UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

November 4, 1940

Legal Field Letter

No. 35

Attached Opinions

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

MEMORANDA

Date	From	To	Subject
10-26-40	Rufus G. Poole (RUB)	John M. Gallagher	Pennsylvania Retail Grocers' Cooperatives (An explanation of "retail sales" under Section 13(a)(2)). (p. 69, par. M; p. 102, par. DD; p. 134, par. A.)
10-26-40	Rufus G. Poole (FR)	Samuel P. McChesney	Artco Metalizers St. Louis, Missouri, File 24-1554 (Coverage of firm engaged in metalizing baby shoes through an electroplating process--whether under Section 13(a)(2)). (p. 69, par. M; p. 102, par. DD; p. 161, par. P.)
10-28-40	Rufus G. Poole (EBE)	Samuel P. McChesney	Modern Bow Company St. Louis, Missouri, File No. 24-1558. (Deductions for carfare spent by an employee from his salary. Computation of hours worked by an employee in transporting goods from and to factory which are worked on at home.) (p. 88, par. K; p. 123, par. 18; p. 232, par. A; p. 249, par. 5.)
10-29-40	Rufus G. Poole (ADH)	Alex Elson	Collective Bargaining Agreements Section 7(b)(1) (p. 10, par. B; p. 60, par. D; p. 91, par. R.)

(6255)

Legal Field Letter

No. 35

Date	From	To	Subject
10-30-40	Rufus G. Poole (GFH)	John M. Gallagher	Companies Furnishing Fire and Burglar Protection (p. 45, par. (m); p. 197, par. K.)
10-30-40	Rufus G. Poole (FR)	Arthur E. Reyman	Fleet Accounts (meaning of word "fleet"). (p. 189, par. I; p. 258, (after par. K.))
11-1-40	Rufus G. Poole (FUR)	Dorothy M. Williams	Establishments engaged in making sales and distributing goods to branch stores. (p. 72, par. 21; p. 103, par. 4; p. 144, par. M.)
11-1-40	Rufus G. Poole (FUR)	Charles H. Livengood	Definition of Selling in Intra-state Commerce Under Section 13(a)(2). (p. 72, par. 22; p. 102, par. DD.)
11-1-40	Rufus G. Poole (ADH)	Alex Elson	Walter V. Lord and Harry A. Lord 82 West Washington Street Chicago, Illinois File No. 12-1485 (Coverage of employees recruited to transport autos from factories in Midwest to purchasers on Pacific Coast.--Coverage of such drivers under Section 13(b)(1). Whether a deduction for privilege of transporting such cars can be made from employee's wages). (p. 62, par. 2; p. 88, par. K; p. 115, par. 2; p. 248, par. E.)
11-2-40	Rufus G. Poole (GFH)	Llewellyn B. Duke	S. B. Hayes Meier Rig & Construction Company Liberty, Texas File No. 47-710 (Whether original construction of drilling rigs for purpose of drilling oil is covered under the Act). (p. 174, par. B; p. 183, par. 5.)

Legal Field Letter

No. 35

LETTERS

Date	To	Subject
10-17-40	Wise, Corbett & Canfield New York, New York	(Coverage under Pulp and Primary Paper Industry of the lining of blotting paper). (p. 199, par. C; p. 256, par. R.)
10-26-40	Strother Kiser Lexington, Kentucky	(Coverage of a wholesale liquor dealer who secures about 5% of his liquor from outside the state and makes all sales within the state). (p. 3, par. 13; p. 194, par. 3.)
10-29-40	Alice M. Bustin, M.D. Columbus, Ohio	(Coverage of Act over Beauty Parlors or Beauty Culture School). (p. 70, par. 6; p. 103, par. 6; p. 197, par. K.)
10-29-40	J. W. Burch, Director Washington, D. C.	(Attorney exempt as a "professional" even if he receives less than $200 per month). (p. 62, par. H; p. 102, par. 4.)
10-29-40	A. L. Secor East San Diego, California	(Whether Section 13(a)(5) exemption covers fertilizer plant making fertilizer from materials secured from fish canneries). (p. 65, par. I; p. 106, par. GG; p. 150, par. E.)
11-2-40	Harvey Broyles Springhill, Louisiana	(Whether the dismantling of a refinery and the utilization of dismantled materials in erecting a new refinery is original construction). (p. 174, par. 2(b).)
11-2-40	Joseph L. Miller National Association of Broadcasters Washington, D. C.	(Whether a student "fill-in announcer" is the employee of Broadcasting studio or of school). (p. 49, par. B; p. 172, par. 1.)

Issued 11/9/40

October 26, 1940

In reply refer to:
LE:RUB:MCC

To: John M. Gallagher, Esquire
Regional Attorney
Philadelphia, Pennsylvania

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

Subject: Pennsylvania Retail Grocers' Cooperatives

Reference is made to your memorandum of October 5, 1940, with which you enclosed brief of the subject company's counsel for our consideration.

It is the view of this office that cooperatives such as the subject company are not retail establishments within the meaning of the exemption afforded by section 13(a)(2) of the act.

With regard to counsel's contention on page 3 that the subject company does not "resell at a profit to the general retail trade", your attention is called to paragraph 6 of Interpretative Bulletin No. 6 which states that a retail sale is one to ultimate consumers and "not for the purposes of resale in any form." You will also note for your further consideration paragraphs 14 through 16 of Interpretative Bulletin No. 5 and paragraphs 7 and 8 of Interpretative Bulletin No. 6.

153403

October 26, 1940

In Reply Refer To:
LE:FR:MF

To: Samuel P. McChesney, Esquire
Acting Regional Attorney
Kansas City, Missouri

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

Subject: Artco Metalizers
St. Louis, Missouri
File 24-1554

Reference is made to memorandum of October 17, 1940, with which you resubmitted your memorandum of July 6, 1940, concerning the applicability of the service establishment exemption to the subject company which metalizes baby shoes through an electroplating process. "The shoes are submerged in a proper solution, and when completed, are covered with copper which gives a replica of the shoe in metal. Most of the business comes from dry goods stores and jewelers. Since the first of the year, however, the firm has done some national advertising, and while some business previously had been done for firms outside of the state, that has increased this year, although the majority of business is still with firms in St. Louis."

The service exemption is not applicable inasmuch as the firm is engaged in manufacture. Furthermore, it appears that most of its business is not done with individual private consumers.

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(6255)

October 28, 1940

In Reply Refer To:
LE:EBE:FB

To: Samuel P. McChesney
Acting Regional Attorney
Kansas City, Missouri

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

Subject: Modern Bow Company
St. Louis, Missouri

File No. 24-1558

The problems raised in your memorandum of July 9, 1940, had implications on which the division had not yet taken a position and for this reason it was necessary to discuss the problems with Colonel Fleming and to secure his approval. We regret that it was not possible to advise you earlier as to our decision.

In the memorandum from your inspector, Robert Tallman, it appears that the Modern Bow Company is owned by a Mr. Fortner who distributes work to some of the employees in the plant who take materials home with them, work on them at night at their homes, and bring back to the premises of the employer the processed product the following morning. Mr. Tallman, replying on Interpretative Bulletin No. 13, suggested that hours spent in transportation to home and factory must be considered hours worked and that the carfare spent for such transportation must be paid to the employee in addition to the minimum wage.

We agree with both of Mr. Tallman's conclusions. Under sections 6 and 7 the employee must receive not less than 30 cents per hour and time and one-half for overtime as "wages"; if he is paid the bare minimum and must make an expenditure for carfare bringing his net compensation below the minimum, we feel that the act has been violated where such carfare has been expended in the interest of the employer. Transportation facilities which are an incident of and necessary to the employment must be considered primarily for the benefit and convenience of the employer under Part 531 of the regulations. See paragraph 10 of Interpretative Bulletin No. 3. When the employee is paid a cash wage part of which he must divert to such expenditures it cannot be said that he has received "free and clear" for his services the amount required to be paid him.

The time spent by an employee in transporting goods from and to the factory which he works on at his home in the evening for the employer's benefit differs, as the inspector implies, from time spent by an ordinary worker in coming from his home to the factory and returning home in the evening. The employer, by carrying on his business through the medium of homeworkers, must be held in legal effect to have made each worker's household a branch of his business. Transportation from part of the employer's premises to another part in the interest of the business must be held within the rule announced by Judge Meekins in Williams v. Atlantic Coast Line Railroad Company where maintenance-of-way employees were held not chargeable with the costs of transporting them from the tool shed to their place of actual work. The hours worked were considered to have begun at the beginning of the transportation.

October 29, 1940

In Reply Refer To:
LE:ADH:KRM

To: Alex Elson, Esquire
Regional Attorney
Chicago, Illinois

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

Subject: Collective Bargaining Agreements
Section 7(b)(1)

This is in reply to your memorandum of October 15, 1940. You state therein that the labor agreement between a local warehouse and the International Longshoremen's Association, Local No. 19, of Chicago, Illinois, contains the following provisions:

> "It is further mutually agreed by and between both parties to this agreement that the working conditions, hours and wages will be as provided in sec. 7(b)(1) of the Fair Labor Standards Act of 1938, which provides that no employee shall be employed more than one thousand (1000) hours, nor more than fifty-six (56) hours in any one week during the period of any twenty-six (26) consecutive weeks.

Apparently the factual situation is that none of the employees covered by the agreement are permanently in the employment of the warehouse and as a result a particular employee may have a few weeks' employment during which he will be required to work 56 hours per week and during which he will not be paid any overtime by virtue of the fact that he is covered by the labor agreement. You recommend that it would seem, so far as an individual employee is concerned, the 7(b)(1) exemption thus imposes a penalty and violates at least the spirit of the law and that legislative history of section 7(b)(1) shows that 7(b)(1) contracts were not intended to be used in situations such as this one.

You suggest that on the basis of the language and the tenor of the Hawkeye case it is your opinion that we should strictly construe the 7(b)(1) exemption as it applies to the subject case and conclude that its application therein is improper.

While we agree that the application of the 7(b)(1) exemption to employees situated in the position which you describe is undesirable, we do not

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feel that in view of the language of the statute and our present interpretation of section 7(b)(1) as set forth in paragraphs 16 through 20 of Interpretative Bulletin No. 8, that there is anything we can do about it.

Furthermore, it seems to us that this is a contractual matter between the union and the local warehouse. If the members of the union are content to forego their rights under section 7(a) of the act, it does not seem to me that we can properly interfere in this situation.

The whole matter of possible amendments to sections 7(b)(1) and 7(b)(2) of the Fair Labor Standards Act is now under consideration. Situations such as that which exists in the subject case can perhaps be avoided by the insertion in section 7(b)(1) of a guarantee similar to that which exists in section 7(b)(2). This proposal and many others have occurred to us in the consideration of the amendment of these sections but for the present we feel that there is nothing that can be done to obviate the unfairness to the individual employee arising in situations such as you describe.

October 30, 1940

In reply refer to:
LE:GFH:ABS

To: John M. Gallagher, Esquire
Regional Attorney
Philadelphia, Pennsylvania

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

Subject: Companies Furnishing Fire and Burglar Protection

This will refer to your communication of October 21, 1940.

You state that the Owl Protective Company is a company engaged in furnishing fire and burglar alarm systems, under contract, to firms in interstate commerce or to plants engaged in the production of goods for interstate commerce. It is stated that certain employees of the Owl Company wire up the windows and doors of the building and connect such wires with a time clock in such manner that if the windows or doors are entered during the time that the wires are connected with the clock, an alarm is immediately sounded. This alarm is either connected to a large gong outside the building, or by a telephone wire to the central office of the Owl Protective Company, which sounds an alarm at the central office. In the latter case the Owl Company relays the signal of the unlawful entrance to the Electrical Bureau, notifies the owner and makes an investigation. The attorneys for these companies claim that the companies are not engaged in the production of goods or in any occupation necessary thereto, and that their sole function is to reduce the cost of burglary and fire insurance.

It is my opinion that employees of such companies who actually install such wiring and alarm systems in plants engaged in commerce or the production of goods for commerce are covered within the principles stated in paragraph 13 of Interpretative Bulletin No. 5.

Moreover, it appears that other employees of such companies who receive and relay alarms at the central exchanges would seem to be covered in that the practical effect of their activities

is to protect and preserve the factories and machinery which are the means by which goods for commerce are produced or by which interstate commerce is carried on. They are engaged in performing, through the use of mechanical devices, precisely the same services as are normally performed by watchmen, and of course, we have consistently taken the position that watchmen of plants engaged in commerce or in producing goods for commerce are covered.

That the employees in question are employed by an independent contractor rather than the firms engaged in commerce or in the production of goods for commerce, should not affect the result since it is our position that Congress in sections 6 and 7 of the act clearly expressed its intention that the employment of the particular employee, rather than the nature of the employer's business, should be determinative of questions of coverage.

October 30, 1940

In Reply Refer To:
LE:FR:FMS

To: Arthur E. Reyman, Esquire
Regional Attorney
Cleveland, Ohio

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

Subject: Fleet accounts

Reference is made to your memorandum of October 4, in which you state that you have an inquiry which reads as follows:

> "In Bulletin R-769 dated May 12, 1940, referring to dealers and automobiles and automotive parts, reference is made to fleet sales and fleet accounts in Mr. McNulty's statement to Col. Fleming on page 2. What is meant by fleet? Does it refer to transportation or hauling companies, or would the term embrace any large amount of trucks owned by an industrial concern? For example, trucks used by a creamery company in delivering milk or by a coffee company selling and delivering coffees and kindred articles direct to consumers."

It is the opinion of this office that the term "fleet" embraces any large number of trucks owned by an industrial concern.

(6255)

In reply refer to:
LE:FUR:MF

November 1, 1940

AIR MAIL

To: Miss Dorothy M. Williams
Regional Attorney
San Francisco, California

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

Subject: Establishments engaged in making sales and distributing goods to branch stores.

Reference is made to your memorandum of October 28, 1940, in which you inquire as to the applicability of the 13(a)(2) exemption to the San Francisco branch of Don Lee, Inc., an automobile parts store maintaining other branches elsewhere in California.

You state that the San Francisco branch supplies parts to the other branches. Even considering such transactions to be wholesale sales, however, the branch makes over 50 percent of its sales at retail.

However, you suggest that inasmuch as any manufacturing in an establishment will destroy the 13(a)(2) exemption, acting as a central warehouse for a chain should also destroy the exemption on the theory that warehousing like manufacturing is not an ordinary attribute of retailing.

This office does not agree with that suggestion inasmuch as it is our opinion that the coverage of a warehouse is predicated on the proposition that a warehouse serving more than one store is similar to a wholesale dealer. Accordingly, if a store acts both as a warehouse and as a retail outlet, the warehouse transfers should be considered wholesale sales. If 50 percent of the sales are at retail, the entire establishment would be exempt under section 13(a)(2) unless the warehouse is completely segregated from the remainder of the business in which case the warehouse would be a separate wholesale establishment.

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(6255)

In Reply Refer To:
LE:FUR:MF

To: Charles H. Livengood, Jr., Esquire
Regional Attorney
Nashville, Tennessee

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

Subject: Definition of Selling in Intrastate Commerce
Under Section 13(a)(2)

Reference is made to your memorandum of September 6, 1940 in which you inquire as to the applicability of the retail establishment exemption to a concern 30 percent of whose sales are at retail outside the state and 21 percent at wholesale within the state, the goods having been received from outside the state.

Although your memorandum does not specifically so state, I am assuming that the remaining 49 percent of the sales were at retail within the state. It thus appears that the business is 79 percent retail. Nevertheless, we believe the exemption is inapplicable since we feel that in accordance with our opinion concerning the coverage of wholesalers receiving their goods from outside the state, the sales made at wholesale within a state even by a "retail establishment" must be considered sales in interstate commerce. If you add the wholesale sales in this case to the out-of-state retail sales, you get 51 percent, which means that the greater part of the sales is not made in intrastate commerce.

As you are aware, the Alterman case, presently being litigated in Georgia, involves the question of the coverage of the act with respect to wholesalers.

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(6255)

In reply refer to:
LE:ADH:NC:MF

November 1, 1940

To: Alex Elson, Esquire
Regional Attorney
Chicago, Illinois

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

Subject: Walter V. Lord and Harry A. Lord
82 West Washington Street
Chicago, Illinois
File No. 12-1485

This is in reply to your memorandum of September 26 in regard to the subject employers who are engaged in transporting automobiles by the driveway method from Kenosha and Racine, Wisconsin and Oak Park, Illinois, to points in Nevada and California. You state that these employers also appear to operate under a contract with the Pacific Nash Motor Company for the delivery of these cars and that their employees are recruited from the Middle West for the purposes of driving cars to the West Coast, their sole compensation being transportation furnished them. The employees also pay $6 to the employer for the purposes of lodging on the trip. You ask our opinion as to whether the exemption contained in section 13(b)(1) applies to these employees and as to whether "wages" have been paid to them in "facilities" customarily furnished.

Inquiry at the Interstate Commerce Commission reveals that Walter V. Lord is licensed as a contract carrier, and Harry A. Lord as a common carrier. A California address was given for both of them. Inasmuch as each of the Lords is operating under a license from the Interstate Commerce Commission, drivers employed by them seem to fall within the exemption provided by section 13(b)(1) in accordance with paragraph 3 of Interpretative Bulletin No. 9. See also Interstate Commerce Commission v. Davidson (D.C.D. Neb. 1937) 20F. Supp. 832.

Assuming that the drivers of the cars are employees of the Lords, they are entitled to receive at least 30 cents an hour either in cash or in facilities valued at "reasonable cost." As we have

stated in section 531.1(d) of the regulations, as revised, facilities furnished primarily for the benefit or convenience of the employer are not to be included in wages payable under the act. After some consideration we feel that the transportation furnished a driver by a motor carrier must be considered within the rule enunciated by Judge Meekins in Williams v. Atlantic Coast Line Railroad Company, where it was held that no deductions could be made for transporting maintenance-of-way employees from the tool shed to the place on the railroad's right of way on which they were to perform repairs. Consequently, the employer may not include an allowance for transportation to the driver in reckoning wages due under the act.

It also appears that the employees pay $6 to the employer for purposes of lodging en route. If the employer obtains no profit directly or indirectly from this payment, we are inclined to regard it as equivalent to an independent assignment to the innkeeper or other third party for the benefit of the driver. Any profit obtained by the employer would of course offend the principles declared in paragraph 15 of Interpretative Bulletin No. 3, as revised

In Reply Refer To:
LE:GFH:MF

November 2, 1940

To: Llewellyn B. Duke, Esquire
Regional Attorney
Dallas, Texas

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

Subject: S. B. Hayes Meier Rig & Construction Company
Liberty, Texas
File No. 47-710

This is in reply to your communication of October 2, 1940.

You state that the subject concern is engaged solely in the business of erecting drilling rigs for the purpose of drilling oil and gas wells under contract. The only work performed by its employees is to take the materials furnished by the oil company with whom the contract is made and erect the rig at the point designated by the company. You state that their duties cease with the erection of the rig and that they have no connection with the actual drilling of the well.

Our opinion has consistently been that oil drillers are within the coverage of the act when their employer has reason to believe that the resulting oil, if any, will move in commerce. We have also expressed the opinion that employees of geophysical survey units are engaged in a process or occupation necessary to the production of goods for commerce within the meaning of section 3(j). See Legal Field Letter No. 26, page 15. We stated in that letter that knowledge as to structural formations and the like which is furnished by geophysical units, has become almost universally an essential prerequisite to investment by the industry in any productive sites or operations. I believe the reasoning in that opinion is sound. Certainly, the erection of drilling rigs is indispensalbe to the production of oil. In fact it may be said that these activities are universally an essential prerequisite to productive operations. Moreover, regardless of whether employees engaged in such work are physically employed in the actual drilling for oil, the courts may well hold that such activities are so integrally connected with the actual drilling by which oil is produced as to be inseparable therefrom.

We do not believe any conflict exists between this position and the opinion expressed in paragraph 12 of Interpretative Bulletin No. 5. It is our position that the erection of the rig is an integral part of the drilling operations and inseparable therefrom for the purpose of determining whether employees so engaged are entitled to the benefits of the act. The drilling of an oil well in and of itself constitutes a production of goods, and employees employed either in such drilling or in operations so closely connected therewith as reasonably to be considered a part thereof appear obviously to be as truly engaged in the production of goods as the employee employed in pumping oil from the completed well. Moreover, section 3(j) of the act defines "produced" as "manufactured, mined, handled, or in any other manner worked on in any state."

An oil derrick is erected solely to the end of conducting the subsequent drilling operations as a direct result of which the oil is to be produced. When it is considered that such a derrick when once erected cannot conceivably serve any other productive purpose, it becomes apparent that the construction thereof is properly to be regarded as an intregral step in the actual drilling operations. On the other hand, while an enterpriser in constructing a factory building may plan to produce specific types of commodities, the utility of the building certainly is not limited to the production of the commodity originally contemplated. There are numerous instances in which, because of economic factors such as fluctuations in the demands for various factory products, plants have been renovated, new machinery installed, and commodities entirely different from those originally contemplated have been produced. A consideration of this obvious distinction urges us to the conclusion that the local contractor who constructs a building in which goods for commerce are to be produced, as compared with the contractor who constructs an oil derrick, is a step removed from the actual productive operations, and on that ground we feel that it is reasonable and proper to distinguish the two situations. We believe the distinction we have drawn should resolve your difficulties concerning employees engaged in clearing land, digging pits, filling pits, and in building earthen fire walls.

The principles expressed herein should serve also to answer the questions submitted by Mr. F. E. Nichols in his memorandum of August 23, 1939, requesting an opinion as to the applicability of the act to the Meier Rig & Construction Company.

153581

October 17, 1940

In Reply Refer To:
LE:WMC:MF

Wise, Corbett & Canfield
Counselors at Law
122 East 42nd Street
New York, New York

Attention: Mr. Canfield

Gentlemen:

We regret the delay in replying to your inquiry. It is our understanding that you desire to ascertain whether or not the lining of blotting paper is a process subject to the wage order for the pulp and primary paper industry.

It is our opinion that where the lining of blotting paper is performed in a pulp and primary paper plant it is a further finishing within the meaning of the definition of the pulp and primary paper industry and employees engaged in this further finishing operation are subject to the wage order for the pulp and primary paper industry. Where, however, the lining is performed in other than a pulp and primary paper plant employees engaged in the operation are not covered by the wage order for the pulp and primary paper industry. So, also, employees within a separate converting department of the same pulp and primary paper mill or company to whom the paper is delivered for lining will not be covered by the order. If the lining of blotting paper is done in a converted paper products plant or in a converted paper products department of a pulp and primary paper plant, it will be subject to any wage order which may be promulgated for the converted paper products industry. As yet there has been no recommendation made for this industry and until a recommendation is made and a wage order issued on the basis of such recommendation, a 30-cent minimum will be applicable to all employees in the converted paper products industry engaged in commerce or in the production of goods for commerce.

Enclosed is a copy of Administrative Order No. 56, containing a definition of the converted paper products industry.

Hoping this fully answers your inquiry, I am

Very truly yours,

For the Solicitor

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

Enclosures (2)

(6255)

October 26, 1940

In reply refer to:
LE:FUR:GW

Mr. Strother Kiser
512 Security Trust Building
Lexington, Kentucky

Dear Mr. Kiser:

This will confirm the understanding reached by you with Mr. Reel of this office on October 16, relating to the applicability of the Fair Labor Standards Act of 1938 to a wholesale liquor dealer who secures about 5 percent of his liquor from outside the state and makes all his sales within the state.

It is the view of this office that such a business is engaging in interstate commerce and that all of its employees, except those who handle only the locally produced liquor, are within the general coverage of the act and are entitled to its benefits, unless specifically exempt therefrom. Note the enclosed Regulations, Part 541.

If the wholesale house in question purchases out-of-state produced liquor from another local wholesaler, this office is not prepared to express an opinion as to whether such purchases put the wholesaler in interstate commerce. Accordingly, in such instances, enforcement proceedings will not be instituted by the Wage and Hour Division until a position has been taken and due notice thereof given. You appreciate that employees are given a separate right of action under section 16(b) of the act and that this office has no control over suits brought under that section.

If the two wholesale houses are, in fact, bona fide separate entities but are controlled by the same management, this office would at this time decline to express an opinion as to the interstate nature of the wholesaler "once removed" from interstate commerce. Such cases would, of course, be subject to careful scrutiny to ascertain whether the two houses are in fact separate. If, in fact, the liquor never passes through the first wholesale house, but goes through from the out-of-state manufacturer to the second wholesale house, or, if the liquor is already destined for the second wholesale house when it leaves the manufacturer and merely passes through the hands of the first wholesaler rather than being actually sold by him after its arrival at his house, the second wholesale house will be considered to be doing interstate business.

Very truly yours,

For the Solicitor

By_____
Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review (6255)

Enclosures (2)

October 29, 1940

In Reply Refer To:
LE:GFH:MF

Alice M. Bustin, M. D.
Suite 500 Beggs Building
21 East State Street
Columbus, Ohio

Dear Dr. Bustin:

This is in reply to your letter of October 15, 1940. I am returning your stamped self-addressed envelope since Government mail does not require postage.

You inquire as to the applicability of the Fair Labor Standards Act to beauty operators and beauty students in schools of cosmetology.

The act, a copy of which is enclosed, applies to employees who are engaged in interstate commerce or in the production of goods for interstate commerce. I am enclosing copies our Interpretative Bulletins Nos. 1 and 5 which deal generally with the scope of coverage of the act. In my opinion, beauticians and beauty students of schools of cosmetology are not in the ordinary case engaged in commerce or in the production of goods for commerce and, hence, are not entitled to the benefits of the act.

Moreover, there is an exemption set forth in section 13(a)(2) of the act for any employee of a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. You will note from paragraph 10 of Interpretative Bulletin No. 6 that beauty parlors are deemed to be service establishments of the type included within the exemption.

If I can be of further assistance, please communicate with me.

Very truly yours,

For the Solicitor

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

Enclosures (6)

(6255)

October 29, 1940

In Reply Refer To:
LE:FR:NC

Mr. J. W. Burch, Director
Prentice-Hall, Inc.
Munsey Building
Washington, D. C.

Dear Mr. Burch:

Reference is made to your letter of October 17, 1940, in which you inquire about the applicability of the Fair Labor Standards Act of 1938 to an attorney who is employed full time by a trade association. His sole duties with the association are to get out a periodical bulletin to the members, explaining the laws of interest to them and digesting decisions and the like. He is paid $150.00 a month.

It would appear that the employee in question does not lose his status as a "professional" under section 541.3 of the enclosed Regulations, Part 541, by virtue of the fact that he receives less than $200.00 a month inasmuch as he is apparently actually engaged in the practice of law.

In other words, assuming that the employee meets all the conditions expressed in section 541.3(a), he will be exempted from both the wage and hour provisions of the Fair Labor Standards Act of 1938.

Very truly yours,

For the Solicitor

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

Enclosure

(6255)

October 29, 1940

In Reply Refer To:
LE:FR:LGM

Mr. A. L. Secor
4086 Marlborough Avenue
East San Diego, California

Dear Mr. Secor:

Reference is made to your letter of December 2, 1939, in which you inquire about the applicability of the Fair Labor Standards Act of 1938 to a fertilizer plant making fertilizer from materials secured from fish canneries. I regret that an earlier reply was not possible.

The act, a copy of which is enclosed, applies to employees engaged in interstate commerce or in the production of goods for interstate commerce. Whether an employee is so engaged depends, of course, upon the facts in the particular case. For your information, I am enclosing copies of Interpretative Bulletins Nos. 1 and 5, which discuss the general coverage of the act. Your attention is particularly directed to paragraphs 2, 6, and 9 of Interpretative Bulletin No. 5. It is believed that the information contained therein will be helpful to you in ascertaining the coverage of the act in your case.

I also direct your attention to section 13(a)(5) of the act, which exempts from the wage and hour provisions employees engaged in processing fish products or by-products thereof. If the employees in question are engaged exclusively in processing fish scrap in its raw or natural state into fish fertilizer, it would appear that the exemption is applicable to such employees. See paragraph 6 of the enclosed copy of Interpretative Bulletin No. 12 as to the nonapplicability of the exemption to certain employees not engaged in performing operations enumerated in section 13(a)(5).

For your information, I am also enclosing a copy of the Workers' Digest. If, after studying the enclosed material, you have any further questions, please do not hesitate to call upon me again.

Very truly yours,

For the Solicitor

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

Enclosures (5)
57527

(6255)

In reply refer to:
LE:GFH:MF

November 2, 1940

Harvey Broyles, Esquire
Peoples Bank Building
Springhill, Louisiana

Dear Mr. Broyles:

This is in reply to your letter of October 24, 1940.

You ask for information with regard to the applicability of the Fair Labor Standards Act to employees of a small oil company engaged in selling its products in interstate commerce. The particular employees about whom you inquire dismantled the company's plant in Sibley, Louisiana and moved it to Cotton Valley, Louisiana. The company contends that such employees were not subject to the act since they were engaged in original construction.

The act, a copy of which is enclosed, applies to employees who are engaged in interstate commerce or in the production of goods for interstate commerce. I am enclosing a copy of our Interpretative Bulletins Nos. 1 and 5 dealing generally with the scope of coverage of the act, and I direct your attention particularly to paragraphs 1 and 5 of Interpretative Bulletin No. 1, and paragraphs 12 and 13 of Interpretative Bulletin No. 5.

It will be noted from paragraph 12 of Interpretative Bulletin No. 5 that employees engaged in the original construction of buildings are not generally within the scope of the act, even if the buildings when completed will be used to produce goods for commerce. However, in paragraph 13 of Interpretative Bulletin No. 5 it is stated that employees od contractors who are engaged in maintaining, repairing or reconstructing essential instrumentalities of commerce or buildings used to produce goods for commerce, are deemed covered by the act. It is my opinion that employees engaged in dismantling a refinery and utilizing the dismantled materials in the erection of a new refinery in a different city within the same state are engaged in original construction, and hence are not entitled to the benefits of the act with regard to such employment.

I hope this information will furnish a sufficient answer to your problem.

Very truly yours,

For the Solicitor

By_____
Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review
(6255)

Enclosures (3)
168052

In reply refer to:
LE:KCR:MF

November 2, 1940

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:

Colonel Fleming has asked me to reply to your letter of September 18, 1940 enclosing a communication from a broadcaster member of your association inquiring if a student of a southern college may perform work as a "fill-in announcer" without being subject to the Fair Labor Standards Act. I regret that an earlier reply was not possible. You refer to a letter quoted in the Wage and Hour Reporter, Volume 3, Page 385, of September 9, 1940, to the effect that certain students of schools of journalism are not, under certain conditions, considered to be employees of the newspapers which are cooperating with the schools of journalism in giving practical experience to the students.

It appears from the information contained in the communication attached to your letter that the "fill-in announcer" is taking general academic training at the southern college and is not a member of a school which is preparing him to be a radio announcer. It is therefore our opinion that the letter quoted in the Wage and Hour Reporter to which you refer would not be applicable in the situation presented by you. If the "fill-in announcer" engages in performing actual work for the broadcasting company, it is our opinion that he is an employee under the broad definition of the employer-employee relationship in section 3(d), (e) and (g) of the enclosed copy of the act.

Very truly yours,

For the Solicitor

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

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148366

Enclosure

(6255)