UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

December 17, 1940

Legal Field Letter

No. 39

Attached Opinions

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

MEMORANDA

Date	From	To	Subject
12-4-40	Rufus G. Poole (GFH)	Samuel P. McChesney	Denver Burglar Alarm, Inc. Denver, Colorado File No. 5-546 (Whether a company engaged in the installation, maintenance, service and repair of electrically operated burglar alarms leased to wholesale and retail establishments is covered by the Act). (p. 138, par. E; p. 186, par. H; p. 193, par. J; p. 198, par. 4)
12-5-40	Rufus G. Poole (VCW)	William H. Cross	Fickett-Brown Manufacturing Company, Inc. Application of Textile Wage Order to Production of Wiping Waste. (p. 199, par. C; p. 256, par. R).
12-10-40	Rufus G. Poole (ILS)	Miss Dorothy Williams	Application of section 7(b)(3) to preparation for the grape pressing operation. (p. 74, par. P; p. 94, par. T).
12-11-40	Rufus G. Poole (FR)	Samuel P. McChesney	Group Hospital Service Kansas City, Missouri (Whether such a service is exempt under Section 13(a)(2) or is similar in nature to an insurance function). (p. 69, par. M; p. 102, par. DD; p. 178, par.2)
12-11-40	Rufus G. Poole (ADH)	Miss Dorothy Williams	Application of I.F.L. #43 to the Hawaiian Islands. (Deals with exemption under Section 13(b)(1), and its applicability to Hawaiian Islands). (p. 62, par. F; p. 115, par. MM; p. 239)

Legal Field Letter
No. 39

LETTERS

Date	To	Subject
12-4-40	F. C. C. Boyd New York City	(Whether candy and magazine salesmen on trains are "outside salesmen"). (p. 72, par. N; p. 102, par. 5).
12-4-40	J. M. Kemper U.S. Department of Agriculture Washington, D.C.	(Whether employees of the Beneficial and Relief Association of the Department of Agriculture are subject to Act, like other insurance company employees). (p. 49, par. B; p. 178, par. 2; p. 179, par. D.)
12-6-40	McGinnis, Waller & McGinnis Evansville, Indiana	(Whether adjusters of a finance company, who spend 25% of their time in checking wholesale stocks, 50% of their time in collecting past due accounts, and the balance of time doing promotional work for the finance company, are outside salesmen). (p. 72, par. N; p. 102,par.5).
12-7-40	E. C. Reynolds Memphis, Tennessee	(Whether certain types of accountants not paid on a salary basis, qualify for the professional exemption under Section 541.2 of Regulations). (p. 62, par. H; p. 107 par. 4; p. 233, par. A).
12-9-40	W. Sidney Pelton Boston, Massachusetts	(Employer-employee relationship with respect to the following situation: Manufacturer engages an independent contracto to repair the roof of the manufacturer's plant, to erect a new chimney and to make general building repairs and renovations, and the regular employees of the independent contractor who is engaged in the repairing and construction business perform the work in question. Whether the manufacturer is under any obligation to see that the persons employed by the independent contractor are paid minimum wages and overtime compensation as required by the Act. Whether the goods produced in the manufacturer's plant during the period when the repairs are being mad may be considered as "hot goods" subject to the provisions of section 15(a)(1) of the Act. (p. 49, par. B; p. 137, par. D; p. 142, par. 2).
12-10-40	Gale E. Pugh Washington, D.C.	(Whether Section 7(c) is applicable to employees engaged in the "cutting up an drawing operations" on poultry). (p. 68 par. 8; p. 97, par. 2).

Legal Field Letter
No. 39

LETTERS

Date	To	Subject
12-11-40	V. P. Ahearn Washington, D.C.	(Coverage of Act with respect to various operations on equipment for sand and gravel work, i.e. dismantling, unloading, etc.). (p. 139, par. 5).
12-11-40	Mrs. E. O. Susong Greeneville, Tennessee	(Whether a daily newspaper sending no copies outside the state is covered by the Act). (p. 160, par. 7).
12-13-40	Benjamin Wilk Detroit, Michigan	(How to determine whether a sale is retail or non-retail). (p. ~~261~~ 261, after par. BB).

Errata sheet 1/27

Issued 12/19/40

In reply refer to:
LE:GFH:NC

December 4, 1940

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

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

Subject: Denver Burglar Alarm, Inc.
Denver, Colorado
File No. 5-546

This is in reply to your communication under date of October 22, 1940, file reference KCL:TOM:LG.

You state that the subject firm is engaged in the installation, maintenance, service and repair of electrically operated burglar alarms which are leased to companies who desire to use such equipment. Sixteen out of 194 establishments subscribing to this service arrangement are wholesale establishments. The remainder of the 194 are retail stores. None of the companies leasing the equipment is engaged in the production of goods. You express your doubts as to coverage of the subject company's employees.

It is my opinion that at least when maintaining and repairing these burglar alarms in wholesale houses which are covered by the act, the employees of the subject concern are within the coverage of the act. The practical effect of the activities of these employees is to protect and preserve buildings in 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. Of course, we have consistently taken the position that watchmen of plants engaged in interstate commerce are covered by the act.

Moreover, even if I assume that these services, when performed for retail establishments, are not covered, the employees in question would still be covered in any week in which they also render the services to covered wholesale houses.

#168860

(6808)

December 5, 1940

In Reply Refer To:
LE:VCW:EC

To: Mr. William H. Cross, Acting Chief
Analysis and Review Section

Attention: Mr. Joseph S. Genovese

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

Subject: Fickett-Brown Manufacturing Company, Inc.

Application of Textile Wage Order to
Production of Wiping Waste

During the course of a conference in Mr. Woerheide's office on November 12, 1940, attended by Messrs. Charles M. Brown, president and treasurer, and J. L. Haynie, plant superintendent, of the subject concern, and Messrs. Douty, Genovese and Woerheide of the Wage and Hour Division, Messrs. Brown and Haynie described the operations in question as follows:

> Slasher waste is purchased from outside cotton mills. The waste arrives in the plant in the form of long strands of sized cotton threads. The threads in the strands run parallel to one another. These strands of threads are put into a machine which intermingles the threads into a fluffy and tangled mass. Without further processing the mass of threads is sold in this condition as wiping waste.

It is our opinion that the slasher waste which is processed by the subject corporation into wiping waste is "waste" within the meaning of that term as used in paragraph 2 of section 552.4 of the Administrator's wage order for the textile industry. It is also our opinion that the operations performed by the subject concern upon said slasher waste constitute a "processing" of waste within the meaning of that term as used in the aforesaid section of the Administrator's wage order. Thus, the employees of the subject concern who are engaged in processes or occupations necessary to the production of wiping waste are entitled to the benefits of the Administrator's wage order for the textile industry.

(6808)

In reply Refer to:
LE:ILS:RFP

December 10, 1940

AIR MAIL

To: Miss Dorothy Williams
Regional Attorney
San Francisco, California

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

Subject: Application of section 7(b)(3) to preparation for the grape pressing operation

In reply to your memorandum of October 30, 1940, it is the opinion of this office that the section 7(b)(3) seasonal exemption is applicable to employees during workweeks in which they are engaged in preparing for the grape pressing operation.

The section 7(b)(3) exemption, you will note, is an industry exemption and everyone within the industry is entitled to the exemption. Certainly the employees engaged in preparing for the grape pressing operation are employed in that industry which is engaged in first processing of fresh fruits. Since a seasonal exemption has been granted to such industry, the exemption includes all employees within that industry, including the employees in question.

167276

(6808)

In reply refer to:
LE:FR:MWW

December 11, 1940

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

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

Subject: Group Hospital Service
Kansas City, Missouri

This will reply to your memorandum of November 28, 1940 in which you inquire as to the applicability of the 13(a)(2) exemption to the hospital service in question. You state:

> "This hospital service was recently incorporated and entered subscriptions for group hospitalization under the guarantee of 11 hospitals, 8 in Kansas City, Misscuri, and 3 in Kansas City, Kansas, to furnish service required in the policy or subscription. I am informed that 90 percent of the subscribers live and reside in Kansas City, Missouri. The same proportion of services rendered in hospitalization would be in Kansas City, Missouri.
>
> "The function of the workers in question is to receive and enter and keep general file materials with reference to outstanding subscriptions. The service is the type authorizing the collection payments to be made at each pay period. Of course, with collections and new subscriptions there is a good deal of office work to be done."

It is the opinion of this office that the 13(a)(2) exemption appears inapplicable since the function performed by this Group Hospital is similar in nature to an insurance function.

We concur in your opinion that the manager of the Hospital Care Department and the general auditor who receive only $150 a month are not exempt from the act on the grounds mentioned by you.

180282

(6808)

In Reply Refer to:
LE:ADH:LL

December 11, 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: Application of I.F.L. #43 to the Hawaiian Islands.

This is in reply to your memorandum of November 22, 1940, in which you state that a local employer ships beer to the Territory of Hawaii where the beer is stored and is distributed to the local retailing trade. You further state that the employer has asked whether his truck drivers in the Territory of Hawaii engaged in distributing his beer to other wholesalers and retail outlets in the Territory are subject to the Fair Labor Standards Act and whether such drivers are within the exemption contained in section 13(b)(1) of the act. You inquire whether the instructions contained in I.F.L. #43 and supplement thereto are applicable to these truck drivers.

It is our opinion that such drivers are engaged in "commerce" as the term is defined in section 3(b) of the Fair Labor Standards Act. We have been advised by the Interstate Commerce Commission that it has no jurisdiction over trucking operations of this sort in the Territory of Hawaii since the Motor Carrier Act generally does not apply in Hawaii. The exemption contained in section 13(b)(1) of the Fair Labor Standards Act, therefore, does not apply to such drivers, with the consequence that the considerations underlying I.F.L. #43 and supplement thereto do not apply in this situation either.

177440

(6808)

In reply refer to:
LE:GDR:MF

December 4, 1940

Mr. F. C. C. Boyd
The Union News Company
131 Varick Street
New York City

Dear Mr. Boyd:

I have your letter of November 26, 1940, in which you inquire about the application of the Fair Labor Standards Act to your candy and magazine salesmen on trains. You state:

> "In connection with our operations on railroads, we also, as you no doubt well know, operate news agents on trains. These news agents on trains obtain merchandise on consignment consisting of newspapers, magazines, candy, etc. which they sell at the regular established retail prices. Upon their return from their respective trips on trains, they make an accounting for their merchandise and retain as a commission either 15%, 18% or 20% of their total sales, as the case may be. We have considered these train agents as outside salesmen and therefore not subject to the provisions of the Fair Labor Standards Act."

It is our opinion that these persons are also "outside salesmen" within the Administrator's definition under Sec. 13(a)(1) of the Fair Labor Standards Act.

Sincerely yours,

GERARD D. REILLY
Solicitor of Labor

(6808)

In Reply Refer To:
LE:FR:PG

December 4, 1940

Mr. J. M. Kemper, Secretary-Treasurer
Beneficial and Relief Association
U. S. Department of Agriculture
Washington, D. C.

Dear Mr. Kemper:

Colonel Fleming has asked me to answer your letter of November 4, 1940, in which you inquire about the applicability of the Fair Labor Standards Act of 1938 to employees of the Beneficial and Relief Association of the Department of Agriculture. You state:

> "This Association is a voluntary association of employees of the Department of Agriculture. It was organized specifically for the purpose of obtaining group insurance for its members. The Association does not issue life insurance policies. On the contrary, the Association is issued policies of life insurance by the underwriting insurance company which are designated 'Group' or 'Master' policies, and the members of the Association are likewise issued individual certificates of insurance under such Group or Master policies by the insurance company. Members pay dues to the Association and such dues payments are used by the Association to pay premiums on the Group policies and to defray the operating costs of the Association. It is obvious that this Association is not engaged in writing or selling life insurance. On the other hand, it is merely a policy holder, and the medium through which employees may obtain group life insurance."

It is the opinion of this office that in the ordinary case the employees of insurance companies are engaged in interstate commerce and within the general coverage of the act. Your situation is somewhat different from the normal one and presents a problem of coverage that is not free from doubt. However, as the Association operates as an agency through which the premiums are collected for the insurance company in the form of dues, assists in the sale of policies and otherwise represents the insurance company in its dealings with association members, it is believed that it is engaged in commerce.

In view of the possibility of employees' suits under section 16(b) of the act, and in view of the fact that you are at present operating on a 40 hour week schedule, I would suggest that you continue

(6808)

working on this basis. I note from your letter that your normal workweek is merely one of 42 hours. Therefore, by deducting 20 minutes for each day of your six day week (either by altering the starting or closing time or by lengthening the lunch period, or any combination of those possibilities) you will be in strict compliance with the act.

For your information I am enclosing copies of Interpretative Bulletins Nos. 1 and 5 which deal with the general coverage of the act, Regulations, Part 516 and an Employers' Digest.

Very truly yours,

For the Solicitor

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

Enclosures (4)

170527

C O P Y

In reply refer to:
LE:KCR:ARC

McGinnis, Waller & McGinnis
Attorneys and Counselors at Law
1016-21 Citizens National Bank Building
Evansville, Indiana

December 6, 1940

Gentlemen:

This is in reply to your letter of November 26, 1940, in which you inquire if adjusters employed by a finance company engaged in interstate commerce are exempt from the Fair Labor Standards Act as outside salesmen.

You state that the adjusters in question devote approximately 25 percent of their time in checking wholesale stocks held as collateral by the company, 50 percent of their time in collecting past due accounts and the balance of their time in promotional work in behalf of the company.

The outside salesman exemption provided by section 13(a)(1) of the act is defined in section 541.5 of the enclosed regulations. From the statements contained in your letter it is the opinion of this office that the adjusters are not customarily and regularly engaged in making sales, and, therefore, do not meet the requirements of the outside salesman definition. It also appears that the adjusters do not meet the 20 percent rule set forth in the definition with respect to the amount of nonexempt work which may be performed by an outside salesman. As stated at page 45 of the enclosed copy of the Report and Recommendations of the Presiding Officer, the outside salesman definition is not applicable to outside buyers and collectors.

I also direct your attention to the administrative exemption provided by section 13(a)(1) of the act. This exemption is defined in section 541.2 of the regulations, and carries a salary requirement of $200 a month.

Very truly yours,

For the Solicitor

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

Enclosures (3)
178888

COPY

LE:KCR:PG
December 7, 1940

Mr. E. C. Reynolds
Reynolds, Bone, Griesbeck
and Hinderer
Memphis, Tennessee

Dear Mr. Reynolds:

On November 18, 1940, you and Mr. Griesbeck called at the Washington office of the Wage and Hour Division to discuss the possible exemption of various employees of your firm under section 541.3 of our regulations defining the term "professional." The employees in question are all employed as accountants in connection with your firm's public accounting practice.

From the description given by yourself and Mr. Griesbeck it did not appear that there was anything in the duties of the accountants inconsistent with the requirements of section 541.3 of the regulations except with respect to their fulfilling of requirement (B) thereof. Without attempting to pass final judgment on whether they all fulfill all the other requirements of section 541.3 it will be assumed for the purposes of this letter that they do.

The question concerning subsection 541.3 (B) arises from the method of compensation. It is our understanding that these employees are paid on the following basis. When they are sent out on a job the client is charged a given amount for each such accountant assigned to the job. This charge is made on the basis of a seven hour day. Thus, for example, accountant A may be sent to a given client and the client will pay $20.00 a day for that accountant's services. The total number of days charged for is computed by dividing the total number of hours by seven. Thus, if the accountant works forty-nine hours for that client, seven days are charged for. Furthermore, in each instance the accountant himself is paid a percentage of the amount charged the client for his services. Generally speaking, those accountants whose services are most highly valued receive the highest percentage of the amount paid by the client. Thus, at one extreme an accountant for whose services $15.00 per diem is charged receives 55 percent thereof as compensation, whereas the accountant for whose services $20.00 are charged receives 70 percent thereof as compensation. As a result of this practice the accountants employed by you receive varying

(6808)

amounts of pay depending on the number of hours and days they work each week.

At the outset it can be said that some of these accountants are paid at a rate of less than $200 per month aside from the consideration of whether their method of compensation meets the requirement of the regulations that they be paid on a fee or salary basis.

Basically the distinction between payment on a salary and payment on an hourly or daily basis is that the employee paid on a salary basis is guaranteed a minimum sum of money for any work performed in the period on which the salary is based. Thus to meet the $50 a week salary test of the professional definition, an employee must be guaranteed at least $50 for any workweek in which he works only one or two hours, for example. If his salary basis is $200 a month, he must be guaranteed at least $200 for any month in which he performs any work. Your accounting employees are not, in our opinion, paid on a salary basis.

Payment on a fee basis which is also permitted in the regulations is characterized by the payment of an agreed sum for the completion of a single job regardless of the precise time required for its completion. Fee payments in a sense resemble piece work payments, but with the important distinction that generally speaking a fee payment is made for the kind of job which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again. It should be recognized, of course, that the word "fee" is occasionally used loosely and it may well be that you describe your charges to your clients as "fees." Nevertheless within the meaning of the regulations a payment to an employee which is based directly on the number of hours or days he works and not on the accomplishment of a given single task, cannot be considered payment on a fee basis; see page 33 of the Report of the Presiding Officer. In the light of the foregoing considerations it does not appear that any of your accountants can qualify for exemption under section 541.3 of the regulations.

In the course of your discussion you asked concerning the propriety of adopting a basic hourly rate of pay for these employees which in view of the probable overtime they will be required to work during the course of the year will yield them total annual earnings of approximately the same amount as was earned by those employees last year. It is not a violation of the act for you to compensate

the employees on an hourly basis which is agreeable to the employees so long as payment is made in workweeks both over and less than forty hours in accordance with such hourly rate. This matter is discussed at some length in paragraphs 16 through 27 of the enclosed copy of Interpretative Bulletin No. 4.

Sincerely yours,

Administrator

Enclosures

COPY

December 9, 1940

In Reply Refer To:
LE:KCR:EG

W. Sidney Felton, Esquire
Horrick, Smith, Donald & Farley
First National Building
1 Federal Street
Boston, Massachusetts

Dear Mr. Felton:

This is in reply to your letter of November 21, 1940 in which you inquire if a statement attributed to Mr. Stephen R. McRae, of the South Carolina Regional Office of the Wage and Hour Division, conforms with the interpretation by this office of the Fair Labor Standards Act. You state that Mr. McRae is quoted in the press as having stated that "if a mill contracts to have work done on its property, it is jointly responsible with the contractor to see that employees receive the minimum wage."

You inquire if Mr. McRae's statement is applicable to the situation in which a manufacturer engages an independent contractor to repair the roof of the manufacturer's plant, to erect a new chimney and to make general building repairs and renovations, and the regular employees of the independent contractor who is engaged in the repairing and construction business perform the work in question. It is stated that the manufacture does not control or direct the independent contractor as to the manner of performing the contract and has no control or supervision over the employees of the independent contractor. You inquire particularly if the manufacturer is under any obligation to see that the persons employed by the independent contractor are paid minimum wages and overtime compensation as required by the act. You also inquire if the goods produced in the manufacturer's plant during the period when the repairs are being made may be considered as "hot goods" subject to the provisions of section 15(a)(1) of the act. You inquire if the responsibilities of the manufacturer would depend upon his knowledge or reasonable means of acquiring knowledge that the independent contractor is violating the act. You also inquire if the manufacturer is under any obligation to maintain records with respect to the independent contractor's employees.

(6808)

As you know, section 15(a)(1) of the act provides that it shall be unlawful for a manufacturer to transport, offer for transportation, ship, deliver, or sell in interstate commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in interstate commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7 of the act. It is the opinion of this office that employees of an independent contractor engaged in repairing, altering, reconstructing, etc., a factory building being used to produce goods for interstate commerce are necessary to the production of such goods and therefore are within the general coverage of the act. See paragraph 13 of Interpretative Bulletin No. 5. Accordingly, the goods produced in the factory of the manufacturer during the period in which the repairs were being made by employees of an independent contractor would be subject to the "hot goods" provisions of section 15(a)(1) if the employees of the independent contractor were not paid in accordance with the act. Certainly if the manufacturer has reason to believe that the employees of the independent contractor are not being paid in accordance with the requirements of the act, a violation of section 15(a)(1) would seem clear provided that the manufacturer shipped in commerce or sold with knowledge that shipment in commerce is intended, any goods produced while the repairs are being made. In this situation, the act does not require that the manufacturer maintain records of employment with respect to employees of the independent contractor if in fact the employees in question are not the manufacturer's employees under the definition of the employer-employee relationship contained in section 3(d), (e) and (g) of the act.

Very truly yours,

For the Solicitor

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

Enclosure

176241

COPY

December 10, 1940

In reply refer to:
LE:ILS:MSS

Mr. Gale E. Pugh
Gale E. Pugh & Company, Inc.
1147 E Street, Southwest
Washington, D. C.

Dear Mr. Pugh:

This is in reply to your letter of October 30, 1940. As you know, section 7(c) of the act provides an exemption from the hour provisions only for an aggregate of 14 workweeks in a calendar year for the employees of an employer engaged in handling, slaughtering, or dressing poultry (see paragraphs 14 and 21 through 24 of the enclosed bulletin No. 14).

A word is necessary with reference to the application of the above exemption to the men who work on the bench cutting up and drawing poultry. Your letter indicates that this operation is performed "after the poultry has been dressed and cooled." In addition we are advised by experts in the Department of Agriculture that this operation is performed only as orders are received by the firm for particular quantities of drawn poultry. Under such circumstances, as you will observe from paragraph 23(a) of bulletin No. 14, the section 7(c) exemption seems inapplicable to the employees engaged in the "cutting up and drawing" operations.

Very truly yours,

For the Solicitor

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

Enclosure

95582

(6808)

December 11, 1940

In Reply Refer To:
LE:GFH:MF

Mr. V. P. Ahearn, Executive Secretary
National Sand and Gravel Association
Munsey Building
Washington, D. C.

Dear Mr. Ahearn:

This is in reply to your letters of August 10, 1940 and September 11, 1940. I regret that, due to the great flood of inquiries which we have received in recent months, an earlier reply has not been possible.

With your letter of September 11, you enclosed a memorandum prepared by Mr. William Hole, Secretary of the American Aggregates Corporation of Greenville, Ohio. You state that Mr. Hole's statement of the problems of coverage involved is more comprehensive than that contained in your letter of August 10, and you request that we discuss the various points raised in Mr. Hole's memorandum. I assume that in all the situations posed by Mr. Hole, the employer is engaged in producing sand and gravel solely for consumption within the state.

First Situation

1. Does the dismantling of such items as screens and crushers fall within the coverage of the act if, at the time of such activities, the employer had no intention to ship such items in interstate commerce?

Generally, they would not, provided that at the time of such operations the employer did not intend, hope, or have reason to believe that the dismantled materials would move in interstate commerce.

2. Are the employees who load such items of equipment onto trucks or railroad cars for interstate shipment subject to the act?

We believe, even on this incomplete statement of facts, that activities of such employees would be considered by the courts as included in the flow or stream of commerce and that such employment is covered by the act.

(6808)

Second Situation

On occasion employees may remove an item of equipment from a plant with the specific intention on the employer's part of having it shipped from one state to another.

1. It is our opinion that employees who dismantle the equipment which is to be shipped in commerce are subject to the act.

2. It is our opinion that employees who load the equipment onto the truck or railroad car for interstate shipment are subject to the act.

Third Situation

When the items of equipment above referred to are received at the plant located in another state, they are unloaded from the means of transportation and are ordinarily installed in that plant.

1. It is our opinion that employees who unload the items of equipment from the means of transportation are subject to the act.

2. Unfortunately, with regard to employees who install the items of equipment in the plant, we are unable to supply any concise and definite opinion because of the general nature of your question. More detailed facts concerning the precise type of equipment, its use, and the installation operation itself are necessary in order to enable us to express an opinion covering installation work as such. It should be pointed out, however, that it is the position of this division that if an employee in any workweek performs work which is covered by the act and work which is not covered, his employment for the entire workweek is subject to the act. If the unloaders whose activities are covered install equipment within the same workweek that they unload such equipment, they are covered by the act for all the hours worked by them.

Fourth Situation

These plants often receive coal and other items of machinery which move across state lines.

1. If a car of coal is unloaded by using a crane which deposits the coal in a truck which in turn places the coal in stock piles, are any of the employees engaged in driving such trucks subject to the act?

Section 13(b)(1) provides an exemption from the maximum hour provisions of the act for "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." We are enclosing a copy of Interpretative Bulletin No. 9, dealing with the scope of this exemption. Paragraphs 5 through 7 of this bulletin set forth the position of the Wage and Hour Division with regard to employees of private motor carriers.

Since October 15, 1940, all drivers employed by private motor carriers who are regulated by the Interstate Commerce Commission are exempt from the overtime provisions of the Fair Labor Standards Act although still entitled to receive a minimum wage of at least 30 cents per hour. All nondriving employees of such private motor carriers, however, are not within the exemption contained in section 13 (b)(1) of the Fair Labor Standards Act and are, therefore, still entitled to receive overtime at the rate of time and one-half the regular rates of pay for all hours worked in excess of 40 in any workweek.

2. If the railroad spots the coal cars on elevated trestle and the railroad brakeman trips the hopper door permitting the coal to run from the car down below the trestle, it is our opinion that any employees subsequently removing such coal are within the coverage of the act.

3. See supra third situation, proposition 1.

4. See supra third situation, proposition 2.

Fifth Situation

At certain plants electrical energy generated in other states is used. Transformers are placed on the plant's premises which are owned, however, by the power company, or by the National Sand and Gravel Association. Employees of the company install and maintain the electrical facilities at the respective sites of operations.

1. We are at present studying the question of whether employees engaged in constructing power lines between two or more states are covered. If you will communicate with us in several weeks, we shall inform you of any opinion which we may reach on this matter.

2. It is our opinion that employees engaged in the maintenance of the power line from the power company's line to the transformers, whether owned by the plant or by the National Sand and Gravel Association are subject to the act. See paragraph 13 of the enclosed copy of Interpretative Bulletin No. 5.

3. Whether employees engaged in the maintenance of electrical equipment at the plant itself are subject to the act is a question of fact depending upon the precise details of the operations of the employees in question.

If the employees are engaged in maintaining the transmission lines leading to the plant, it seems that their employment is properly to be deemed covered under the principles expressed in paragraph 13 of Interpretative Bulletin No. 5.

As will be noted from paragraph 9 of Interpretative Bulletin No. 5, an employee may be subject to the act one week and not the next; and it is likewise true that some employees of an employer may be subject to the act and others not. The burden of effecting segregation between workweeks and between different employees, however, is on the employer.

For your further information, I am enclosing, in addition to Interpretative Bulletin No. 5, a copy of the act, copies of Interpretative Bulletins Nos. 1, 4, and 13, and copies of our Regulations, Parts 541 and 516. I am also enclosing a copy of the Employers' Digest of the act.

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

Very truly yours,

For the Solicitor

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

Enclosures (9)

141057
156656

December 11, 1940

In Reply Refer To:
LE:GFH:BF

Mrs. E. O. Susong
The Greenville Daily Sun
Greenville, Tennessee

Dear Mrs. Susong:

This is in reply to your letters of September 27, 1940 and November 1, 1940. I regret that an earlier reply has not been possible.

You state that you are engaged in publishing a small daily newspaper and that your out-of-state circulation numbers about 70 copies in a circulation of 3500. You ask if you would be relieved from complying with the Fair Labor Standards Act if these out-of-state subscriptions were to be discontinued.

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, and I direct your attention particularly to paragraphs 1 and 5 of Interpretative Bulletin No. 1 and paragraphs 2, 4, 8, and 9 of Interpretative Bulletin No. 5. I believe that the cited paragraphs will satisfy you that employees engaged in producing newspapers, copies of which move in interstate commerce, are covered by the act.

Moreover, it should be noted that in our opinion even a newspaper which sends no papers outside of the state may yet be "engaged in (interstate) commerce," since it receives and disseminates information from outside the state and this seems essential to the stream of interstate commerce.

In this connection, it is of interest to note the language of Ford, J., in the case of Fleming v. Lowell Sun Company (D.C.U.S., D. Mass.) Civil Action No. 976, decided November 22, 1940:

(6808)

"The respondent contends, in resisting the order sought, that the Administrator is without jurisdiction over the respondent's affairs because of the infinitesimal amount of respondent's circulation that crosses the state lines.

"In support of this contention the respondent argues that more than 98% of its total average daily circulation is distributed entirely within the Commonwealth of Massachusetts. To be sure, the Congress in passing the Act was exercising its power to regulate commerce to correct and eliminate the conditions referred to in its findings set out in Section 2(a) of the Act. However, the percentage or number of newspapers of the respondent that crossed state lines is not controlling on the question of whether or not the respondent is engaged in commerce between the states. It is common knowledge that the instrumentalities of interstate commerce are used and affected by every newspaper in gathering and publishing news and preparing the newspaper for circulation both in and out of the state in which it is published. This point has been raised time and time again, and it is too late in this case, under the doctrine laid down by the recent cases of Associated Press v. National Labor Relations Board, 301 U.S. 103, and National Labor Relations Board v. A. S. Abell Co., 97 F.(2d) 951, and cases cited, to raise it successfully now. Cf. Gibbons v. Ogden, 9 Wheat, 1; National Labor Relations Board v. Fainblatt, 306 U.S. 601, where the court said: 'The Power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.'" /Underlining supplied./

It is my opinion that employees employed in producing the newspaper which you describe may well be deemed by the courts to be within the coverage of the act in spite of the fact that out-of-state subscriptions are discontinued.

Of course, the exemption provided for in section 13(a)(8) of the act for any employee employed in connection with the publication of any weekly or semi-weekly newspaper with a circulation of less than 3,000, the major part of which

circulation is within the county where printed and published, has no application in the case of an employee of a daily newspaper. For your information, however, I am enclosing a copy of press release R-350, which explains the scope of this 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 (4)

152264
167486

December 13, 1940

In Reply Refer To:
LE:FR:MF

Mr. Benjamin Wilk, General Manager
Standard Building Products Company
14200 Cloverdale Avenue
Detroit, Michigan

Dear Mr. Wilk:

Reference is made to your letter of November 29, 1940, in which you inquire about the applicability of the Fair Labor Standards Act of 1938 to employees of distributional establishments which make all their sales within the state.

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 14 through 16 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.

Section 13(a)(2) of the act provides that the wage and hour provisions shall not apply to "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 thereof. It is believed that the information contained therein will enable you to ascertain whether your business is a "retail establishment" within the meaning of this exemption. The exemption is further discussed in the enclosed press release G-27. See also press releases G-37 and G-62.

In your letter you raise the following question:

> "Will you please give me an interpretation as to where to draw the line between retail and wholesale when a building supply dealer starts delivering to a contractor on a speculative job and the job is sold before the house is completed. If the basement was started as a speculative job and the house was sold during the time the basement was

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being erected could we assume that the percentage of time that the house was speculative was wholesale and the balance of the time was retail sale."

It is the opinion of this office that the retail or nonretail character of a sale is determined by the facts as they existed at the time the contract of sale between the dealer and the contractor was entered into and not by the facts as they may exist at the time of delivery of the goods contracted for.

Very truly yours,

For the Solicitor

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

Enclosures (18)

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