestic textiles which are manufactured by contractors.

It is clear that the textile wage order is not applicable to employees of companies which are engaged solely in the importation or jobbing of textiles. In the event your company has any relationship to a manufacturing concern, it will be necessary to submit information on the relationship between your company and such concern in order to enable us to ascertain whether the exemption for independent jobbing companies applies.

The order is applicable to the manufacturing and finishing of woven fabrics. The question is, therefore, raised as to whether the employees of independent contractors or are the employees of your company. In determining the status of these employees you should have reference to sections 3(e) and 3(g) of the Fair Labor Standards Act of 1938 which provide, respectively, that an "'employee' includes any individual employed by an employer" and that "'employ' includes to suffer or permit to work".

If you wish to secure additional information regarding the subject discussed in this letter, you should address your inquiry to the signer of this letter. If you wish to secure information regarding other phases of the Fair Labor Standards Act, it will be appreciated if you will write direct to the regional office of the Wage and Hour Division at 412 Federal Building, 641 Washington Street, New York, New York.

It is regretted that an earlier reply was not possible.

Very truly yours,

For the General Counsel

By_____
Joseph Rauh
Assistant General Counsel

Enclosure
#39165

(3891)

(Copy)

In reply refer to:
LE:ILS:SAF

Honorable Millard E. Tydings
United States Senate
Washington, D. C.

Dear Senator Tydings:

This is in reply to your letter of February 13, 1940, in which you refer to the firm of A. N. Faulkner and Company which does some cold-packing of strawberries.

For the information of this firm, we are enclosing copies of the Fair Labor Standards Act and of Interpretative Bulletins Nos. 1 and 5, dealing with its general coverage. In Interpretative Bulletin No. 5 we refer you to paragraphs 2, 4, 5 and 9.

We are also enclosing a copy of Interpretative Bulletin No. 14, dealing with the exemptions granted by the Act to agriculture and the processors of agricultural commodities, and refer you particularly to paragraphs 14, 19, 22 to 24, 25 to 28, 33 and 37.

You will note from paragraphs 14, 19 and 22 to 24 of Interpretative Bulletin No. 14 that Section 7(c) provides an exemption from the hours provisions only for an aggregate of 14 workweeks in a calendar year for the employees of an employer engaged in the first processing of, or in canning or packing perishable or seasonal fresh fruits or vegetables. As paragraph 19 indicates, in our opinion, the stemming of strawberries constitutes "first processing."

As paragraph 23 (a) of Interpretative Bulletin No. 14 points out, only those employees who perform the operations described in Section 7(c) or who perform operations that are so closely associated thereto that they cannot be segregated for practical purposes, and whose work is also controlled by the irregular movement of commodities into the establishment, are covered by that exemption.

Section 13(a)(10) exempts from both the wage and hour provisions "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

(3891)

The "area of production" is defined and explained in Regulations, Part 536, and R-334, copies of which are enclosed. Quite apart from the definition of "area of production," however, it is our opinion that the cold-packing of strawberries, consisting of stemming and placing the strawberries in sugar, is a processing operation not included within the operations described in Section 13(a)(10) and is therefore not exempt thereunder.

Sincerely yours,

Harold D. Jacobs
Administrator

Enclosures (6)

70873

(Copy) February 29, 1940

LE:GH:HS:MBS

Mr. Francis Lincoln
Box 143
Munising, Michigan

Dear Sir:

This is in reply to your letter of December 28, 1939, in which you indicate that you are interested in the application of the Fair Labor Standards Act to the seasonal exemptions granted to certain branches of the lumber industry. We quote from your letter:

> "Is all work connected with sleigh hauling such as cutting timber skiding the timber, cooks and cookees used at the time of the hauling. And the loading on railroad cars for shipping exempt under the seasonal ruling?
>
> "Also their is other work connected with peeling such as dray hauling to cars And the loading on cars for shipping. Which isn't quiet clear to me. If this is considered as seasonal also."

For your information we are enclosing copies of the Fair Labor Standards Act and of Interpretative Bulletins Nos. 1 and 5, dealing with its general coverage.

We are also enclosing Regulations, Part 526, dealing with the partial hours exemption granted to industries found by the Administrator to be of a seasonal nature under Section 7(b)(3). The employees in industries described in the enclosed Press Releases Nos. R-283 and R-384 are entitled to that exemption.

The Act provides in Section 7(b)(3) that employees engaged in industries which are found by the Administrator to be of a seasonal nature may be employed in excess of the prescribed maximum hours for not more than 14 workweeks in the aggregate in any calendar year, provided that overtime compensation is paid at the rate of time and one-half for employment in excess of 12 hours in any workday and 56 hours in any workweek. The employees who are engaged in the particular operations discussed in these two releases and all employees whose operations are immediately incidental thereto are included within the branches of the lumber industry found to be of a seasonal nature.

(3891)

Thus, in response to your first question, persons actually engaged in hauling are exempt, and likewise persons engaged in loading and unloading the sleighs. Persons engaged in timber cutting are not exempt. Cooks and cookees would be exempt during any workweek in which all their work is performed for exempt employees, such as the men engaged in hauling. If part of their work in any workweek is performed for nonexempt employees such as the loggers, they are not exempt. If the timber is loaded directly from the sleighs on to railroad cars, the loaders are exempt, but if it is first unloaded and piled and later loaded on railroad cars, the loaders are not exempt.

The sap peeling exemption includes felling, trimming and peeling of pulpwood trees while the sap is running; and bucking and piling operations conducted upon both the bark and the logs during the sap peeling season. It does not include dray hauling and loading on cars.

Cooks, cookees and choreboys are necessary to the production of timber and pulpwood and are therefore within the coverage of the Act. As stated above, they are included in the seasonal exemption only if, for any workweek, they work entirely for a gang doing exempt work (such as sap peelers) and do no work for men doing nonexempt operations like logging. Even if they are included in the exemption, they are entitled to time and one-half pay for overtime above twelve hours in a day or 56 hours in a workweek.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (6)
62489

(Copy)

February 29, 1940

In reply refer to:
LE:WMC:MM

Mr. Max H. Zuckerman, Executive Secretary
United Infants' and Children Wear Ass'n
Infants' and Children's Wear Code Authority
225 West 34th Street
New York, New York

Dear Mr. Zuckerman:

We are in receipt of your inquiry concerning whether or not infants' bonnets are included within the definition of the Millinery Industry as contained in the Administrator's Wage Order which became effective January 15, 1940.

The Millinery Industry, as defined in the Order, includes "the manufacture of all headwear, except knitted headwear, for ladies, misses, girls and infants, from any material, but not including the manufacture of felt hat bodies of fur or wool." We are informed that infants' bonnets are not manufactured by millinery manufacturing concerns or according to ordinary millinery processes, such as blocking, trimming, cutting, etc. To this extent, we do not believe that the manufacturing of infants' bonnets should be included within the definition of the Millinery Industry. However, we refer you to the definition of the Infants' and Children's Outerwear Industry as included in the definition of the Apparel Industry and to the definition of the Knitted Outerwear Industry, concerning which Wage Orders are pending disposition by the Administrator.

Enclosed you will find copies of Notices of Hearing which contain the recommendations of the Apparel Industry and Knitted Outerwear Industry Committees and the definitions of the Apparel Industry and the Knitted Outerwear Industry.

Very truly yours,

For the General Counsel

By_____
Joseph Rauh
Assistant General Counsel

Enclosures (2)

(3891)

(Copy)

March 13, 1940

LE:HM:VOG

Mrs. Kathleen J. Lowrie
Inspector
Detroit, Michigan

Joseph Rauh
Assistant General Counsel

S. Loewenstein & Sons

Mr. Frank E. Cooper, of the law firm of Beaumont, Smith & Harris, of Detroit, has submitted to us a memorandum on the coverage of the Act to the employees of this concern, which employees he designates as "day cooler men" and "boner room men."

At the outset we wish to point out that we are not prepared to agree with Mr. Cooper that all of the products of this concern with the exception of the skins and the bone and fat products in question are consumed with the state. It appears that Mr. Cooper places heavy reliance upon the mere local sales. Therefore, with reference to the production of these goods generally the attention of Mr. Cooper should be directed to paragraphs 2, 4, 5 and 9 of Interpretative Bulletin No. 5. The location of Detroit would seem to indicate that a portion of these products do actually move outside the state even though sold locally.

However, assuming that Mr. Cooper's statement would be borne out after an exhaustive investigation we believe that our position with respect to the employees in question would still be the same.

It is stated that a large part of the meat purchased by this company is purchased on the hoof from Michigan farmers. We assume, therefore, that the remainder of this meat is obtained from out of state sources. It further appears that the skins obtained as a result of slaughtering and cleaning operations do actually move in commerce.

The "cooler men" carry carcasses to designated display racks, the place of display of each carcass being dependent upon its grade. Thereafter the carcasses are sold to purchasers who come to view them on the display racks. Some carcasses are not acceptable to the purchasers and are not sold. Thus it would seem that, at the time these "cooler men" are employed in the work described, their employer has reason to believe that a portion of these goods, as parts or ingredients of other goods, will move out of the state. (See treatment following as to disposition of bone and fat.)

We assume that the carcasses which have not been sold to purchasers are removed by the "cooler men" to the boner room. The

"boner men" separate the meat from these carcasses from the bone and fat. The meat is sold to sausage makers and used in the production of sausage which is consumed within the state, while the bone and fat are sold to renderers, becoming a part and an ingredient of other products. A portion of the renderers' products are sold outside the state. As well, it should be noted that a portion of the remainder, although sold locally, may also move in commerce. This latter point, however, is not a determinative factor, since a portion of the renderers' goods are deemed to move in commerce.

We do not believe that Mr. Cooper's statement that the ultimate movement of these byproducts in commerce as a part or ingredient of the renderers' goods is a matter of conjecture has any substantiation in fact. Not only is it reasonable to believe that these byproducts do so move in commerce under the circumstances but it would appear to be entirely unreasonable to believe that these byproducts do not so move.

Mr. Cooper spends considerable effort maintaining that the work of the "boner men" is not necessary to the production of the renderers' goods. However, it is our opinion that this matter is entirely beyond the scope of coverage in this instance. The "boner men" are entitled to the benefits of the act because they are, themselves, engaged in the production of goods for commerce within paragraphs 2, 4, 5 and 9 of Interpretative Bulletin No. 5. Moreover, we do not believe that Mr. Cooper would seriously contend that these employees are not engaged in "production."

With respect to the decisions cited by Mr. Cooper in his memorandum, we believe that he has failed to note the distinction between N.L.R.B. decisions dealing with activities which "affect" commerce and the applicability of the Fair Labor Standards Act to employees who are engaged in the production of goods for commerce. At the same time, paragraph 9 of Interpretative Bulletin No. 5 illustrates the obvious consistency of our interpretations with the reasoning of these cases, in so far as the applicability of the act to particular employees is concerned.

We do not believe that the "boner men" can qualify under the "professional" exemption of Section 13(a)(1).

It is, therefore, suggested that Mr. Cooper be advised of our position with respect to the applicability of the Act to the employees in question. However, if your investigation has uncovered facts which may affect the coverage of the Act and which have not been made known to us by Mr. Cooper, we shall appreciate your advising us with respect to this matter.

77630

(Copy) March 21, 1940

LE:EBE:MC

Mr. R. H. Hopkins
Beer Distributor Publishing Company
43 East Ohio Street
Chicago, Illinois

Dear Mr. Hopkins:

We regret exceedingly that an earlier reply has not been possible to your letters of October 3, 1939, and October 16, 1939, in which you inquire about the application of the Fair Labor Standards Act to the wholesaling of beer.

You ask in your first question whether the act applies to all employees of a wholesaler who receives his merchandise from outside the state and distributes within the state in which his business is located. In this connection we are enclosing a copy of the act and copies of Interpretative Bulletins Nos. 1 and 5 dealing with its general coverage. You will note that it is the opinion of this division as set forth in paragraphs 14 through 16 of the latter bulletin that such a wholesaler should comply with the act.

You next ask whether the act applies to "employees NOT handling actual receipt of the beer from another state." As you will note, the statute covers all employees engaged in interstate commerce or in the production of goods for interstate commerce. It is our opinion that this would include employees engaged in the marketing of products derived from another state regardless of whether they are in physical contact with the product as it is received, since they are an integral part of interstate commerce.

In answer to your third question whether the distributor is in interstate commerce if he himself trucks his beer from another state, you will realize from the enclosed bulletins that the distributor is then actually engaged in the interstate transportation of goods and should comply with the act. In this connection we are enclosing a copy of Interpretative Bulletin No. 9 dealing with the status of truck drivers. You will note from paragraph 5 thereof that employees of private carriers are considered subject to both wage and hour provisions until jurisdiction over them is assumed by the Interstate Commerce Commission.

In your final question you ask whether a wholesaler who purchases his beer within his state and markets it within the same state is subject to the act if his grain, bottles, or labels are derived from beyond the borders of the state. If in this question you contemplate

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the purchase of beer by a wholesaler directly from a manufacturer or producer within the state, it would not appear that the wholesaler is engaged in interstate commerce when he sells for local consumption in the same state, even though the components of the product may have crossed interstate lines. If the distributor purchases the beer from a jobber or another distributor who is importing the beer from outside the state, we feel it is a borderline question whether or not the distributor should comply with the act. At least until the Courts have defined the general radius of coverage, this division will express no opinion in such situations. It should be noted, however, that where the distributor makes sales within the state and has reason to believe that the goods are to be shipped outside the state he should comply with the law. The analogous situation with respect to producers and manufacturers is dealt with in paragraph 4 of Interpretative Bulletin No. 5.

If you have additional questions on these matters, we shall be pleased to be of all possible assistance to you.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (4)

38410

(Copy)

March 15, 1940

LE:WC:LF

Mr. George A. Sherman
Sherman Hat Company
1307 Washington Avenue
St. Louis, Missouri

Dear Mr. Sherman:

Your letter of February 27 to Mr. Merle D. Vincent has been referred to me for reply.

You state that in conjunction with the manufacture of millinery, you are manufacturing ladies' hand bags to match. The hats and the bags are made in the same factory by the same operators at the same machines. These operators, you state, receive in excess of the minimum rate established for the millinery industry. In connection with the manufacture of bags, you desire to know whether or not employees engaged in the finishing of bags who sit at separate tables under the supervision of a special forelady and do not engage in any operations in connection with millinery are required to be paid the minimum wage established for the millinery industry.

It is our opinion that if the work of these employees who finish these bags is completely segregated from millinery operations, they do not fall within the definition of the millinery industry and are not required to be paid the minimum of 40 cents. However, if these employees engaged in any millinery operations or if their work can not be segregated from such operation, it is our opinion that the 40 cent minimum will be applicable.

If you wish to secure additional information regarding the subject discussed in this letter, you should address your inquiry to the signer of this letter. If you wish to secure information regarding other phases of the Fair Labor Standards Act, it will be appreciated if you will write direct to the Regional Office of the Wage and Hour Division at 314 Old Custom House Building, 815 Olive Street, St. Louis, Missouri.

Very truly yours,

For the General Counsel

By_____
Joseph Rauh
Assistant General Counsel

76589
cc-Mr. Max Zaritsky
United Hatters, Cap
and Millinery Workers
International Union
245 Fifth Avenue
New York, New York

(3891)

(Copy)

March 19, 1940

LE:NSA:LGR

Victor W. Klein, Esquire
Butzel, Eaman, Long, Gust & Bills
National Bank Building
Detroit, Michigan

Dear Mr. Klein:

This will acknowledge receipt of your letter of February 6, 1940, in which you refer to our letter of February 1, and request us to explain the basis of our opinion that the sales of trailers for transportation of freight by truck are not "retail sales" within the meaning of the exemption provided by Section 13(a)(2).

Without entering into an exhaustive analysis of the problem, in my opinion, there is embodied in the commonly accepted concept of the term "retail" the idea that goods are sold for private as distinguished from industrial or business purposes. Thus you will find in many industries that the line between the "legitimate" distribution field of the wholesaler and the "legitimate" distribution field of the retailer depends upon the nature of the activities carried on by the purchaser and the use to which the product is put. Factories, railroads, highway construction concerns, manufacturers, etc. are commonly considered as "legitimate" customers of wholesalers. The business purpose to which the products purchased are put is considered to preclude sales made to such purchasers from being in fact sales to the ultimate consumer within the meaning of the term "retail." In this connection your attention is directed to page 411 of volume 15 of the Encyclopedia of Social Sciences.

Very truly yours,

George A. McNulty
General Counsel

#72584

(3891)

(Copy)

March 21, 1940

In reply refer to:
LE:LS:MS

Miss Anne Bezduda
306 E. 6th Street
New York, New York

Dear Miss Bezduda:

This is in reply to your letter requesting an opinion on whether employees who make up shade cards showing samples of various materials such as silks, cottons, oilcloths and woolens are subject to the Textile Minimum Wage Order effective October 24, 1939.

The order is primarily applicable to the manufacture of yarn and fabrics from cotton, rayon, silk, flax, jute and other fibers enumerated in the order. It is also applicable to employees who are engaged in shipping, selling and other occupations incidental to the operation of a textile manufacturing plant. If the sample cards to which you refer are made up in connection with the selling operations of a textile plant, it would appear that the order applies except with respect to such items as oilcloths and woolens which are not subject to the textile order.

In the event that these sample cards are made up, however, in connection with the activities of a company which is engaged solely in jobbing and has no connection with a textile plant, the order does not apply.

Very truly yours,

For the General Counsel

By_____
Joseph Rauh
Assistant General Counsel

#47391

(3891)

(Copy)

March 13, 1940

LE:ILS:MBS

Fred E. Campbell, Esquire
Feldman, Kittelle, Campbell & Ewing
726 Jackson Place
Washington, D. C.

Dear Mr. Campbell:

In reply to your letter of February 9, 1940, it is the opinion of this office that those employees engaged in the labelling of ketchup would be within the Section 7(c) exemption, providing their activity is an integral part of an uninterrupted canning process. However, since such employees also label chili sauce, the applicability of the exemption depends upon other considerations. In order to express an opinion on this matter, we should be informed of the precise contents of the chili sauce and of the nature of the operations in connection with the bottling thereof.

As regards those employees engaged in shipping and warehousing of both perishable and nonperishable commodities, we refer you to the information contained in paragraph 23(b) of Interpretative Bulletin No. 14. As is there indicated, employees who can both perishable and nonperishable fruits or vegetables during a particular workweek are not exempt under Section 7(c) during that workweek. The same principle applies to employees shipping and warehousing perishable and nonperishable fruits and vegetables during the same workweek.

An employee who performs both exempt and nonexempt work for an employer is subject to the wage and hour provisions of the Act in any workweek during which he performs any nonexempt work. In determining the number of hours worked for the purposes of the statute, the total number of hours which such employee works in both kinds of employment should be counted and such employee should receive compensation at the rate of time and one-half his regular rate of pay for all hours in excess of the applicable statutory maximum. For your information, we are enclosing a copy of Interpretative Bulletin No. 13, which discusses the manner of determining the hours for which employees are entitled to compensation under the Act.

If we can be of further service, do not hesitate to call upon us.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (2)

(3891)

(Copy)

February 28, 1940

LE:EBE:SAF

G. W. Gambill, Esquire
Cooper, Royse, Gambill & Crawford
Merchants National Bank Building
Terre Haute, Indiana

Dear Mr. Gambill:

In your letter of February 5, 1940, you advise that one of your clients engaged in the manufacturing of shoes is anxious to make deductions from the wages of his employees who "are careless about their work" and "damage and spoil some of the shoes." You ask whether it is permissible for the employer to deduct by way of penalty from the wages of such employees where "more than the ordinary amount of damages in the shoes" occurs and where the deduction does not "cut" their wages below the minimum.

For your information, we are enclosing a copy of the Fair Labor Standards Act and copies of Regulations, Part 531, and Interpretative Bulletin No. 3. You will observe that under Sections 6 and 7 of the Act, employees engaged in interstate commerce or in the production of goods for interstate commerce, unless specifically exempt, are entitled to be compensated at not less than 30 cents per hour and time and one-half the regular rate of pay for hours worked in excess of 42 during any one workweek. While penalties for defective work are not permitted as deductions under Section 3(m) of the Act, since they are not a "facility" furnished the employee, this section need not be considered so long as the cash wage actually paid is above the minimum prescribed in the Act. In other words, if an employee is paid 50 cents an hour and penalties for defective work aggregate 5 cents, it is permissible for the employer to pay 45 cents in cash for that workhour; where the rate of pay is 30 cents, however, the employer is not permitted to deduct for the penalty and pay the employee only 25 cents per hour for he is thereby failing to comply with Section 6 of the Act.

We trust that this will furnish you with the necessary information. If you have any other questions, please do not hesitate to communicate with us.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo

Enclosures (3)
72458

(3891)

(Copy)

March 19, 1940

John J. Smith
Assistant Attorney
Birmingham, Alabama

LE:HM:LS

Joseph Rauh
Assistant General Counsel

Coverage of employees who work on the paving of streets and the laying of gutters and curbs

I have before me a memorandum of October 28, 1939, concerning the application of paragraph 13 of Interpretative Bulletin No. 5 in the case of employees of private contractors engaged in paving streets and laying gutters and curbs in connection therewith.

In paragraph 13 we have taken the position that employees of contractors, engaged in maintaining, repairing or reconstructing highways or other essential instrumentalities of interstate commerce, would seem to be engaged in interstate commerce and subject to the act. City streets over which interstate commerce more or less regularly travels afford a mode of access to interstate markets no different from that supplied by less urban roadways. The fact that centralization of population and industrial development requires the intensive growth of branch facilities to main arteries of travel in interstate commerce would not seem to alter the coverage of the act.

It has been said that city streets are post roads because they are letter carrier routes. Western Union Telegraph Company v. City of New York, 38 F. 552. Similarly, city streets over which interstate commerce more or less regularly travels may be deemed by the courts to be channels and instrumentalities of interstate commerce. Again, in 96 U. S. 1, 24 L. ed. 708, it is said that city streets are as indispensable as any other roads as a means of intercommunication.

With respect to those city streets over which it does not appear that interstate commerce more or less regularly travels, it is believed that no definite opinion as to the coverage of employees engaged in maintaining, repairing or reconstructing such streets can be supplied.

It should be pointed out that no definite position has ever been taken by this office regarding the application of the act in the case of the employees engaged in the original construction of essential instrumentalities of commerce. However, as is pointed out in the treatment entitled "Highway Construction Under the Fair Labor Standards Act," a copy of which has been sent to your office, the construction of a new road or street over a pre-existing roadbed should be regarded as reconstruction within the meaning of paragraph 13.

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(3891)

COPY

February 28, 1940

In reply refer to:
LE:KCR:ES

Beverley R. Worrell
Regional Attorney

Joseph Rauh
Assistant General Counsel

M. F. Blankenbaker
File No. 45-23

This will reply to your memorandum of February 17, 1940, in which you inquire if a manufacturer of coops who sells all of such coops to a wholesale dealer of poultry in Richmond for shipment of live chickens in the coops to New York City is engaged in producing goods for interstate commerce. You inquire if the wholesaler, located in the same city as the manufacturer, is the ultimate consumer of the coops, or if the purchaser of the poultry in New York City is the ultimate consumer.

In paragraph 6 of Interpretative Bulletin No. 5, as revised in November, 1939, the opinion is expressed that the manufacturer of containers, such as coops, is engaged in producing goods for interstate commerce if at the time the containers are produced the manufacturer hopes, intends or has reason to believe that the containers will be shipped in interstate commerce with the contents of the container. This opinion is expressed irrespective of the question as to who is the ultimate consumer of the containers. Thus, it is our opinion that the manufacturer of the chicken coops is engaged in producing goods for interstate commerce whether the wholesaler or the purchaser in New York City is considered to be the ultimate consumer of the chicken coops if at the time the manufacturer of the coops hoped, intended or had reason to believe that the chicken coops would move outside the State of Virginia.

73284

(3891)

(Copy)

March 23, 1940

LE:CRR:ABS

Mr. E. C. Hillweg
Assistant Secretary
Chamber of Commerce of Minneapolis
Minneapolis, Minnesota

Dear Mr. Hillweg:

I have before me your letter of March 8, together with our previous correspondence concerning the applicability of the Fair Labor Standards Act in the case of building service and maintenance employees employed by the Chamber of Commerce of Minneapolis in the operation of its several office buildings which, it is stated, are operated as a unit. In one of these buildings is located the trading room of the Chamber of Commerce and other portions of the buildings appear to be occupied by tenants who are engaged therein in activities of an interstate nature.

On the facts presented, it is our opinion that the maintenance and building service employees mentioned in your letter are covered by the law. It may be, however, that the functions of certain of these workers could be segregated so that they would be serving only such portions of the buildings as are occupied by tenants who are not engaged in interstate activities of any sort. Such a segregation in theory could be accomplished in the case of charwomen, for example, or window washers. However, employees such as elevator operators or janitors, who serve the entire building could not, apparently, be so segregated.

You state that the building service and maintenance employees employed in the building operated by your various competitors in Minneapolis are not covered by the Fair Labor Standards Act. Whether or not this is the case I am unable to determine, since that particular question is not presented.

Very truly yours,

For the General Counsel

By_____
Milton C. Donbo
Chief Opinion Attorney

73023
78933

(3891)

(Copy)

March 11, 1940

In reply refer to:
LE:KCR:BW

Mr. Joseph L. Miller
Director of Labor Relations
National Association of Broadcasters
Normandy Building
1626 K Street, N. W.
Washington, D. C.

Dear Mr. Miller:

This is in reply to your letter of February 24, 1940, written in response to my letter to you of February 7, dealing with the applicability of the Fair Labor Standards Act to announcers of broadcasting companies.

In your letter you quote from a ruling of the Bureau of Internal Revenue dealing with the applicability of the Social Security Tax to radio announcers. That rule covers two situations. (1) It states that in those cases in which a sponsor of a program desires the services of a particular announcer, the sponsor negotiates a contract with the broadcasting company for the services of the announcer at a specified sum per broadcast. This sum, less the management commission, is paid to the announcer in addition to his regular compensation from the broadcasting company. The ruling then states that the announcer under such arrangements is the employee of the sponsor while performing services for the sponsor, and that the employer tax must be paid by the sponsor. The ruling holds (2) that in those cases in which the broadcasting company agrees to deliver to the sponsor a "complete package" or a "studio-built" program, the radio announcer furnished with such program remains the employee of the broadcasting company. You then state in your letter,

> "I presume I am correct in advising members of our Association to follow this Internal Revenue Bureau ruling in computing overtime under the Fair Labor Standards Act as well as for Social Security Tax purposes."

I do not believe it is safe for you to assume that the rulings of the Bureau of Internal Revenue on the applicability of the Social Security Tax provisions may be followed in determining liability under the Fair Labor Standards Act. The Fair Labor Standards Act, a copy of which is enclosed, provides in Section 3(d) that the word "employer" shall include "any person acting directly or indirectly in the interest of an employer in relation to an employee * * *." Under this provision, it is our opinion that the courts will consider that two possible employers of an employee are both employers for the purposes of the act and that the requirements thereof may be applicable to both of such employers. Generally, in those cases in which either of two employers may be considered to be the employer of an employee, this Division will consider that the employer paying the salary to the employee is the one required to keep the records and, in the

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first instance, has the primary duty of compliance with the Act. Thus, the broadcasting company in the case designated (1) in the Bureau of Internal Revenue ruling, pays the extra compensation to the announcer, its regular employee, although such extra compensation is received from the sponsor for such purpose. It is our opinion that the broadcasting company in that instance does not lose its status as the employer of the announcer while the announcer is performing a special assignment for a sponsor of a radio program.

From another standpoint, it is our opinion that the extra compensation received by the radio announcer indirectly from the sponsor may be considered as compensation which would be included in the regular compensation of the announcer for purposes of determining the regular rate of pay. Paragraphs 16 and 17 of the enclosed copy of Interpretative Bulletin No. 13 discuss the problem of employees having more than one job. You will note in our opinion that if two companies arrange for the employment of a common employee under the circumstances discussed in those paragraphs both of such employers should be considered as a joint employer for the purposes of the act. Thus, if those paragraphs are applicable, the broadcasting company will be considered as jointly employing the announcer during the period in which he is employed by the sponsor, and the broadcasting company will thus be jointly liable for overtime compensation for all hours worked, including those worked for the sponsor, and including in the regular rate of pay compensation received from both employers.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (2)

74983

(Copy) March 14, 1940

Mr. A. L. Fletcher
Assistant Administrator

LE:KCR:EH

Joseph Rauh
Assistant General Counsel

Curtis Publishing Company
812 Hi-Long Building
Columbus, Ohio
34-371

Reference is made to your memorandum of March 11, 1940, to which is attached the inspection report of the above subject company. It appears that the inspector's inspection was interrupted in order to obtain an opinion as to whether or not employees engaged in soliciting subscriptions to magazines distributed by the Curtis Publishing Company are outside salesmen within the meaning of our Regulations, Part 541, Section 541.4. You indicate that, in your opinion, the employees are not outside salesmen by reason of the fact that they are soliciting subscriptions over the telephone in company-provided quarters.

It is our opinion that company-provided quarters are "places of business" of the Curtis Publishing Company within the meaning of Section 541.4, and that, therefore, the outside salesman exemption is not applicable in those cases where the company does provide quarters.

The local retailing capacity exemption defined in Section 541.3 of the Regulations would not, in our opinion, be applicable to the solicitors in question. They are not engaged in making retail sales the greater part of which are in intrastate commerce, or in work immediately incidental thereto, but rather are engaged in making interstate sales, because it appears that the magazines are mailed directly from Philadelphia to the individual subscribers in Ohio as a result of the solicitation of the employees in question.

While the inspection report does not disclose any complete evidence of violations of the act, the report does indicate that an examination of the records of the company in Philadelphia may disclose violations, particularly in so far as deductions are made in the Philadelphia office for cancellations. It would appear to me that the only method of determining whether or not violations of the Act exist is to examine the payroll records of the company in Philadelphia.

(3891)

(Copy) March 18, 1940

LE:HM:BW

Mr. Harold Katzelnick
152 New York Avenue
Jersey City, New Jersey

Dear Mr. Katzelnick:

We regret very much that we have been unable to reply to your letter inquiring as to the applicability of the Fair Labor Standards Act to the employees of public accounting firms before this time.

With respect to employees of accounting firms, it would appear that normally certified public accountants meet the educational tests set forth in subsection (iv) of Section 541.2 of the Administrator's Regulations. Whether such accountants meet the other tests laid down in the section is a question of fact which we are unable to determine from your inquiry. If an employee meets those tests the exemption will apply.

With respect to nonprofessional employees of an accounting firm, it is our opinion that employees engaged in preparing or in work incidental to the preparation of stockholders reports, balance sheets or other financial statements which are sent outside of the state directly by their employer or indirectly through his clients are within the coverage of the statute. There may also be other activities of employees in an accountant's office which would subject such employees to the Act.

The wage and hour provisions contained in Sections 6 and 7 require that employees receive not less than 30 cents an hour and at least time and one-half their regular rate of pay for all work in excess of 42 hours in any workweek. Prior to October 24, 1939, the minimum wage and maximum hour standards were 25 cents and 44 hours respectively.

In addition to the civil and criminal provisions of Sections 16(a) and 17 of the Act your attention is directed to Section 16(b) which provides that employees covered by the Act may recover from their employer double the amount of any unpaid minimum wages or unpaid overtime compensation.

We are enclosing for your information copies of our Interpretative Bulletins Nos. 1, 4, 5 and 13. If you wish to secure additional information regarding the subject discussed in this letter, you should address your inquiry to the signer of this letter. If you wish to secure information regarding other phases of the Fair Labor Standards Act, it will be appreciated if you will write direct to the regional office of the Wage and Hour Division at 1004 Kinney Building, 790 Broad Street, Newark, New Jersey.

Very truly yours,

For the General Counsel

By _____
Milton C. Donbo
Chief Opinion Attorney

Enclosures (7)
38354

(3891)

(Copy) March 16, 1940

In reply refer to:
LE:LS:RH

Mr. Oscar D. Grimes
Athens Manufacturing Company
Athens, Georgia

Dear Mr. Grimes:

This is in reply to your letter of January 2, 1940 concerning the applicability of the textile minimum wage order to wool mixtures.

Section (c)(8) of the order is applicable to:

> "The manufacturing, bleaching, dyeing, printing or other finishing of woven fabrics (other than carpets and rugs) from mixtures of wool or animal fiber (other than silk) containing not more than 25 percent by weight of wool or animal fiber (other than silk), with any of the fibers designated in clause (1), with a margin of tolerance of 2 percent to meet the exigencies of manufacture."

The order applies to the manufacturing of yarn by the cotton system from mixtures of wool fiber with cotton or rayon if the mixture does not contain more than 45 percent by weight of wool fiber. In the event the mixture is in excess of the 45 percent yarn standard or the 25 percent fabric standard, the minimum wage recommendation of Industry Committee No. 1A for the Woolen Industry would appear to be involved. As you probably know, however, this recommendation has been the subject of a public hearing and will not become effective unless and until approved by the Administrator in accordance with the provisions of Section 8 of the Fair Labor Standards Act, a copy of which is enclosed.

Your letter apparently states that you manufacture fabrics containing 60 percent rayon and 40 percent wool. Consequently, it would appear that such fabrics are not subject to the textile minimum wage order and come within the terms of the definition which has been issued for the woolen industry.

Although different percentage standards have been established for the yarn and fabric mixtures there is absolutely no requirement that the yarns be manufactured in one building and the fabrics be manufactured in another building. The Fair Labor Standards Act and the minimum wage orders issued pursuant thereto affect only minimum wages and are not concerned with methods or places of production.

(3891)

If you wish to secure additional information regarding the subject discussed in this letter, you should address your inquiry to the signer of this letter. If you wish to secure information regarding other phases of the Fair Labor Standards Act, it will be appreciated if you will write direct to the regional office of the Wage and Hour Division at 314 Witt Building, 249 Peachtree Street, Atlanta, Georgia.

Very truly yours,

For the General Counsel

By_____

Joseph Rauh
Assistant General Counsel

Enclosures (2)

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