UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

March 24, 1941

Legal Field Letter

No. 48 : Attached Opinions

Copies of recent opinions on subjects indicated below are furnished herewith for your information and proper notation in the Opinion Manual.

MEMORANDA

Date	From	To	Subject
3-11-41	Philip B. Fleming	Russell Sturgis	Applicable Wage Order for Silk and Rayon Mixtures (p. 199, par. C; p. 256, par. R.)
3-15-41	Rufus G. Poole (VCW)	Alex Elson	Employees engaged in grading and baling of rags of assorted materials other than woolens and in skirting men's and ladies' wool suits. (Coverage under the Textile wage order and woolen wage order.) (p. 199, par. C; p. 256, par. R.)
3-18-41	Rufus G. Poole (FR)	Donald M. Murtha	Request for Opinion - Employees of a Service Garage (Whether exempt under Section 13(a)(2) where service garage is operated in connection with the wholesale distribution of automobiles.) (p. 70, par. 4; p. 72, par. 22, p. 103, par. 4.)
3-19-41	Rufus G. Poole (FR)	Donald M. Murtha	Request for Opinion - Employees of Locker Establishments. (Whether such refrigeration rendered to farmers to store meats is a service establishment under Section 13(a)(2); whether processing of hides will defeat this exemption. Applicability of Section 13(a)(6) to butchering done on the farm.) (p. 53, par. 2; p. 69, par. M; p. 102, par. DD; p. 107, par. 2; p. 145, par. 2.)

LETTERS

Date	To	Subject
3-17-41	George C. Neal Ruffin, N. C.	(Coverage of Textile wage order over employees engaged in salvaging silk and nylon yarn from defective full-fashioned hosiery still in the gray, by

		unraveling the yarn and winding it on cones for reknitting.) (p. 199, par. C; p. 256, par. R.)
3-18-41	H. Thomas Austern Washington, D. C.	(Discussion of Sections 7(c), 13(a)(6), and 7(b)(3) as they relate to certain problems in the canning of fresh fruits and vegetables, and to specific employees engaged therein, such as buyers, and fieldman.) (p. 36, par. 5; p. 36, par. 7; p. 51, par. A; p. 68, par. 6; p. 74, par. P; p. 82, par. F; p. 94, par. T; p. 99, par. 4(c); p. 110, par. 5(b).)
3-18-41	W. J. Hester Coral Gables, Fla.	(Whether Act applies to stenographers and typists employed by a university occasionally engaged in the compilation and transcription of information published in bulletins of the university and sent outside the state.) (p. 27, par. 6; p. 160, par. 6; p. 185, par. 3.)
3-18-41	A. C. Glassell, Jr. Lake Charles, La.	(Watchmen engaged in watching oil drilling machinery and equipment when not in use temporarily, whether covered under the Act.) (p. 43, par. 12; p. 183, par. 5.)
3-18-41	Hon. Overton Brooks Washington, D. C.	(Whether or not an employer may pay an employee at his customary hourly rate of pay for time not worked due to "illness, vacation, or other reasonable excuse" without running the risk of increasing the employee's regular rate of pay for overtime purposes under the Act.) (p. 241, par. B; p. 244, par. C; p. 256, par. Q.)
3-19-41	DeForest P. Davis Chicago, Illinois	(Applicability of the Section 13(a)(1) exemption and Section 13(a)(2) exemption to two types of demonstrators who demonstrate certain wares in chain retail stores and who in some cases, make sales. No 13(a)(2) exemption during workweeks when demonstrators move from store to store.) (p. 37, par. G; p. 65, par. J; p. 69, par. M; p. 72, par. N; p. 101, par. 3; p. 102, par. 5; p. 102, par. DD.)
3-20-41	Horace Russell Chicago, Illinois	(Applicability of Act to savings and loan associations.) (p. 177, par. 1.)
3-22-41	E. D. Grant Norridgewock, Maine	(Payment of wages at regular pay period.) (p. 252, par. L.)

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March 11, 1941

To: Russell Sturgis
Acting Territorial Representative
San Juan, Puerto Rico

From: Philip B. Fleming
Administrator

Subject: Applicable Wage Order for Silk and Rayon Mixtures.

In your communication of February 8, 1941, you asked what rates would be applicable to the manufacture of underwear comprising both silk and rayon. As you pointed out, the wage order contains separate divisions for the "silk underwear division" and the "cotton underwear and infants' underwear division," the latter of which is defined to mean "the manufacture from cotton, rayon or other synthetic fiber of women's, misses' and children's underwear and nightwear... ."

It is our opinion that the higher of two or more minimum rates of pay must be paid under the law where segregation is not feasible; consequently, the manufacture of silk and rayon underwear would fall under the silk underwear division, and the hourly and piece rates applicable thereto would govern the production of such garments, except in the case of underwear for infants under three years of age, where the cotton underwear rate applies by specific direction of the wage order for the Puerto Rico Needlework Industries.

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LE: VCW:VN

Alex Elson, Esquire
Regional Attorney
Chicago, Illinois

March 15, 1941

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

Employees engaged in grading and baling of rags of assorted materials other than woolens and in skirting men's and ladies' wool suits.

It is our opinion that employees engaged in the grading and baling of rags and assorted materials other than wool are subject to the textile industry wage order, if they perform these processes in an establishment in which picking or garnetting operations are performed; otherwise these employees are not subject to any wage order.

It is our opinion that employees engaged in the skirting of men's and ladies' wool suits and the baling of these suits and other woolen rags are subject to the woolen industry wage order if they perform these operations in an establishment in which picking or garnetting operations are performed; otherwise these employees are not subject to any wage order.

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C
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Donald M. Murtha, Esquire
Acting Regional Attorney
Minneapolis, Minnesota

LE:FR:VN

March 18, 1941

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

Request for Opinion - Employees
of a Service Garage

This will reply to your memorandum of March 7, 1941, in which you inquire whether the employees of a garage ordinarily exempt under section 13(a)(2) would lose the exemption because of the fact that they check and service a new car which is being sold at retail. You state:

> "It is ordinarily the practice when new cars arrive from the factory at the retail establishment that bumpers and other equipment is placed on the new automobiles and they are very carefully checked before delivery to the purchaser."

We agree with your conclusion "that this work is merely incidental to the work of the retail establishment, and, therefore, the exemption would not be lost."

You also inquire whether employees of a service garage run in connection with the business of a wholesale distributor of automobiles would lose the 13(a)(2) exemption if they perform work on the new cars being sold at wholesale. We assume that the employer runs both a garage and a separate wholesale distributional establishment.

In our opinion, if the work the garage employees do on the new cars is of the same nature as their usual work in the garage, such work need merely be counted as nonservice in determining the application of release G-27. If, on the other hand, the work performed by the garage employees on new cars is entirely different from their normal activities in the garage (in other words, if it is work peculiar to the wholesale distributional end of the business and is not work which they perform upon cars of the general public), such employees would not be exempt under section 13(a)(2), since they would be working in both an exempt and nonexempt establishment during the week.

You also present this case:

" . . . a company operates both a garage and some

> other business such as the wholesale distribution of beverages. Would an employee in the service garage ordinarily exempt under Section 13(a)(2) lose the exemption because he spent a small portion of his time filling the trucks of the beverage department with gas or cleaning and repairing the same, or should the value of these services merely be added to the wholesale side to determine if the garage is a retail or wholesale establishment?"

This work, in our opinion, should merely be added to the nonservice side. It is the same work as that engaged in by the garage employees when dealing with vehicles not owned by their employer.

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LE:FR:VN

Donald M. Murtha, Esquire
Acting Regional Attorney
Minneapolis, Minnesota

March 19, 1941

Rufus G. Poole
Assistant Soliticor
In Charge of Opinions and Review

Request for Opinion-Employees of Locker Establishments.

This will reply to your memorandum of January 8, 1941. You state:

"The refrigerated locker service business has had a very rapid growth in this part of the country in recent years. Heretofore, when a farmer killed livestock for his own consumption it was not possible to keep the meat fresh more than a few days except in the winter. Today he may bring the livestock to his local creamery, or grocer or butcher, have it killed and cut into convenient parts and stored for his use in an individual locker situated in a refrigerated storeroom. Thereafter, from time to time he can obtain whatever portions are needed.

"A charge of about $10.00 per year is made for this service. An additional charge is made for killing and butchering. For the most part the killing and butchering and storing is done in a segregated portion of the retail store or creamery; ordinarily, in separate rooms used for no other purpose. One or two persons may do all of the work required.

"The only relation to interstate commerce or production of goods for commerce arises from the fact that that most of the hides are shipped into interstate commerce.

"If there is segregation, would this locker room business in itself be a service establishment within the meaning of Section 13(a)(2)?

"If it is a service establishment, does the production of hides constitute manufacturing and

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thus prevent the application of the service establishment exemption?

"If, in the retail grocery or butcher shop, there is no segregation, would the production of the hides be manufacturing, and thus deprive the store of its retail exemption under Section 13(a)(2)? (It is understood that Section 13(a)(1), however, could still apply and that the store might not be otherwise engaging in interstate commerce.)

"There is usually only one employee in these small establishments who does the killing and cutting and storing, and who has charge of the locker service. The general office force of either a retail store or creamery might, however, have something to do with the shipment of the hide into commerce.

"Consideration should be given to the very insignificant part that the hide plays in the locker business. Consideration might also be given to the effect on the retail butcher business if it were deprived of the exemption of Section 13(a)(2) because of the production of hides for interstate commerce. Thousands of butcher shops in this area butcher their own meat and dispose of hides in commerce regardless of the locker storage business and some of the goods sold by them are received from out of the state."

It is our opinion that the slaughtering of livestock and the production of hides constitute such processing as will defeat the retail establishment exemption unless, of course, they are segregated from the remainder of the business.

This opinion is based not only on general principles to which we have previously adhered but also on a study prepared by the Research and Statistics Branch of the Wage and Hour Division as part of its general reconsideration of processing in otherwise retail establishments. They have informed us that in the usual case slaughtering is carried on in an establishment segregated from the retail distribution, so that

few places will lose an otherwise applicable 13(a)(2) exemption by this construction.

Where the butchering is done on the farm, the 13(a)(6) exemption would seem to apply.

If the locker service were segregated from the processing activities, the 13(a)(2) would apply to the locker service if at least 50 percent of the service were performed for farmers or for private individuals.

#193325

In Reply Refer To
LE:VCW:VN

March 17, 1941

Mr. George C. Neal
Ruffin
North Carolina

Dear Mr. Neal:

This letter is in response to your communication of January 16, 1941.

Employees engaged in salvaging silk and nylon yarn from defective full-fashioned hosiery still in the gray, by unraveling the yarn and winding it on cones for reknitting, are entitled to receive 32½ cents an hour for their regular hours of work in accordance with the provisions of the wage order of the Administrator of the Wage and Hour Division for the textile industry.

For your information I am enclosing copies of the Fair Labor Standards Act and Employers' Digest of the act, the textile industry wage order, and Regulations, Part 522.

It is suggested that you communicate directly with the Social Security Commission regarding the procurement of application blanks for a social security certificate.

Very truly yours,

For the Solicitor

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

Enclosures (4)

196025

In reply refer to:
LE:MCD:FTR

March 18, 1941

Mr. H. Thomas Austern
Covington, Burling, Rublee, Acheson & Shorb
Union Trust Building
Washington, D. C.

Dear Mr. Austern:

This is in reply to your five letters of February 17, in which you raise various questions concerning the applicability of the Fair Labor Standards Act and the exemptions provided therein to certain situations arising in connection with the canning of fresh fruits and vegetables. We shall take up your questions in order.

1. You point out that in some sections of the country canners purchase a portion of their raw materials on produce exchanges rather than under acreage contracts. Where this is done, it is necessary for the canners to employ buyers to visit the exchanges and make the purchases. The buyers go early in the morning to the produce exchange in order to buy the products that are to be canned. After the purchase is made, it is necessary for the buyer to see to it that the raw materials are delivered to the canning plant for canning on the same day. You ask whether these buyers are within the scope of the section 7(c) exemption.

In our opinion such buyers are not within the section 7(c) exemption. They are not working in the "place of employment" where their employer is engaged in canning fresh fruits or vegetables. Since that is so, it is our opinion that the exemption is inapplicable to them.

2. Your next question concerns so-called field men, who perform the function of supervising the production and harvesting of the raw products which are purchased by the canners under acreage contracts with the growers. The activities of these men fall into three distinct categories. (a) During the early months of the year their principal duty is to secure acreage contracts. They call on various growers, adjust difficulties that may remain from the preceding year, discuss with the growers the acreage to be planted, the prices to be paid and secure the execution of written contracts, (b) When the

planting and growing season arrives the duties of the field men are directly related to the planting and growing of crops. They supervise the planting and cultivation of the crops, consult with the grower as to the type of seed which should be used, the method of planting to be followed, fertilization and any other problems of cultivation which may arise. During this period the field men are not required to report at the canning plant regularly. They do, however, periodically report to the canners on the condition of the various crops and may consult with the canners concerning particular problems of cultivation which may arise. (c) During the harvesting and canning periods the field men make the canning plant their headquarters and report there two or three times a day. This is necessary in order to coordinate the harvesting operations, which are done under the direction of the field men, with the operations of the canning plant. The field men watch the various farms under their supervision and report to the canners when the crops are expected to be ready for harvesting. The canners then plan their production, and work out a program for the harvesting of the various fields and the delivery of the crops at the plant. The field men see to it that the crops are harvested at the proper time, and that they are delivered to the canning plant immediately after harvesting.

You correctly point out that the section 7(b)(3) exemption appears to apply to field men during the early months of the year when they are obtaining acreage contracts. Your question is, if one of the section 7(b)(3) weeks is taken for a field man during this period, does this week count as one of the 14 weeks for the canning plant as a whole. The answer to this question is that it does so count. If it were not counted, in our opinion, the section 7(b)(3) exemption would thereby be transformed into something more than a 14 weeks exemption. Since the statute specifically limits it to a 14 weeks exemption, in our opinion, this week must count as one of the 14 weeks.

Your next question is whether the section 13(a)(6) exemption for employees "employed in agriculture" applies to the activities of these field men during the planting and growing season. In our opinion, if the activities of these men during this period are directly related to the cultivation and growing of agricultural commodities and if they work only on the farms save for an incidental amount of reporting to the canning plant, and do no other work, the section 13(a)(6) exemption applies to them.

Your next question is whether the work of the field men during the harvesting season comes under the section 7(c) exemption. You state that the hours of work of the field men are directly controlled by the irregular flow of the raw materials from the field to the cannery and their headquarters during this period is the canning plant. In our opinion, if the facts are as you present them, the field men should be considered as working in the "place of employment" during the harvesting period, since they make regularly recurring

trips to and from the cannery and may be deemed attached thereto. If the work of these men is directly controlled by the irregular flow of the raw materials from the field to the cannery, it is our opinion that the section 7(c) exemption applies to them.

3. You ask whether the section 7(c) exemption applies to essential maintenance and repair work which is performed between two canning seasons by canners who pack more than one commodity. For example, after the close of the season for canning one commodity, the canner may have only a limited number of days to get his plant ready for the canning of another commodity. Not only must he clean his plant and machinery and make all necessary repairs, but it may be necessary substantially to change the arrangement of his plant.

In our opinion the section 7(c) exemption does not apply to work of this character performed between seasons. The canner is not engaged in canning fruits and vegetables during this time and that reason alone is sufficient to prevent the exemption from applying.

4. You ask whether the section 7(c) exemption applies to labelling, casing, warehousing and shipping activities which are performed on commodities canned at an earlier date. You point out that where a canner has limited storage space it may be necessary for his warehouse crew to move or handle commodities packed at an earlier date in order to make room for the current pack.

The operations performed upon carry-over stock are not being performed upon fresh fruits and vegetables but rather upon fruits and vegetables that have been rendered nonperishable. In our opinion, therefore, the section 7(c) exemption does not apply to such operations. Pursuant to your oral request, however, we shall consider the question still further and shall communicate with you thereon in a few weeks.

5. Your next question concerns the operation of pea vineries by the canners. (a) You ask whether, as a general proposition, the vining of peas may be considered "harvesting" within the meaning of section 3(f). In our opinion, it may not be so considered.

(b) You next ask, if a vinery is located on a particular farm and vines only the peas grown on that particular farm, are the vinery employees to be considered "employed in agriculture" and thus exempt under sections 13(a)(6) and 3(f). In our opinion, the vining operations under such circumstances may be considered a practice "performed on a farm," as an incident to farming operations within the meaning of section 3(f) and may, therefore, be considered exempt. However, if the pea vinery vines not only the peas grown on that farm but also the peas grown on other farms, in our opinion, it is not within the exemption.

(c) You next ask whether in weeks in which vining stations vine only peas which are grown by the canner on farms owned or leased by him, the vining station employees are "employed in agriculture" within the meaning of section 13(a)(6). In our opinion the vining operations must be considered a part of the canning operations. So considered, the cannery operations, including the vinery operations, will be exempt under section 13(a)(6), if the canner cans only crops which he grows himself and if the canning operations are merely a subordinate part of the farming operations. Paragraph 10 of Interpretative Bulletin No. 14, indicates some of the tests which determine whether the canning operations will be considered merely a subordinate part of the farming operations.

Whether the exemption may apply in a situation where the canner cans crops grown on lands leased by him will depend upon all the facts in the case concerning the particular lease arrangement or arrangements. Without all of such facts before us in a particular case, we are unable to express an opinion.

(d) Your next question is this: Where the vining station is located away from the canning plant, is each vining station a separate place of employment for which a separate 14 weeks of exemption may be taken under either section 7(c) or section 7(b)(3). In our opinion, each vining station does not constitute a separate place of employment for this purpose. The same 14 weeks of exemption must be taken for both the cannery and all the vining stations. This is true with respect to both the section 7(c) and the section 7(b)(3) exemptions.

(e) Next you ask: If the vining stations are not separate places of employment for purposes of section 7(c), does the section 7(c) exemption nevertheless apply to such vining stations. In our opinion the exemption applies to the vining stations, if the work at both the vineries and cannery is performed as part of a continuous series of operations throughout which the peas remain perishable.

6. Your last question concerns the applicability of section 7(c) to the preparation of fresh fruits or vegetables which are subsequently to be used in the canning of a product considered by the Administrator to be nonperishable. For example, a canner may be engaged in processing tomatoes and at the same time on a segregated line, he may be canning pork and beans in which a tomato sauce prepared from fresh tomatoes is used. The same employees would be employed in peeling and preparing tomatoes for the tomato line and also for use in the making of sauce for pork and beans. The question is whether the fact that some of the tomatoes are to be used in canning pork and beans destroys the exemption under section 7(c) to which the employees engaged in peeling tomatoes would otherwise be entitled.

If we assume that the tomato sauce which is made by these employees is made directly from the fresh tomato and that the same employees do not also can any pork and beans, in our opinion the section 7(c) exemption applies to them.

In this same connection you ask whether if the canner canned only pork and beans, the employees preparing the tomatoes to be used in making the sauce would still be under the section 7(c) exemption. We believe that if such preparatory work is "first processing," as we have explained the meaning of that term in paragraph 19 of Interpretative Bulletin No. 14, and the work performed by these employees is upon the fresh tomatoes only, and if they do no other work, the section 7(c) exemption applies to these employees.

Sincerely yours,

Philip B. Fleming
Administrator

(7697)

In Reply Refer To:
LE:GFH:HH

March 18, 1941

W. J. Hester, Esquire
The University of Miami
Coral Gables, Florida

Dear Mr. Hester:

I sincerely regret that an earlier reply to your letter of October 18, 1940, addressed to Mr. Jacobs, has not been possible.

I quote from your letter:

> "Certain non-administrative or executive employees of the University of Miami, notably stenographers and typists, occasionally are engaged in the compilation and transcription of information which is eventually published in bulletins of the University, and distributed through the United States mails to prospective students in foreign States and Countries. Under the definition of the expression "in the production of goods for commerce" appearing in the Interpretative Bulletin No. 5, dated December, 1938, and the Amendments thereto, it appears that these employees may be held to be subject to the administration of the Fair Labor Standards Act."

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, 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. From the facts appearing in your letter it would seem that the act applies to the employment which you describe.

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The act provides that employees must be paid not less than 30 cents an hour and overtime compensation at not less than time and one-half their regular rate of pay for all hours worked in excess of 40 in a workweek. I am enclosing a copy of our Interpretative Bulletin No. 4 dealing with maximum hours and overtime compensation.

I also direct your attention to section 16(b) of the act authorizing an employee to institute proceedings against his employer for twice the amount of his unpaid minimum wages or unpaid overtime compensation, as the case may be.

For your further information I am enclosing an Employers' Digest and Regulations, Part 516, which deal with the record keeping requirements of the act.

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 (7)
165019

In Reply Refer To:
LE:GFH:HH

March 18, 1941

Mr. A. C. Glassell, Jr.
Glassell Drilling Company, Inc.
203 Calcasieu National Bank Building
Lake Charles, Louisiana

Dear Mr. Glassell:

This will reply to your letter of October 31, 1940, addressed to General Fleming, in which you inquire concerning the application of the Fair Labor Standards Act to a situation which you present. I regret that, due to the fact that your letter was mislaid in our files, an earlier reply has not been possible.

I quote from your letter:

> "Our company is engaged in the business of drilling oil and gas wells, and we have in the past, and are at the present time conforming with all provisions of the Fair Labor Standards Act of 1938. However, we foresee idle periods between locations in the future, at which time it will be necessary for us to employ a resident watchman, who will live in a trailer house on the lease near the rig and watch twenty-four hours per day, with the exception of occasionally being relieved."

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. As will be noted from paragraph 13 of Interpretative Bulletin No. 5, a copy of which is also enclosed, the act applies to employees engaged in maintaining buildings or machinery used to produce goods for commerce. In our opinion it is not necessary in order to establish coverage in such situations that the particular machinery be in operation at the precise moment when the watchman is performing his duties. It is our opinion that if such machinery is used intermittently in the production of goods for interstate commerce, employees engaged in maintaining it between jobs, with

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a view to preserving such machinery in contemplation of its future use in the production of goods for commerce, are engaged in a "process or occupation necessary to the production" of goods for commerce within the meaning of section 3(j) of the act and hence are within the act's general coverage.

The act provides that employees must be paid not less than 30 cents an hour and overtime compensation at not less than time and one-half their regular rate of pay for all hours worked in excess of 40 in a workweek. I am enclosing a copy of our Interpretative Bulletin No. 4 dealing with maximum hours and overtime compensation.

I also direct your attention to section 16(b) of the act authorizing an employee to institute proceedings against his employer for twice the amount of his unpaid minimum wages or unpaid overtime compensation, as the case may be.

For your further information I am enclosing Regulations, Part 516, and an Employers' Digest. 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)
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LE:WTN:VAS

MAR. 18, 1941

Honorable Overton Brooks
House of Representatives
Washington, D. C.

Dear Congressman Brooks:

This is in reply to your letter of January 21, 1941, transmitting an inquiry concerning the Fair Labor Standards Act of 1938, which was addressed to you by Mr. John A. B. Smith, Secretary-Treasurer of the Shreveport Wholesale Credit Men's Association, Inc., Ardis Building, Shreveport, Louisiana. Mr. Smith raises a question as to whether or not an employer may pay an employee at his customary hourly rate of pay for time not worked due to "illness, vacation, or other reasonable excuse" without running the risk of increasing the employee's regular rate of pay for overtime purposes under the act.

With respect to overtime, the act requires that an employer, who works any employees, subject to its provisions, more than forty hours in a workweek, pay such employees overtime compensation at a rate of one and one-half times their regular rate of pay. Under this provision, an employer is free to pay an employee for time during which the employee is not at work. The overtime provision is simply that hours worked in excess of forty per week be compensated for at time and one-half. Whenever overtime is worked, the problem presented is that of determining an employee's regular rate of pay so that overtime compensation may be computed thereon. Under the interpretations of the Wage and Hour Division, an employee's regular hourly rate of pay is determined by dividing the hours which he works, during a workweek, into the total earnings for such hours of employment (see paragraph 7 of Interpretative Bulletin No. 4, a copy of which is enclosed).

The question you present can arise only where an employee receives an hourly rate of pay or a salary for a regular number of hours per week (the equivalent of an hourly rate of pay) and is paid at such rate for hours not worked due to vacation, holiday, illness, or other similar cause. Where an employee is paid a salary without regard to the number of hours worked it cannot be said that he is paid for holidays and the like; the salary compensates for whatever hours he works, no more no less, and he has no set hourly rate of pay which can be attributed to hours not worked. Assuming, therefore, that an employee is paid at his regular hourly rate of pay for hours

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when he is not at work due to vacation, holiday, illness, or other similar cause, the amount so paid is not compensation for hours worked and need not be included in computing the employee's regular rate of pay and overtime compensation under the act. The very term, holiday or illness with pay, negates the idea that such payment was made for hours worked.

It is pointed out in paragraph 70(7) of Interpretative Bulletin No. 4 that payment to an employee at his hourly rate of pay for hours not worked does not constitute payment of overtime compensation and may not, therefore, be credited against overtime compensation due under the act. It is stated that such payment is not compensation for overtime work and likewise does not alter the employee's regular hourly rate of pay. The considerations which dictate that interpretation are like those which control here.

The employer's records must, of course, show the hours of absence and the amount paid therefor, if a sum so paid is to be excluded when an employee's regular rate of pay and overtime compensation under the act are computed.

I am returning your constituent's letter herewith.

Sincerely yours,

Philip B. Fleming
Administrator

Enclosures (3)

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In reply refer to:
LE:EB:JC

March 19, 1941

DeForest P. Davis, Esquire
Cassels, Potter and Bentley
1060 The Rookery
Chicago, Illinois

Dear Mr. Davis:

This will acknowledge receipt of your letters of January 24, February 8, and February 26, 1941, in which you inquire about the application of the Fair Labor Standards Act to certain situations presented by you. We regret that it was not possible to accord an earlier reply to your communications.

In your letter of January 24, 1941, you inquire about the applicability of the act to certain groups of employees of a company engaged in selling merchandise at wholesale across state lines. The first group of employees described by you work in retail stores usually operated by a chain, demonstrating merchandise to customers and instructing retail store personnel in the presentation and sale of merchandise sold by your client at wholesale to the chain store company or retailer. During the course of the demonstration, the demonstrators regularly make sales at retail, all of which are intrastate in nature. As you point out, the demonstrators are paid by your client and are shifted from store to store or chain to chain within a particular state. You inquire as to whether these employees should be considered exempt because engaged either in a bona fide local retailing capacity or in a retail establishment within the meaning of the act and the regulations.

It is the opinion of the Wage and Hour Division that the demonstrators, during those full workweeks in which they work in a particular retail store, are exempt under section 13(a) (2) of the act, in view of the fact that these demonstrators (although they are employees of the wholesale company) would seem to be "engaged" in a retail establishment the greater part of whose selling or servicing is in intrastate commerce.

During such workweeks in which the demonstrators are shifted from store to store, they would not come within the section 13(a)(2) exemption. Assuming, however, that the demonstration of merchandise by these employees is designed for the purpose of making retail sales to customers and actually results in such sales being made by the demonstrators, the demonstrators may come within the local retailing capacity exemption provided by section 13(a)(1) of the act if their hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by such nonexempt employees. See section 541.4 of Regulations, Part 541, a copy of which is enclosed. The work performed by the demonstrators in instructing retail store personnel is considered as nonexempt work. So also is any other work which is not intended to result in a retail sale by the demonstrator.

The second group of employees mentioned in your letter of January 24, 1941, perform duties ordinarily performed by outside salesmen and, in addition, duties similar to those of the first group of employees. You point out that these employees spend the larger part of their working day in conducting demonstrations of your client's merchandise in the department stores to which they sell such merchandise at wholesale; they do not, however, ordinarily make any retail sales, such sales usually being handled by a member of the department store staff. It would seem that these employees are not exempt under the local retailing capacity exemption. Their work is designed to instil a general interest in the type and quality of your client's merchandise rather than to perform work immediately incidental to the retail sale of such merchandise. The outside salesman exemption would likewise seem to be inapplicable to these employees in view of the fact that their nonexempt work, as it appears from your letter, exceeds 20 percent of the number of hours spent by nonexempt employees within the meaning of section 541.5 of Regulations, Part 541.

In your letter of February 8, 1941, you inquire about the applicability of the Fair Labor Standards Act to certain employees of a building and construction contractor doing business in several states, who are employed in constructing and repairing electric power lines pursuant to a contract between the contractor and an electric light and power company. As you know, paragraphs

12 and 13 of Interpretative Bulletin No. 5 set forth the broad outlines of the opinion of the Wage and Hour Division regarding building and construction work. Since it appears from your letter that the utility housed in the building which you describe does not receive power from other states and does not transmit its power to other states, but is engaged merely in producing power for consumption within the state, a portion of which power is consumed by other concerns in the production of goods for interstate commerce, it is believed that a situation is presented with regard to which we are not prepared to render a definite opinion at the present time. Particular employees of a contractor whom you described as repairing and reconstructing such a building, however, may be engaged in receiving or unloading interstate shipments of materials or in other forms of interstate commerce, and, if such is the case, it is our opinion that such employees are within the general coverage of the act during all workweeks in which they are so engaged.

It is the policy of the Wage and Hour Division in cases in regard to which we are doubtful as to the matter of coverage not to institute enforcement proceedings unless and until we have expressed a definite opinion that coverage exists and have given adequate notice of our intention to enforce the act on the basis of such opinion. Interested parties, however, are advised that under section 16(b) of the act, employees are given an independent right to bring suit against employers for double the amount of unpaid minimum wages and double the amount of unpaid overtime compensation. The enforcement policy expressed above cannot bar such suits and thus an employee may sue his employer for unpaid wages and unpaid overtime compensation allegedly due for the whole period of his employment since the effective date of the act.

Very truly yours,

For the Solicitor

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

Enclosure

100429
199206
205356

In Reply Refer To:
LE:FR:HS

March 20, 1941

Horace Russell, Esquire
United States Savings and Loan League
333 North Michigan Avenue
Chicago, Illinois

Dear Mr. Russell:

Please refer to your letter of June 20, 1940, concerning the applicability of the Fair Labor Standards Act of 1938 to employees of various savings and loan associations. You will recall we replied in a preliminary fashion to this letter under date of October 5, 1940, pending the result of an investigation conducted by the Research and Statistics Branch of the Wage and Hour Division.

The Wage and Hour Division is of the opinion that, in the ordinary case, the normal activities of finance companies, such as savings and loan associations, are such that their employees are engaged in interstate commerce and are within the coverage of the act. You appreciate, of course, that in any specific case, an opinion of the division could only be based upon a full knowledge of all the facts. Among the activities of such associations which, I believe, subject them to the coverage of the act are the making of loans to people residing in other states and the taking as security of property located in other states. Many of these associations also join Federal Home Loan Banks or insure accounts with the Federal Savings and Insurance Corporation. These activities frequently involve engaging in interstate commerce. Similarly, the selling of stock to the Federal Government or the acceptance of deposits of the Federal Government may constitute engaging in commerce, since they may involve commercial transactions across state boundries.

It should be emphasized that the language of the United States Supreme Court in the recent case of United States of America v. F. W. Darby Lumber Company, decided February 3, 1941, lends support to the position of the division that the test of engaging in interstate commerce is not quantitative, and that coverage exists even though only part of an employer's activities involve interstate commerce.

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It is accordingly our opinion that, in general, employees of such associations will be entitled to the benefits of the act unless specifically exempt therefrom. It is possible that certain employees may be exempt under section 13(a)(1). See Regulations, Part 541, a copy of which is enclosed.

Very truly yours,

For the Solicitor

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

Enclosure
126458

C O P Y

In Reply Refer To:
LE:WTN:RL

March 22, 1941

Mr. W. D. Grant
President and General Manager
Skowhegan Boat & Canoe Company
Norridgewock, Maine

Dear Mr. Grant:

This is in response to your letter of February 19, 1941, concerning the provisions of the Fair Labor Standards Act. Congresswoman Margaret Smith has also raised a similar question on your behalf. We are enclosing for your general information copies of the act, the Employers' Digest, and Interpretative Bulletin No. 4.

Employees subject to the provisions of the act are entitled thereunder to compensation at a rate of not less than 30 cents an hour and overtime compensation at one and one-half times the regular rate at which they are employed for hours worked in excess of 40 per week. The act does not specify the periods at which the compensation necessary to compliance with its provisions must be paid. However, where full payment of all compensation due under the act is not made regularly at the employer's customary pay period, the employer is clearly in default to the employee under the act. It is the position of the Wage and Hour Division, therefore, that an employee should be compensated at the end of each pay period in an amount equal to the total of sums due him under the act. In this connection, your attention is directed to paragraphs 29, 42, and 43 of Interpretative Bulletin No. 4.

By failing to pay an employee in full at the end of each pay period, and thereby putting himself in default under the act, an employer is not only subject to the customary enforcement proceedings of the Wage and Hour Division, but also to suits by employees pursuant to section 16(b) of the act to recover unpaid minimum wages or overtime compensation, and an equal amount as damages, and a reasonable attorney's fee.

Sincerely yours

Philip B. Fleming
Administrator

Enclosures (3)

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CC: Congresswoman Margaret Smith

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