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UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

January 7, 1941

Legal Field Letter

No. 40

Attached Opinions

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

MEMORANDA

<u>Date</u>	<u>From</u>	<u>To</u>	<u>Subject</u>
12-21-40	Rufus G. Poole (VCW)	Samuel P. McChesney	Request for Interpretation under Textile Wage Order of Keep Klean Cover Co., Inc. St. Louis Missouri File No. 24-146 Reference: SLL:SPMc:ZD (Whether employees engaged in fluffing baled filling by passing the compressed filling through a picking machine, the manufacturing of filling being completed in the plant of another company in another state, are covered by Textile Wage Order.) (p. 199, Par. C; P. 256, par. R).

LETTERS

<u>Date</u>	<u>To</u>	<u>Subject</u>
12-27-40	W. Garfitt	(Applicability of outside salesman exemption to "track salesman" employed by fresh fruit and vegetable car-load dealers. An analysis with respect to the section 7(c) exemption). (p. 68, par. 6; p. 72, par. N; p. 99, par. 4(c); P. 102, par. 5).
12-30-40	Milton Socolof	(Applicability of Act to a manufacturer of chocolate milk whose sales are wholly within the state but also purchases some of the materials from a stock of merchandise kept at a warehouse within the same state by an out-of-state manufacturer. Applicability of section 7(c) to chocolate milk). (p. 67, par. 3; p. 98, par. 3; p. 151, par. 3).
1-4-41	Burton E. Robinson	(Applicability of Act to warehouse and inventory employees of a chain drug company). (p. 25, par. A; p. 144, par. M; p. 194, par. (g)).
1-4-41	R. A. Turrel	(Application of section 3(d) to members of local draft boards). (p. 49, par. B; p. 81, par. D; p. 179, par. D).

December 21, 1940

In reply refer to:  
LE:VCW:LF

To: Samuel P. McChesney, Esquire  
Acting Regional Attorney  
St. Louis, Missouri

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

Subject: Request for Interpretation under Textile Wage  
Order of Keep Klean Cover Co., Inc.  
St. Louis Missouri  
File No. 24-146  
Reference: SLL:SPMc:ZD

It appears from your memorandum of October 25, 1940, that certain employees of the subject corporation are engaged in fluffing baled filling by passing the compressed filling through a picking machine. The manufacturing of the filling is completed in the plant of the Phillips-Carey Company of Hamilton, Ohio. 40

It is our opinion that the operation in question does not constitute a "manufacturing of batting, wadding or filling" within the meaning of the textile industry wage order, and that employees engaged in processes or occupations necessary to the operation of the picking machine in the subject company's plant are not entitled to the benefits of the textile wage order.

95663

December 27, 1940

In Reply Refer To:  
IE:KCR:SQM

Mr. W. Garfitt  
Executive Vice-President  
United Fresh Fruit & Vegetable  
Association  
1425 South Racine Avenue  
Chicago, Illinois

Dear Mr. Garfitt:

This is in reply to your letter of October 25, 1940, addressed to Mr. Snyder, in which you inquire as to the applicability of the outside salesman exemption provided by section 13(a)(1) of the Fair Labor Standards Act to so-called "track salesmen" employed by fresh fruit and vegetable carload dealers. I regret that an earlier reply was not possible.

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You indicate that the salesmen are engaged in making sales on "team-track" at which the cars loaded with fruits and vegetables are located, and spend only a minor portion of their time in the office of the dealer.

If particular locations at the tracks are regularly assigned to the dealers, it would seem that such locations should be considered as the place of business of the dealers within the meaning of the outside salesman definition provided by section 541.5 of the enclosed Regulations, Part 541. In this case, the outside salesman exemption would not be applicable.

As you are aware, section 7(c) of the Act provides a 14 workweek hours exemption for employees engaged in packing perishable or seasonal fresh fruits or vegetables in any place of employment where the employer is engaged in such activities. If an employer is to contend that the track salesmen are outside salesmen in that they are employed away from the employer's place of business, it would seem to follow necessarily that the other employees of the employer for whom the section 7(c) exemption was claimed would not be entitled to such exemption because the employees would not be employed in the place of employment where the employer is engaged.

Mr. W. Garfitt

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You also indicate that the track salesmen receive a very substantial salary. I direct your attention to the new administrative exemption defined in section 541.2 of Regulations, Part 541. This definition carries the salary requirement of \$200 a month and may be applicable to particular track salesmen who meet the requirements of the definition. See in this connection the discussion beginning on page 23 of the enclosed copy of the Report and Recommendations of the Presiding Officer upon which the new Regulations, Part 541, was based.

Very truly yours,

For the Solicitor

By \_\_\_\_\_  
Rufus G. Poole  
Assistant Solicitor  
In Charge of Opinions and Review

Enclosures (3)

#165677

December 30, 1940

In Reply Refer To:  
LE:GFH:NF

Milton Socolof, Esquire  
Stroock & Stroock  
61 Broadway  
New York, New York

Dear Mr. Socolof:

Mr. Fruchtman has asked me to reply to your letter of November 8, 1940.

You ask for our opinion regarding the status under the Fair Labor Standards Act of the employees of an Ohio manufacturer of chocolate milk. It appears that all of his sales are made within the state. You ask if his status under the act is affected by the fact that some of his purchases of raw materials are made from a stock of merchandise kept at a warehouse in the state of Ohio by a New York manufacturer.

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As you know, of course, 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. I believe the answer to your questions is to be found in paragraphs 2, 4, and 10 of Interpretative Bulletin No. 5, to which I direct your attention. The fact that all the sales of the chocolate milk company were made locally would not necessarily mean that the benefits of the act were not available to its employees provided the employer at the time of production of the milk intended, hoped, or had reason to believe that the goods would move in interstate commerce. Please note also from paragraph 4 of Interpretative Bulletin No. 5 that if goods are purchased by an out-of-state purchaser f.o.b. the factory and are taken by the purchaser out of the state, the employees in the factory are deemed engaged in the production of goods for interstate commerce.

With regard to the question directly posed, however, it will be noted from paragraph 10 of Interpretative Bulletin No. 5 that employees engaged in the production of goods purely for local consumption would seem to be excluded from the scope of the act even

though the raw materials upon which they worked are brought in from outside the state. It is also pointed in this paragraph, however, that other employees in the same plant such as employees purchasing the raw materials from other states or handling or unpacking them upon receipt from other states, may be "engaged in commerce" and, therefore, entitled to the benefits of the act. The Wage and Hour Division at this time is not prepared to take a definite position as to the applicability of the act to employees receiving goods purchased from a local warehouse of an out-of-state manufacturer. Until a definite position is taken, and adequate notice given, enforcement proceedings will not be instituted. See, however, section 16 (b) of the act.

If, however, the company is covered under the principles previously referred to in paragraphs 2 and 4 of Interpretative Bulletin No. 5, it is advisable to direct your attention to paragraphs 14, 15, 22, and 23 of the enclosed Interpretative Bulletin No. 14 which explains the section 7(c) exemption. That is an exemption from the hour provisions only for the employees of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products. Information obtained from the Department of Agriculture indicates that chocolate milk is a dairy product. However, you will notice that we have pointed out in paragraph 15 that the making of malted milk, ice cream mix, etc., is not included within the exemption since such manufacture involves the use of ingredients other than milk, etc., to a substantial extent and since such manufacture does not, in our opinion, constitute the first change in the form of the raw materials. There is no doubt that chocolate syrup is a foreign ingredient, nor is there doubt that the mixture of the chocolate syrup with the milk is the first change in the raw material. It is also our information that the manufacture of this product requires pasteurization after the chocolate syrup is added. If such operation is so closely connected with the mixing of the two products as to satisfy the tests set forth in paragraph 23(a) of Interpretative Bulletin No. 14, employees thus engaged would seem to fall within the exemption, too. Of course, if the chocolate syrup is added in such a substantial amount as to defeat the exemption for that reason, none of the employees would be within the scope of section 7(c).

I hope this information will furnish you 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 (5)

In Reply Refer To:  
LE:FR:SB

January 4, 1941

Burton E. Robinson, Esquire  
Clark and Robinson  
Provident Bank Building  
Cincinnati, Ohio

Dear Mr. Robinson:

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Reference is made to your letter of November 28, 1940, in which you inquire about the applicability of the Fair Labor Standards Act of 1938 to warehouse employees of a chain drug company with units in Kentucky and Pennsylvania. You also inquire as to "three employees who make the rounds of the various stores inventorying the merchandise on hand at these stores. Some of their time is spent at the main office of the company on detail work in connection with the inventories they have taken."

The act, a copy of which is enclosed, applies to employees engaged in interstate commerce or in the production of goods for interstate commerce. Enclosed herewith are copies of Interpretative Bulletins Nos. 1 and 5 which deal with the coverage of the act. Your attention is particularly directed to paragraph 4 of Interpretative Bulletin No. 1 and paragraphs 14 through 16 of Interpretative Bulletin No. 5. On the basis of the facts stated in your letter it would seem that the employees to whom you refer are within the general coverage of the act.

Section 13(a)(2) of the act, 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

Mr. Burton E. Robinson

Page 2

activities among branches of a chain store system or to warehousing operations, central executive office work, etc. The exemption is further discussed in the enclosed release G-27. You will note that the exemption does not seem applicable in your case.

For your information; I am also enclosing copies of Regulations, Parts 516 and 541, and an 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. Foole  
Assistant Solicitor  
In Charge of Opinions and Review

Enclosures (10)

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In reply refer to:  
LE:IIS:SL

January 4, 1941

Mr. R. A. Turrel  
Croswell  
Michigan

Dear Mr. Turrell:

This will reply to your letter of October 25, 1940, which was addressed to the National Labor Relations Board, in which you inquire if members of local draft boards are subject to the Fair Labor Standards Act.

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Enclosed you will find a copy of the Fair Labor Standards Act. You will note from a reading of section 3(d) that the United States, states and political subdivisions of states are excluded from the coverage of the act as employers. It is our understanding that members of local draft boards are thus excluded from the coverage of the Fair Labor Standards Act.

Very truly yours,

For the Solicitor

By \_\_\_\_\_  
Rufus G. Poole  
Assistant Solicitor  
In Charge of Opinions and Review

Enclosures (3)

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