UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

November 30, 1940

Legal Field Letter

No. 37 Attached Opinions

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

MEMORANDA

Date	From	To	Subject
11-22-40	Rufus G. Poole (FUR)	Alex Elson	Belmont Radio Corporation 1257 Fullerton Avenue Chicago, Illinois (Difference between a waiting period and a rest period). (p. 123, par. 19).
11-26-40	Rufus G. Poole (FR)	Arthur E. Reyman	Request for Opinion (Applicability of service establishment exemption to parking and storage lot at airport where cars are stored). (p. 70, par. 4; p. 103, par 4).
11-28-40	Rufus G. Poole (GFH)	Dorothy M. Williams	Application of the act to American employees in Canada engaged in activities necessary to the production of goods for interstate commerce. (p. 1, par. A(2)).

LETTERS

Date	To	Subject
10-30-40	Lloyd A. Fry, President Chicago, Illinois	(Coverage of dry saturating felts, deadening felts under the Pulp and Primary Paper Wage Order). (p. 199, par. C; p. 256, par. R).
11-22-40	E. W. Brown Washington, D. C.	(Coverage under Act of master plumber working wholly within District on private homes). (p. 3, par. C; p. 29, par. B).
11-23-40	Cal C. Chambers Lufkin, Texas	(Whether a 15-minute lunch period should be considered as hours worked). (p. 121, par. 7).

(6513)

Legal Field Letter
No. 37

Date	To	Subject
11-27-40	George T. Fonda Pittsburgh, Pennsylvania	(Whether salary requirements of executive exemption under Regulations, Part 541, would be satisfied by a method of compensation whereby bosses in coal mining industry are guaranteed that in any week in which they had any employment they would be paid not less than $30). (p. 65, par.4; p. 101, par. 2; p. 182, par. 2; p. 246, par. 4).
11-28-40	S. J. Levenson New York, New York	(Applicability of Act to employees of a corporation engaged as a selling agent for various manufacturers located in several states. The corporation effects the sale of commodities to various chain stores and is paid a selling commission by the manufacturers whom it represents). (p. 193, par. J).
11-28-40	Max Weisenfreund New York, New York	(Applicability of Act to employees going from store to store trimming windows). (p. 69, par. M; p. 102, par. DD).
11-28-40	Hon. Stephen Pace Washington, D. C.	(Applicability of exemption under section 13(a)(1)-- Professional exemption to a lawyer employed by a bank). (p. 62, par. H; p. 102, par. 4; p. 178, par. (b)).
12-2-40	B. D. Tarlton Corpus Christi, Texas	(Applicability of Act to guides, cooks, and maintenance workers on a hunting lease owned by an oil company, whose duties are wholly in connection with the hunting lease). (p. 46, par. J; p. 159, par. L; p. 187, par. 2).

Issued 12/3/40

In reply refer to:
LE:FUR:LF

To: Alex Elson, Esquire
Regional Attorney
Chicago, Illinois

November 22, 1940

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

Subject: Belmont Radio Corporation
1257 Fullerton Avenue
Chicago, Illinois

Reference is made to your memorandum of October 28, 1940, with which you resubmitted the waiting time problem of the Belmont Radio Corporation.

The company states:

"This point is that such waiting time is a predictable period of time in all cases, that employees are informed definitely ahead of time as to the length of this period, and that they have full freedom to utilize such time for their own purposes. The latter is entirely possible as no period now can be less than one-half hour and employees are not compelled to remain at their position or on the premises.

"A room is provided for the convenience of employees and we have noted that neighborhood shopping, cashing checks, reading, sewing, card playing, baseball, and similar activities represent the principal uses to which this time has been adapted.

"We are very interested in obtaining a decision which we feel should be a favorable one in the light of all the facts. If employees were to be sent home at all times for the balance of the work day, it would undoubtedly mean that their annual income would suffer. As I pointed out at the time our records were inspected and later in my letter of January 25, delays in delivering radio sets to our customers may result in losses of annual quantities in sales and production.

> "Employees are paid when waiting time is for a period of less than one-half hour and for all waiting time in excess of one hour per day. They are also guaranteed a minimum of one hour's work or pay at the conclusion of such waiting period. If employees are called to work and do not work, they are paid for one hour. If they begin work at all, they are paid for at least three hours. As you may see from these provisions, which appear in our labor union agreement, an attempt was made to produce results of equal fairness to employer and employee alike."

It is difficult from that discussion to understand why either paragraphs 4 through 8 of Interpretative Bulletin No. 13 or Inspection Field Letter No. 7 will not meet the case. In the event they do not, will you please submit further data explaining the nature of the difficulty. If the employees are messengers note especially paragraph 5 of Interpretative Bulletin No. 13. It appears from the third paragraph of the company's letter that the employees are subject to call during this period.

The period in this case seems to be one which does not regularly recur at a fixed time and for a stated duration. Hence, it would seem to be a waiting period for which compensation is due. In general the distinction between a rest period and a waiting period is that the rest period is definitely planned in advance and regularly recurs at a previously announced period each day. A rest period also is generally one of definite and previously announced duration.

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(6513)

In Reply Refer To:
LE:FR:EG

November 26, 1940

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

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

Subject: Request for Opinion

This will reply to your memorandum of November 12 in which you state:

> "We have received a request for an opinion concerning the applicability of the provisions of the Act to employees of an employer who describes his business as follows:
>
> "'I have leased a part of one hangar at the Detroit City Airport and use this space to store cars, principally private-owned cars for a time ranging from one or two days or weeks, for customers of the air lines. We maintain a 24-hour service and use the service of four men who work in shifts. We also operate a gasoline pump in connection with the storage service which is also available to customers for 24 hours daily.'
>
> "Our first impression was to classify this employer's business within the 'service establishment' exemption contained in Section 13(a)(2) of the Act, but because of the fact that the services rendered are so inherently tied up with the interstate transportation system afforded by the air lines located adjacent to this employer's place of business, we are requesting an opinion in the matter."

It is our opinion that the service establishment exemption will apply if at least 50 percent of the servicing is rendered to individual private consumers.

We have recently had occasion to consider the applicability of the exemption in the case of a garage, most of whose customers were directed to it by a hotel with whom it had a contractual arrangement. Even though the car owners were for the most part traveling from state to state, and even though the hotel received a commission on the payments made to the garage, it was the opinion of this office that the service establishment exemption was nonetheless applicable. Like reasoning would indicate a similar result here.

In Reply Refer to:
LE:GFH:LL

AIR MAIL

November 28, 1940

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

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

Subject: Application of the act to American employees in Canada engaged in activities necessary to the production of goods for interstate commerce.

This is in reply to your communication under date of October 30, 1940.

I am assuming that the question with regard to which you wish to be advised is as follows: Are American employees in Canada who are engaged in producing Christmas trees for shipment to the United States engaged in the production of goods for interstate commerce and hence entitled to the benefits of the act?

You state: "It would appear that since Canada is not a state within the meaning of the act that production in Canada, even though carried on by American employees, would not be considered within the scope of the act. It would further appear that shipment of Christmas trees from Canada to a state would not constitute commerce inasmuch as it is not a shipment from any state to any place outside thereof. It is therefore our opinion that American employees in Canada engaged in the production, handling and shipment of Christmas trees to the United States are not within the scope of the act."

We believe that the position which you have taken is correct. We do not believe that this position is in conflict with the opinion we have expressed in Legal Field Letter No. 26, page 41, to which you refer.

167275

(6513)

October 30, 1940

In Reply Refer To:
LE:WMC:BSA

Mr. Lloyd A. Fry, President
Volney Felt Mills, Incorporated
5302 West Sixty-Sixth Street
Chicago, Illinois

Dear Mr. Fry:

This is in reply to your letter of September 13, 1940, asking whether dry saturating felts, deadening felts, and saturated felts are included within the definition of the pulp and primary paper industry. You state that your product is composed of rags, waste paper, cotton waste, wool dust and scrap jute.

It is our opinion that so long as the named components of your product are reduced to a pulp in the course of the manufacture of the felts, employees engaged in all processes relative to the production of the pulp are entitled to the minimum wage of 40 cents applicable to the pulp and primary paper industry, which is defined as "the manufacture of pulp, for any purpose, from fibrous material capable of yielding cellulose fibre and the manufacture of paper and of board from such pulp ..." We enclose a copy of the wage order for this industry.

We assume also that the felts, although differing in texture from paper, are pressed from the pulp by a process similar to that used in the manufacture of paper. If that is the case, all employees and not only those engaged in the manufacture of the pulp will be covered by the wage order.

If this statement of opinion does not fully answer your inquiry, I shall be glad to offer you our further assistance.

Very truly yours,

For the Solicitor

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

Enclosures (2)
#142973
#163786

(6513)

In reply refer to:
LE:FR:NC

November 22, 1940

Mr. E. W. Brown
622 Eighth Street, S. W.
Washington, D. C.

Dear Mr. Brown:

Reference is made to your letter of November 13, in which you inquire as to the applicability of the Fair Labor Standards Act of 1938 to your business as a master plumber.

In the event that you perform plumbing work solely in the District of Columbia and that you confine your work to jobbing and remodeling in private homes, it is my opinion that you are not within the coverage of the act.

Very truly yours,

For the Solicitor

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

#174160

(6513)

In Reply Refer To:
LE:FR:SQM

Mr. Cal C. Chambers
President
Texas Foundries, Inc.
Lufkin, Texas

Dear Mr. Chambers:

Colonel Fleming has asked me to answer your letter of November 8, 1940, in which you inquire about the applicability of the Fair Labor Standards Act of 1938 to certain employees taking only 15 minutes for lunch, and certain other employees taking a lunch hour but not punching in and out before and after the period.

With respect to the latter group of employees, your attention is directed to paragraphs 2 and 3 of Interpretative Bulletin No. 13, a copy of which is enclosed. You will note that time clocks will be considered an appropriate basis for recording hours worked only when they accurately reflect the period worked by the employee. You will note that in the ordinary case, periods when the employee is relieved of all duties for the purpose of eating meals need not be considered hours worked.

With respect to the employees taking only a short 15 minute lunch period, it appears that the time of this period varies from day to day because of the different time that the hot iron is poured out of the melting furnace. These men stop work on order of their foreman and retire to the locker room or a shady spot under the trees outside to eat their lunch and all come back to work together on orders of the foreman. Under these circumstances the period is too short to utilize effectively in the employee's own interest and is more akin to a waiting period or short rest period. This period should accordingly be treated as hours worked.

Your inquiry with respect to the rest periods of 15 minutes an hour for men on a piece work basis engaged in pouring hot iron is answered in the enclosed press release R-837. See also paragraph 8 of Interpretative Bulletin No. 4.

Section 13(a)(1) of the act, a copy of which is enclosed, exempts from the wage and hour provisions any employee engaged in an "executive capacity" as that term is defined by the Administrator. Enclosed herewith is a copy of Regulations, Part 541, and your attention is directed to section 541.1 thereof which contains the definition of the term "executive." Any employee who satisfies the terms and conditions set forth in this definition is exempt from both the wage and the hour provisions of the statute. Note also section 541.2.

For your information, I am also enclosing copies of the Employers' Digest and Regulations, Part 516. 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 (7)

#96802

In Reply Refer To:
LE:KCR:HS:MH

Mr. George T. Fonda
National Steel Corporation
Grant Building
Pittsburgh, Pennsylvania

November 27, 1940

Dear Mr. Fonda:

Reference is made to the discussion between you and Mr. Poole, Assistant Solicitor, relating to the possibility of obtaining a ruling by the Wage and Hour Division that certain "bosses" in the bituminous coal mining industry are exempt from the Fair Labor Standards Act as executive employees. You listed the following bosses with respect to whom you requested a ruling: fall bosses, face bosses, fire bosses, washing bosses, machine bosses and transportation bosses. You indicated in your discussion with Mr. Poole that the bosses in question are presently compensated on an hourly basis of approximately $1.25 an hour, but that a changed method of compensation might be devised if such employees would otherwise be exempt under the definition of the executive exemption contained in section 541.1 of our Regulations, Part 541.

You suggested, as one possible method of compensation, that the employees be guaranteed that in any week in which they had any employment they would be paid not less than $30. Compensation in excess of $30 a week would be measured by the number of hours worked in excess of a certain number. We have given careful consideration to this suggestion and are of the opinion that this type of compensation would meet the requirements of section 541.1(E) in that it is the equivalent of compensation "on a salary basis." It should be clearly understood that the guarantee must be a true guarantee and not one which operates only or primarily in workweeks with long hours in which the employee will earn not less than $30 in any event. Failure to pay $30 in any workweek in which any work is performed will indicate that the guarantee is not bona fide, and thus exemption claimed thereunder will be inapplicable.

You also suggested during the course of the discussion that, aside from the salary question, it would be helpful for the Wage and Hour Division to indicate whether or not the above-named bosses fulfill the other requirements of section 541.1. Unfortunately, this does not appear to be practical. We have ascertained from discussions with representatives of the Government, familiar with working conditions in the bituminous coal mining industry, that the conditions of employment of the various "bosses" in question vary rather

widely between different companies and between different mines of the same company. Therefore, it is impossible for the Wage and Hour Division to give a blanket ruling to the effect that certain bosses, by title, are either exempt or nonexempt under the new executive definition.

A single example may be helpful. We are advised that the fire boss in a large mine usually exercises supervisory authority over all of the miners in a particular shift and performs a relatively insubstantial amount of manual work, whereas in the smaller mines the fire boss performs a substantial amount of manual work in erecting posts, doors, etc., which would oftentimes exceed 8 hours a week and, therefore, render the executive exemption inapplicable. Thus, (assuming that the salary requirement has been met) ordinarily the duties of the fire boss in the former case would qualify him for exemption under section 541.1, whereas the duties of the fire boss in the latter case would not fulfill the requirements. Similarly in some mines the face boss may meet each of the six conjunctive requirements of section 541.1 whereas in other mines the face boss may fail to meet one or more of the requirements. Under the circumstances a single blanket ruling that attempted to cover each of the bosses referred to in your conference would necessarily be confusing rather than clarifying in its effect.

One suggestion may be made to employers and employees interested in the effect of the new definition. Except in the case of the fire boss, typically, though perhaps not invariably, the bosses named above appear to meet the requirements of subsections 541.1(A), (B), (C) and (D). Accordingly, particular attention should be given to the fulfillment or non-fulfillment of subsections (E) and (F). In the case of the fire boss, there may be a serious question about the other subsections as well. It is suggested, however, that a careful reading of pages 10 through 23 of the report will enable the mine operators and their employees to determine the applicability of the exemption in individual instances without undue difficulty.

Sincerely yours,

Administrator

Enclosures (2)

(6513)

In Reply Refer To:
LE:KCR:OMB

November 28, 1940

Mr. S. J. Levenson
51 East 42nd Street
New York, New York

Dear Mr. Levenson:

This is in reply to your letter of November 19, 1940, in which you inquire as to the applicability of the Fair Labor Standards Act to employees of a corporation engaged as a selling agent for various manufacturers located in several states. The corporation effects the sale of commodities to various chain stores and is paid a selling commission by the manufacturers whom it represents.

The applicability of the act to employees of wholesalers and jobbers is discussed in paragraphs 14 through 16 of the enclosed copy of Interpretative Bulletin No. 5. In our opinion, the employees of your client who perform work in connection with the effecting of sales of commodities which are delivered from one state to any point outside thereof are within the general coverage of the act.

You inquire particularly with reference to outside salesmen, typists, and other office employees. Section 13(a)(1) of the act provides an exemption for outside salesmen and this exemption is defined in section 541.5 of the enclosed copy of Regulations, Part 541. The applicability of the exemption to particular employees is discussed in the enclosed copy of the Report and Recommendations of the Presiding Officer. Clerical employees are generally not exempt from the act by section 13(a)(1) unless they qualify as "executive" or "administrative" employees as those terms are defined in sections 541.1 and 541.2, respectively, of the regulations.

Unless otherwise exempt, employees subject to the act must be paid not less than 30 cents an hour and be compensated at not less than time and one-half their regular rate of pay for all hours worked in excess of 40 in a workweek.

Very truly yours,

For the Solicitor

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

Enclosures (3)

97830

(6513)

In reply refer to:
LE:RUB:SWS

Mr. Max Weisenfreund
Andron & Company
120 West 42nd Street
New York, New York

November 28, 1940

Dear Mr. Weisenfreund:

This is in reply to your letter of October 23, 1940, in which you seek certain information concerning the applicability of the Fair Labor Standards Act of 1938 to an employee ordinarily engaged in the warehouse of a chain store who is used several times a year in the capacity of window trimmer.

Section 13(a)(2) of the act, a copy of which is enclosed, exempts from the wage and hour provisions "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Enclosed herewith is a copy of Interpretative Bulletin No. 6 which discusses this exemption, and your attention is particularly directed to paragraphs 5 through 9 and 18 thereof. You will note that each physically separated unit or branch store of a chain store system is considered to be a separate "establishment" within the meaning of the exemption. It should be noted, however, that the exemption does not extend to general distributive activities among branches of a chain store system or to warehousing operations, central executive office work, etc.

Employees going from store to store trimming windows are in our opinion not exempt under section 13(a)(2).

For your information I am also enclosing a copy of the Employers' 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 (3)

167716

(6513)

In Reply Refer To:
LE:KCR:HWJ

November 28, 1940

Honorable Stephen Pace
House of Representatives
Washington, D. C.

Dear Congressman Pace:

This is in reply to your letter of November 20, 1940, addressed to Mr. Snyder, Deputy Administrator, to which is attached a communication dated November 16, 1940, from Mr. Adrian Thayer of Americus, Georgia, who inquires if he is exempt from the Fair Labor Standards Act in his employment by a bank in that city.

It appears that Mr. Thayer is a member of the bar and was practicing law prior to his employment with the bank in question. His present work consists principally of the preparation of notes, deeds and various other contracts relating to loans and other papers in connection with matters arising in the bank. Mr. Thayer indicates that he is of the belief that he is exempt from the act as a professional employee.

Section 13(a)(1) of the act provides an exemption from the wage and hour provisions for professional employees. This exemption has recently been redefined in Regulations, Part 541, a copy of which is enclosed, which became effective on October 24, 1940. The professional exemption is defined in section 541.3. You will note the $200 a month salary requirement is not applicable to a holder of a valid license or certificate permitting the practice of law, who is actually engaged in the practice thereof. The duties described by Mr. Thayer in his letter to you would appear to satisfy the requirements of the proviso in section 541.3 relating to the inapplicability of the salary requirement to lawyers. I also direct your attention to subsection (A)(4) of section 541.3 of the regulations which indicates the amount of nonexempt work which may be performed by a professional employee. If Mr. Thayer satisfies all of the requirements of section 541.3, he is exempt from the wage and hour provisions of the act.

I appreciate your interest in referring Mr. Thayer's letter to me for reply. As requested, I am returning it herewith.

Sincerely yours,

Administrator

Enclosures (3)
#97953

(6513)

In Reply Refer To:
LE:GFH:MF

December 2, 1940

B. D. Tarlton, Esquire
903-6 Nixon Building
Corpus Christi, Texas

Dear Mr. Tarlton:

This is in reply to your letters of October 25 and November 13, 1940. I regret that an earlier reply has not been possible.

You ask for information regarding the applicability of the Fair Labor Standards Act to employees employed as guides, cooks, and general maintenance workers on a hunting lease owned by an oil company, You state that the duties of these employees will be purely in connection with the hunting lease and in no way connected with the company's business of producing oil.

As you know, 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 of our Interpretative Bulletins Nos. 1 and 5 which deal generally with the scope of coverage of the act. On the basis of the facts as stated it would appear that none of the employees whom you describe will be engaged in interstate commerce or in the production of goods for interstate commerce and hence will not be covered by the Fair Labor Standards Act.

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

Enclosures (3)

168773
96369

(6513)