DEPARTMENT OF LABOR

Wage and Hour Division

Legal Field Letter

No. 27 Attached Opinions August 21, 1940

The following copies of recent opinions on subjects indicated below are furnished herewith for your information. You have by now received the first volume of the Opinion Manual. The page and paragraph numbers which appear after the subject are for your convenience in properly indexing each new opinion. The alternating blank page in the Opinion Manual should be used for this purpose.

MEMORANDA

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6-4-40	Irving J. Levy (EBE)	D. Lacy McBryde	Admissibility, competency and weight to be given consent decrees of injunction in employees' suit under section 16(b). (p. 119, par. WW; p. 225)
6-21-40	Rufus G. Poole (DC)	Herman Marx	Van Raalte Co., Inc. Paterson, New Jersey, (Coverage of lace and net stockings under textile and hosiery wage orders.) (p. 199, par. C; p. 256, par. R)
6-27-40	Rufus G. Poole (LS)	Walter C. Bryan	Applicability of the Textile Minimum Wage Order to Employees of Textile Design Studios. (p. 34, par. 2; p. 199, par. C; p. 256, par. R)
7-1-40	Rufus G. Poole (CHL:DC)	John M. Gallagher	Horn Surgical Company Philadelphia, Pennsylvania (Coverage of Surgical Elastic hosiery, surgical abdominal supports, elastic and nonelastic (cotton fabric), as well as trusses and other surgical supports to correct bodily disorders under Knitted Underwear and Commercial Knitting Wage Order.)(p. 199, par. C; p. 256, par. R)

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Date	From	To	Subject
7-8-40	Rufus G. Poole (JDH)	Charles M. Joseph	Request for Opinion, Wage Order for Knitted Underwear Industry (Coverage of polo shirts) (p. 199, par. C; P. 256, par. R)
7-10-40	Rufus G. Poole (OS)	Dorothy M. Williams	Cook houses in lumber camps (Whether a service establishment and not covered by Act) (p. 46, par. 2(a); p. 71, par. 14; p. 104, par. 11)
7-10-40	Rufus G. Poole (OS)	Alex Elson	Olympic Commissary Company Grego-Skarry Commissary Company Generelle Commissary Company (Whether Commissary Company engaged in feeding and housing employees of contractors and railroads is a retail or service establishment and not covered by Act.) (p. 71, par. 18; p. 103, par. 3)
8-1-40	Rufus G. Poole (CAA)	Mr. L. A. Hill	Request for Opinion: Reply to your letter of January 25, 1940. (Computation of regular rate of pay on basis of actual number of hours worked or on basis of hours mentioned in an agreement between employer and employees.) (p. 13, par. 12; p. 245, par. 3)

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LETTERS

Date	To	Subject
6-15-40	Miss Irene L. Blunt The National Federation of Textiles, Inc., New York, New York	(Coverage under the Textile and Woolen Wage Orders -- of materials containing different percents of wool, etc.) (p. 199, par. C; p. 256, par. R)
6-21-40	Barrow Manufacturing Company, Inc. Winder, Georgia	(Re: Manufacture of jackets and overalls out of all cotton corduroy--coverage under Apparel Wage Orders.) (p. 199, par. C; p. 256, par. R)
6-27-40	Mr. H. M. Small Glaser & Yoffe, Inc. Chelsea, Massachusetts	(Coverage of Wool Industry Wage Order over sorting and grading of rags and clips.) (p. 199, par. C; p. 256, par. R)
6-27-40	Miss Mae Jones Atlanta, Georgia	(Coverage of Textile Wage Order over employees making awnings.) (p. 199, par. C; p. 256, par. R)
7-1-40	Mr. Ralph Rosenblatt New York, New York	(Coverage of Textile Wage Order over mill sales agent acting as a jobber and as an independent contractor.) (p. 199, par. C; p. 256, par. R)
7-2-40	Herbert L. Wasserman, Esquire Consolidated Flower Manufacturers, Inc., New York, New York	(Manufacturing apparel and artificial flowers--coverage under Apparel Wage Order.) (p. 199, par. C; p. 256, par. R)
7-31-40	Norman R. Minick, Esquire Norvell & Minick Nashville, Tennessee	(Re: employees having a contract right to percentage distribution of net profits--whether it should be included in determining regular rate of pay.) (p. 15, par. C; p. 230, par. 8; p. 240, par. A)
8-3-40	Mr. William R. Davis United Mine Workers of America LeJunior, Kentucky	(Re: employer who credits unused or unredeemed scrip to his advantage.) (p. 88, par. K; p. 248, par. E; p. 251, par. J)
8-5-40	Mr. W. A. Hatfield Chicago, Illinois	(Laundries rendering service to hotels and dining cars of trains not operating outside state.) (p. 61, par. 3; p. 116, par. 1; p. 188, par. 4(g))

(5499)

(COPY)

June 4, 1940

D. Lacy McBryde
Regional Attorney
Charlotte, North Carolina

LE:EBE:JAM

Irving J. Levy
Assistant General Counsel

Admissibility, Competency and weight to be given consent decrees of injunction in employees' suit under section 16(b).

You ask in a memorandum of May 22, 1940, if a consent decree is admissible in a suit brought by an employee against the same employer under section 16(b) and, if so, what weight the court should give to such a decree "on the question of commerce." You also ask whether the consent decree operates to "estop the defendant to deny commerce and jurisdiction."

It is, of course, well settled that admissions of a party in his pleadings are competent evidence as an admission against the party's interest and may be offered in a subsequent suit involving the same or different parties. Middleton v. Hunter, 195 N.C. 418, 142 S.E. 325. Such an admission may be inferential. Thus, where a defendant power company denied in its answer in a suit for damages for personal injuries "that it individually is constructing a tunnel through the mountain, as alleged," this statement was held by the court to be an implied admission that the work was being done by the company, not individually, but in conjunction with others. The statement was held admissible in a damage suit brought by another employee on the theory that it was a declaration or admission against interest. Ledford v. Tallassee Power Co., 194 N.C. 98, 138 S.E. 424.

In the ordinary case when a consent decree is secured the employer makes no admissions in the stipulation which could be of any advantage to the employee subsequently asserting a claim under section 16(b). No past violations of the act are expressly admitted; no coverage of particular employees is admitted. The employer simply agrees to a decree enjoining him from prospective violations of the law. Thus, if no declarations against interest are made in the stipulation, it is not necessary to decide whether a court would consider the stipulation as equivalent to a pleading within the operation of the above rule, since admission of the stipulation would have no probative value with respect to the issues presented to the court in the subsequent employees' suit.

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Since the consent decree was entered against the employer in a suit brought by the Administrator, involving different parties as well as somewhat different issues, it cannot of course be regarded as res adjudicata of the employees' rights. The rule, as summarized by Wigmore and quoted in Commonwealth v. Monongahela Bridge Co., 216 Pa. 108, 64 Atlantic 909, is as follows:

> "'The moment we leave the sphere of the same cause, we leave behind all question of judicial admissions. A judicial admission is a waiver of proof, and a pleading is for the purpose of the very cause itself, a defining of the lines of controversy and a waiver of proof of all matters outside these lines of dispute. But this effect ceases with that litigation itself; and when we arrive at other litigation and seek to resort to the parties' statements as embodied in the pleadings of prior litigations, we resort to them merely as quasi admissions, i.e., ordinary statements, which now appear to tell against the party who then made them.' 2 Wigmore on Evidence. S 1065. The record is received, 'not as an adjudication conclusively establishing the fact, but as the declaration or admission of the party himself that the fact is so.' Truby v. Seybert, 12 Pa. 101, 103."

The judgment entered by the court, of course, contains no acknowledgment of prior violations by the defendant. Whether the defendant was induced to consent to the judgment because he acknowledged the applicability of the act to his employees in the past, or whether he acknowledged the prospective applicability of the act to his employees in their future activities, or whether he simply desired to avoid litigation of the question of coverage which he did not admit, is not disclosed from the judgment. Consequently, it does not seem that a court would find the decree of any probative value in a suit brought by an employee. Since the employer has not admitted that his employees have been subject to the act during the period for which restitution is paid, but simply has agreed to avoid future violations, it can hardly be argued that he is estopped to deny coverage during that period.

Of course, if the application of the law is admitted in an answer, or is specifically admitted by the defendant in some other writing, this admission may be introduced for whatever probative value it may have in a subsequent controversy by the same or different parties.

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(5499)

COPY

June 21, 1940

Herman Marx
Acting Regional Attorney
Newark, New Jersey

Rufus G. Poole
Associate General Counsel

LE:DC:BEW

Van Raalte Co., Inc.
Patterson, New Jersey

This will reply to your memorandum dated June 17 regarding the application of the hosiery minimum wage order and the textile minimum wage order to the Van Raalte Company's plants at Paterson and Boonton. In my opinion the manufacture of lace or net is subject to the textile minimum wage order, and this is so even though that same piece of lace or net is later fashioned into hosiery in the same establishment.

The fashioning of the lace and net after its manufacture into shapes to be sewn into stockings, however, is subject to the hosiery minimum wage order. Furthermore, it appears that the net and lace hosiery which is produced in this manner is full-fashioned hosiery so that the process of cutting and pulling threads from the lace to shape the same for hosiery will bear a 40 cent minimum wage rate under the full-fashioned branch of the hosiery minimum wage order, while the manufacture of the lace will bear a 32½ cent minimum wage rate under the textile minimum wage order. Likewise the dyeing, finishing and boxing of the lace hosiery is subject to a 40 cent minimum wage rate under the hosiery minimum wage order.

125003

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COPY

Walter C. Bryan, Esq.
Regional Attorney
New York, New York

LE:LS:MA

Rufus G. Poole
Associate General Counsel

June 27, 1940

Applicability of the Textile Minimum Wage Order to Employees of Textile Design Studios

This is in reply to Mr. Joseph's memorandum of February 24 on the above subject.

The provisions of the Order are applicable to all employees who are engaged in the production of the articles specified in the Order or in occupations which are necessary to the production of such articles. It appears from your description of the work done by employees in these studios that the creation, preparation and coloring of the design are so closely related to the manufacture of textiles that the Order is applicable.

You recognize that employees engaged in designing fabrics who are on the payroll of a manufacturer are subject to the Order. The Order is also applicable, in my opinion, to employees of design studios which are independent contractors. The Order has been drafted in terms of process and not on a plant basis. Any employee who is engaged in performing a process subject to the Order is covered even though his employer may be engaged in an independent business which services textile establishments.

#77239

(5499)

July 1, 1940

John M. Gallagher
Regional Attorney
Philadelphia, Pennsylvania

LE:CHL:DC:ARC

Rufus G. Poole
Associate General Counsel

Horn Surgical Company
Philadelphia, Pennsylvania

Your memorandum of May 7 requests an opinion concerning the application of the Knitted Underwear and Commercial Knitting Wage Order (Regulations, Part 555) to the operations of the above named company. It appears that these operations include the manufacture of surgical elastic hosiery, surgical abdominal supports, elastic and nonelastic (cotton fabric), as well as trusses and other surgical supports to correct bodily disorders.

The letter upon which your request is based indicates that the nonelastic abdominal supports are made from cotton fabrics which are purchased; that the surgical elastic hosiery and abdominal supports are made from cotton and silk yarns or thread and rubber thread; and that no knitted or woven fabrics or knitted elastic strips suitable for use in elastic belts, corsets and other wearing apparel are made for resale. I infer that the company does engage in knitting fabric for some of its own products.

Subsection (a) of section 555.4 of Regulations, Part 555 defines the Knitted Underwear and Commercial Knitting Industry to include the "manufacturing, dyeing or other finishing of any knitted fabric made from any yarn or mixture of yarns" with certain exceptions relating to outerwear, to suitings and coatings, and to hosiery. These terms of the definition seem to cover the knitting operations performed in the establishment with the exception of knitting operations in connection with the manufacture of hosiery. The definition is apparently designed to cover all commercial knitting regardless of the type of yarns used and regardless of whether the knitted fabric is made for use or for sale--with, of course, the specific exceptions noted in the definition. Consequently the knitting of elastic and nonelastic cotton fabric will be subject to the 33½ cent minimum wage rate established in the Knitted Underwear Order.

Subsection (b) of section 555.4 of Regulations, Part 555 includes within the definition of the Knitted Underwear and Commercial Knitting Industry the "manufacturing, dyeing or other finishing, from any yarn or mixture of yarns, or from purchased

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knitted fabric, of . . . knitted garments or garment accessories for use as underwear, sleeping wear, or negligees" and certain related products not here in question. These terms of the definition do not seem to include the surgical hosiery, supports and trusses which are the finished products of the company in question; and accordingly, in my opinion, the operations of the company other than those involved in the process of knitting fabric are not covered by the Knitted Underwear and Commercial Knitting Wage Order.

Surgical elastic hosiery which is manufactured by the Horn Surgical Company is included within the hosiery minimum wage order and its manufacture will, therefore, be subject to the 32½ cent minimum wage rate in so far as the hosiery is seamless, and the 40 cent wage rate in so far as any of the hosiery may be full-fashioned.

The cutting and sewing processes which are part of the manufacture of surgical elastic abdominal supports and other surgical supports to correct bodily disorders are included within the corsets and allied garments divisions of the apparel industry and will consequently be subject to a 35 cent minimum wage rate commencing on July 15, 1940.

114010

(5499)

July 8, 1940

Charles M. Joseph
Senior Attorney
New York, New York

LE:JDH:JBR

Rufus G. Poole
Associate General Counsel

Request for Opinion, Wage Order for Knitted Underwear Industry

In your memorandum of May 20, 1940, you request an opinion as to the status under minimum wage orders of the employees of a manufacturer engaged in the production of men's polo shirts from purchased knitted fabrics in a "cut and sew shop." You suggest an apparent conflict in paragraph (b) of the wage order defining the knitted underwear industry. The first clause of paragraph (b) refers to the manufacture of certain products from yarn or from purchased knitted fabric. Subdivision 3 of paragraph (b), however, refers only to knitted shirts of cotton which are manufactured in the same establishment where the knitting was done.

The definition of the knitted outerwear industry, for which a 35 cent minimum becomes effective on July 1, 1940, covers the manufacture of all knitted outerwear when the manufacturing is done in the same establishment where the knitting was performed. Polo shirts would normally have fallen into the general category of knitted outerwear. It was found, however, that polo shirts are made predominantly in knitted underwear mills. See opinion of Administrator on the recommendation of Industry Committee No. 8 for the knitted underwear and commercial knitting industry, page 6. Hence those polo shirts which would normally have been included within the knitted outerwear industry were placed within the jurisdiction of the knitted underwear industry by subparagraph (b)(3) of the latter definition. Since it was intended to transfer to the knitted underwear industry only those polo shirts which would otherwise have been a part of the knitted outerwear industry, the clause referred to covers only those polo shirts which are manufactured in the same establishments where the knitting is performed. You will note that of the four subparagraphs in paragraph (b) of the knitted underwear definition, it is only with respect to the third, polo shirts, that the qualification is made. The products specified in the other three subparagraphs are included within the knitted underwear industry even if they are made from purchased knitted fabric. It is our opinion, therefore, that polo shirts are not intended to be covered by the knitted underwear definition unless they are made in the same establishment where the knitting is performed.

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We do not believe that polo shirts are included within the sportswear and other odd outerwear division of the apparel industry. We direct your attention to the "dress shirts, collars, and sleeping wear" division of the apparel industry which covers "the manufacture of men's and boys' dress shirts, sport shirts . . . from any purchased knit fabric." It is our opinion that the manufacture of polo shirts from purchased knit materials in a cut and sew shop is subject to the 32½ cent minimum rate, effective July 15, 1940, pursuant to the wage order for the apparel industry.

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(5499)

July 10, 1940

Dorothy M. Williams
Regional Attorney
San Francisco, California

LE:OS:CAO

Rufus G. Poole
Associate General Counsel

Cook Houses in Lumber Camps

In your memorandum of July 1, 1940, you request that we inform you of the ground for our opinion that "lumber camp cooks, cookees, and bull cooks not covered by the act."

In our opinion a cook house in a lumber (or mining) camp which is physically set apart from the rest of the camp may be considered a "service establishment" within the meaning of section 13(a)(2).

Of course, cook house employees who are also engaged in nonexempt work would be entitled to the benefits of the act for any week during which they perform such nonexempt work.

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(COPY)

July 10, 1940

Alex Elson
Regional Attorney
Chicago, Illinois

LE:OS:CAO

Rufus G. Poole
Associate General Counsel

Olympic Commissary Company
Grego-Skarry Commissary Company
Generelle Commissary Company

In your memorandum of May 4, 1940, you request our opinion regarding commissary companies engaged in the business of housing and feeding employees of contractors and railroads traveling in different states. These companies you state operate "a type of moving restaurant and boarding house combined, and secure a contract from a railroad construction company to feed and house the employees on the construction work at any particular point where a job has been secured."

In our opinion, a commissary which constitutes a physically separated unit is considered to be a "service establishment" within the meaning of section 13(a)(2). This is so whether the commissary serves railroad employees exclusively or whether it also serves employees of the general public.

The cook house which accompanies the traveling carnival would also seem to come within this exemption.

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(Copy)

August 1, 1940

To Mr. L. A. Hill
Seniro Auditor
Minneapolis, Minnesota

In Reply Refer to:
LE:CAA:FMS

From: Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

Subject: Request for Opinion:
Reply to your letter of January 25, 1940.

You are correct in your opinion that the actual number of hours per week worked by an employee will determine whether the employee works a regular number of hours, in which case paragraph 11 of Bulletin 4 will apply, or an irregular or fluctuating number of hours, in which case paragraph 12 of Bulletin 4 will apply.

The case to which the inspectors returning from the last inspectors' school refer involves different considerations. I suppose that the inspectors are referring to the case where, for example, an employee is employed at $21.00 a week for a 42 hour workweek--that is, that the employer when he employed him agreed to pay him $21.00 a week and to work him not more than 42 hours. As a matter of fact, however, the employer works the employee in excess of 42 hours. The question is whether 42 hours, or the number of hours actually worked shall be taken as the basis for computing the employee's regular rate of pay.

This is a question about which we have as yet taken no definite position. If, as a matter of fact, the employer violated his agreement with the employees, we are inclined to say that his regular rate of pay is based on the 42 hour week and that he will not be permitted to benefit by reason of the fact that he violated his contract. However, it may be that in such a case the original agreement was not violated but was modified by the employee's acquiescence in working a greater number of hours for the same $21.00. In such case, the original agreement is superseded by the modified agreement and the employee's regular rate of pay must be arrived at on the basis of the actual number of hours worked. Whether the agreement in a particular case is modified or violated often involves a difficult question of fact which must be decided on the basis of all the facts in the case.

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COPY

June 15, 1940

LE:VCW:DET

Miss Irene L. Blunt
Secretary
The National Federation of Textiles, Inc.
10 East 40th Street
New York, New York

Dear Miss Blunt:

This letter is in response to a communication from the New England Spun Silk Corporation forwarded by you to the Wage and Hour Division, requesting information regarding the coverage by the Administrator's wage orders for the textile and woolen industries of certain operations performed in the plant of the New England Spun Silk Corporation.

The problem of the New England Spun Silk Corporation is set forth in its letter as follows:

> "We are principally spun silk spinners and, therefore, operate under the 32½¢ minimum wage scale but our production consists of about 20% yarns containing a mixture of 80% wool and 20% silk and the purpose of this letter is to inquire how Paragraph 7 of this Wage Order No. 1 should be interpreted. What we want to know is whether any mixture of wool and silk even though the wool component may be 45%, or 80% or more, as long as the mixture contains a certain percentage of silk, belongs under Administrative Order No. 1 which calls for 32½¢, or whether such yarns have to be classified as belonging under the 36¢ minimum wage order of the woolen and worsted textile industry.
>
> "We also have the problem where some of our operators handle, a small part of their time, yarns containing more than 45% wool and we would like to know how we are supposed to pay such operators; whether we are allowed to pay them under the 32½¢ silk wage scale, or whether we are compelled to pay them under the woolen and worsted scale for whatever time they might handle yarns containing more than 45% wool."

Enclosed please find copies of the Administrator's wage orders for the textile and woolen industries.

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You will note that by the terms of paragraph (1)(c)(7) on page 4 of the wage order for the textile industry and paragraph (f) on page 3 of the wage order for the woolen industry, the manufacturing or processing of yarns or threads which contain any proportion of wool or animal fiber (other than silk) in combination with silk by the woolen system is subject to the 36 cents per hour minimum wage rate established by the wage order for the woolen industry; the manufacturing or processing of yarn or thread containing in excess of 45 per cent by weight of wool or animal fiber (other than silk) in combination with silk by a system other than the woolen system is subject to the minimum wage rate of 36 cents per hour established by the wage order for the woolen industry; and the manufacturing or processing of yarns or threads containing 45 per cent or less by weight of wool or animal fiber (other than silk) in combination with silk is subject to the 32½ cent minimum wage rate established by the wage order for the textile industry.

As regards the instances where the same operators or workers perform work subject to two different minimum wage rates during the workweek it is our opinion that these operators or workers are entitled, under the Fair Labor Standards Act, to receive payment at least at the highest of the two minimum wage rates for the total number of hours worked during the particular workweek. This rule applies to all employees engaged in an occupation or occupations necessary to the production of the products subject to different minimum wage rates.

Very truly yours,

For the General Counsel

By_____
Rufus G. Poole
Associate General Counsel

Enclosures (2)

(5499)

COPY

June 21, 1940

LE:DC:JAM

Barrow Manufacturing Company, Inc.
Winder
Georgia

Gentlemen:

In your letter dated June 15 you have asked our opinion whether the manufacture of a jacket out of all cotton corduroy will be subject to the 32½ cent minimum wage rate under the apparel minimum wage orders commencing on July 15, 1940.

In my opinion the corduroy jacket is included within the sportswear and other odd outerwear division of the apparel industry. You will notice on page 2 of the enclosed interpretative statement relating to minimum wage rates in the apparel industry, that an overall jacket made of the same material as the overalls with which they are ordinarily used is not included in the sportswear and other odd outerwear division of the industry, but is included under the 32½ cent division for single pants of 100 percent cotton fabric, overalls, coveralls and work shirts. However, in my opinion since overalls are not ordinarily made out of corduroy the corduroy jackets to which you refer in your letter are probably not overall jackets within the meaning of the 32½ cent division, but are jackets under the 40 cent sportswear division.

This classification of the corduroy jacket will not differ whether the jacket is made with a zipper or not.

Very truly yours,

For the General Counsel

By_____
Rufus G. Poole
Associate General Counsel

Enclosure

124759

(5499)

COPY

LE:LS:MA

June 27, 1940

Mr. H. M. Small
Glaser & Yoffe, Inc.
Spruce and Fifth Streets
Chelsea, Massachusetts

Dear Mr. Small:

This is in reply to your letter of June 12 concerning the scope of the wool industry minimum wage order.

Section 556.4 of the order provides in subsection (d), that

> "The picking of rags and clips made entirely from wool or animal fiber (other than silk), and the garnetting of wool or animal fiber (other than silk) from rags, clips, or mill waste; and other processes related thereto",

are included in the definition of the wool industry.

It is my opinion that this provision of the wage order applies to the sorting and grading of rags and clips when performed in a plant which is engaged in the processes of picking and garnetting. When the sorting and grading is performed in connection with other processes it would not appear that the order is applicable.

Sorting and grading processes subject to the order are covered regardless of whether they are performed by machinery or by hand.

Very truly yours,

For the General Counsel

By_____
Rufus G. Poole
Associate General Counsel

123354

(5499)

COPY

June 27, 1940

LE:VCW:EMC

Miss Mae Jones
Post Office Box 1905
Atlanta, Georgia

Dear Miss Jones:

This letter is in response to your communication of May 16, 1940 in which you state that you are employed as an awning sewer in a textile mill which makes both bags and awnings and request an opinion as to whether the Textile Wage Order applies to employees engaged in the production of awnings.

Enclosed please find a copy of the wage order of the Administrator of the Wage and Hour Division, United States Department of Labor for the textile industry. You will note that paragraph (c)(4) on page 3 of this wage order expressly includes within the definition of the textile industry bags and certain other products. Processing of awnings is not included within the definition. For this reason machine operators making bags are subject to a minimum wage rate of 32½ cents per hour under the Administrator's wage order and operators performing similar work upon awnings are subject to a 30 cents per hour minimum wage rate under the Fair Labor Standards Act.

Very truly yours,

For the General Counsel

By_____
Rufus G. Poole
Associate General Counsel

Enclosure

117053

(5499)

COPY

July 1, 1940

LE:LS:MWW

Mr. Ralph Rosenblatt
815 Gerard Avenue
New York, New York

Dear Mr. Rosenblatt:

This is in reply to your letter requesting an opinion on the applicability of the textile minimum wage order to a mill sales agent who sells materials as an independent contractor and who is also engaged in a small jobbing business.

It would seem clear that the jobbing business done by your client is not subject to the wage order. The status of the mill sales is dependent upon whether a chargeout analogous to an actual sale and transfer takes place before your client commences his activities. If such a transaction does occur, it would appear that this phase of your client's business is also not subject to the wage order. On the other hand, if your client is merely performing the same type of work which is done by a salesman attached to the mill, the wage order would apply.

The Fair Labor Standards Act of 1938 prescribes a broad test of the employer-employee relationship. In determining whether your client is actually an independent contractor you should take account of section 3(g) of the act which defines "employ" as including "to suffer or permit to work."

Where an employer is subject to a wage order, clerical employees who are engaged in work necessary to the covered occupations are also entitled to receive the prescribed minimum. There are no learner exemptions for stenographers or messenger boys.

I am sending you for your information a copy of the textile minimum wage order as well as Regulations, Part 541, defining the exempt categories of employees employed in "a bona fide executive, administrative, professional or local retailing capacity or in the capacity of outside salesman."

It is regretted that an earlier reply to your letter was not possible.

Very truly yours,

For the General Counsel

By_____
Rufus G. Poole
Associate General Counsel

Enclosures (2)

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COPY

July 2, 1940

LE:DC:EKS

Herbert L. Wasserman, Esquire
Consolidated Flower Manufacturers, Inc.
401 Broadway
New York, New York

Dear Mr. Wasserman:

This is in reply to your letter of June 14 asking two questions regarding the application of the 35 cent minimum wage rate which will become effective in the artificial flower and feather division of the apparel industry commencing on July 15.

From the evidence adduced during the course of the public hearing on the recommendations of Industry Committee No. 2, I believe that the Administrator was correct in finding that artificial flowers used for decorative purposes are generally sold to the ultimate consumer at retail and that apparel flowers are generally sold to the apparel trade. However, I do not believe that it follows from this general finding that all artificial flowers which are sold to the ultimate consumer at retail are decorative flowers and not apparel flowers. I am not, myself, familiar with the entire line of artificial flowers carried by variety stores such as Woolworth's, but I do not feel that the distribution of artificial flowers through such variety stores means that the flowers are decorative flowers. In other words, it may be possible that artificial flowers intended for apparel purposes are distributed through variety stores such as Woolworth's and if so their manufacture will be subject to the 35 cent minimum wage rate for the artificial flower division of the industry.

In my opinion the manufacture of artificial flowers to be used upon millinery will be subject to the 35 cent minimum wage rate established for the artificial flower and feather division of the apparel industry. You will note that the exceptions of knitted outerwear, knitted underwear, hosiery and millinery, etc., which are made in the general definition of the apparel industry are to be interpreted as defined by the Administrator. Thus, the millinery industry which was excepted from the apparel industry is the millinery industry as defined by the Administrator in the millinery minimum wage order. This millinery industry does not include the manufacture of artificial flowers and feathers to be used on millinery and consequently, in my opinion, the manufacture of these flowers and feathers continues within the apparel industry.

(5499)

You state in your letter that you have advised your members that the manufacture of artificial flowers for millinery will not be subject to the apparel minimum wage order. In view of our opinion in this matter I should appreciate it very much if you would advise your members that we believe that the manufacture of these flowers is subject to the apparel minimum wage order.

Very truly yours,

For the General Counsel

By_____
Rufus G. Poole
Associate General Counsel

E124198

(5499)

COPY

July 31, 1940

LE:CAA:ARC

Norman R. Minick, Esquire
Norvell & Minick
Suite 706 Harry Nichol Building
Nashville, Tennessee

Dear Mr. Minick:

This is in reply to your letter of October 24, 1939. I regret that an earlier reply was not possible, but the questions raised in your letter were under consideration for some time.

The first question you ask is answered in paragraph 19 of the enclosed Interpretative Bulletin No. 4. As you will note in footnote 6 to Section 516.4 (iii) of Regulations, Part 516, copy of which is enclosed, it seems that Christmas bonuses are not included in determining the employee's regular rate of pay on the basis of which he must be paid time and one-half. Similarly, a profit-sharing bonus depending wholly upon whether the company has made any net profits and distributed annually at the sole discretion of the company, need not be computed in determining the regular rate of pay. If, however, the employees have a contract right to the percentage distribution of the net profits, then in effect, the amounts so distributed constitute deferred compensation and should be included in determining the regular rate of pay. Such a contract right to receive the bonus may be expressed or implied. As to whether a contract right exists in every case to receive the bonus is a question of the general contract law about which it is not our function to express an opinion.

Very truly yours,

For the General Counsel

By_____
Rufus G. Poole
Associate General Counsel

Enclosures (4)

40958

(5499)

COPY

August 3, 1940

In Reply Refer to:
LE:EBE:VJM

Mr. William R. Davis
Recording Secretary
Local Union No. 6057
United Mine Workers of America
LeJunior, Kentucky

Dear Mr. Davis:

Colonel Fleming has asked us to furnish you with the information requested in your letter of July 17, 1940, in which you inquire about the application of the Fair Labor Standards Act to the issuance of scrip by the Benity-Harlan Corporation to its employees. You enclosed a credit slip which is issued by the company and which is indicated to be "good today only." This scrip is advanced against the wages of the employees. It is redeemable only at the company's store which, when merchandise is pruchased, issues a yellow slip of the type which you also enclosed. You further advise that when scrip is torn by store clerks the employee is told that it is no longer of any value even though drawn the same day. The employees also complain that they are "charged too much store account."

For your information we are enclosing a copy of the Fair Labor Standards Act and a copy of the Workers' Digest. Problems of deductions and payment under the act are discussed in the accompanying Regulations, Part 531 and Interpretative Bulletin No. 3. As you will observe from paragraph 6 of Interpretative Bulletin No. 3, scrip does not constitute a proper medium of payment under the act. It is neither cash "nor other facilities" within the meaning of section 3(m). However, the use of scrip for purposes of conveniently and accurately calculating merchandise, board, lodging or other facilities customarily furnished to the employee during the pay period is not prohibited. Employer may not, however, credit himself with unused or unredeemed scrip since that has not been redeemed for board, lodging or other facilities. If, however, scrip is issued to an employee to the amount of one dollar and that scrip is then redeemed by the employer for board, lodging or other facilities at the company's store, the merchandise so received will be considered furnished by the employer to the employee but the "reasonable cost" of this merchandise must be measured by the requirements of section 3(m) and Part 531 of the regulations.

(5499)

Section 531.1 of these regulations defines reasonable cost to exclude any profit to the employer or any affiliated person. Thus, if the employer obtains a profit from furnishing facilities which "cuts into" the minimum wage required to be paid by the act, there has been a violation of section 6. In other words, the employee must receive the minimum wage in cash free and clear or in other facilities valued without profit to the employer. When the cash wage paid free and clear does equal the minimum, section 3(m) and the regulations are not applicable. See paragraph 7 of Interpretative Bulletin No. 3. Where the minimum wage is affected, the employer may not charge the employee for the loss or destruction of scrip since, in such case, the employee has not received the full minimum in cash or in facilities.

This office is at all times prepared to entertain complaints where violations of the act are suspected. If after investigation, the facts warrant, necessary legal proceedings will be taken to assure compliance with the provisions of the law. For your convenience we are enclosing a confidential complaint form which may be filled out and forwarded to our regional office located at 119 Seventh Avenue North, Nashville, Tennessee.

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

Very truly yours,

Rufus G. Poole
Assistant Solicitor
In charge of Opinions and Review

Enclosures (5)

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(5499)

August 5, 1940

Mr. W. A. Hatfield
Vice President
Fred Harvey
80 East Jackson Boulevard
Chicago, Illinois

In reply refer to
LE:FR:EMC

Dear Mr. Hatfield:

This will reply to your letter of July 31, 1940, addressed to Colonel Fleming and discussed by you in person with Mr. Reel, concerning the applicability of the Fair Labor Standards Act of 1938 to your laundries at Newton, Kansas; Albuquerque, New Mexico; Grand Canyon, Arizona; and Needles, California.

Mr. Reel informs me that it was understood that the Albuquerque laundry was subject to the act and that the Grand Canyon Laundry, which served only hotels and restaurants in Arizona, was not subject to the act, assuming of course, that at the time it performed its laundry services, it had no reason to believe that goods laundered would thereafter move out of the state.

The Needles laundry, we understand, does work only for hotels in California and for dining cars on trains which do not leave California. It is our opinion that under these circumstances this laundry is not subject to the act.

Exemption from the hours provision of the act is sought for the Newton laundry under section 13(b)(2). It is our opinion that section 13(b)(2) exempts only those employees of the railroad who perform operations which subject their employer to Part I of the Interstate Commerce Act. Even assuming that these employees are employees of the railroad, it seems clear that they do not perform operations which subject the railroad to Part I of the Interstate Commerce Act. The case of these laundry workers is clearly distinguishable from that of dining car employees and we advise that you comply with the act in the operation of the Newton laundry.

With respect to the Grand Canyon and Needles Laundries, the opinions of noncoverage expressed above shall not be held to apply if the facts are other than as stated.

Very truly yours,

Rufus G. Poole
Assistant Solicitor
In charge of Opinions and Review

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