UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

April 2, 1941

Legal Field Letter
No. 50

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
3-22-41	Rufus G. Poole (EGL)	Donald M. Murtha	Raw Fur Receiving (Seasonal exemption for this industry.) (p. 74, par. P; p. 94, par. T.)
3-25-41	Rufus G. Poole (EGL)	Dorothy M. Williams	Section 7(b)(3) (Whether the exemption applies on an individual employee basis, comparison with Section 7(c) exemption as it applies to a night watchman where the employer takes the Section 7(b)(3) exemption for such watchman during the same 14 workweek period in which he applies the Section 7(c) exemption to other cannery employees.) (p. 43, par. 12; p. 66, par. L; p. 74, par. P; p. 94, par. 1; p. 95, par. U.)
3-28-41	Philip B. Fleming (GFH)	Russell Sturgis	Coverage of gardener tending factory yard. (p. 29, par. 7; p. 40, par. 8; p. 150, par. F.)

Legal Field Letter
No. 50

MEMORANDA

Date	From	To	Subject
3-29-41	Rufus G. Poole (FR)	Llewellyn B. Duke	Request for Opinion (Computation of hours worked; travel time, where employees must travel by boat to reach the oil wells at which they work. Whether time spent at site of work waiting for boat to take employees back should be considered hours worked when employees are detained because of atmospheric conditions. Whether deductions can be made for boat fare from the employee's wages.) (p. 123, par. 18; p. 123, par. 19; p. 248, par. E.)
3-31-41	Rufus G. Poole (GFH)	Donald M. Murtha	Lametti & Lametti Townsend, Montana File No. 25-115 (Whether a company engaged in the placer mining of gold and doing certain test digging operations before actual placer mining takes place is subject to the Act with respect to such test operations.) (p. 182, par. 3.)

LETTERS

Date	To	Subject
3-24-41	Ira Butler Fort Worth, Texas	(Computation of hours worked; traveling time — where the employer furnishes means of conveyance to employees to site of work as a convenience to the employees and there are other reasonable means of transportation to site of work available.) (p. 123, par. 18.)
3-25-41	J. G. Youngquist Rock Island, Illinois	(Whether part-time writers and editors doing work for publishing companies are employees of such publication houses.) (p. 35, par. 10; p. 49, par. B; p. 64, par. (j).)

LETTERS

Date	To	Subject
3-26-41	William J. Higley Toledo, Ohio	(Whether the employees of a custom tailor who makes clothes to order are included within an applicable wage order, or come under Section 13 (a)(2).) (p. 69, par. M; p. 102, par. DD; p. 148, par. (b); p. 256, par. R.)
3-28-41	American Can Company New York, New York	(Whether "road service men" employed by can manufacturing companies are exempt under the Section 7(b)(3) exemption, since their work is subject to the demands of the canning seasons.) (p. 42, par. 10(c); p. 74, par. P; p. 94, par. T.)
3-31-41	S. J. Campbell Fayetteville, Arkansas	(Whether the members of a canner's family working in a cannery should be counted in determining whether the number of employees in the establishment engaged in canning operations exceeds 10 within the meaning of the "area of production".) (p. 56, par. 1(a); p.111, par. KK.)

COPY

March 22, 1941

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

LE:EGL:LL

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

Raw Fur Receiving

This is in reply to your memorandum of February 27, 1941.

You ask about the seasonal exemption that has been granted to the raw fur receiving industry and about the correlation between press releases R-1243 and R-611.

R-1243 supersedes R-611. The finding of facts of the presiding officer at the hearing that was held concerning this exemption and which are contained in press release G-102 further explain the nature and the scope of the exemption.

The exemption is not limited to specialized raw fur receiving houses that operate in the chief fur trading centers. It is applicable to all fur receiving houses that come within the determination in R-1243. The mere fact that an establishment, in addition to the receiving, handling, scraping and drying of raw furs, performs other activities such as handling and preparing wool, hides, and scrap metal, does not prevent it from taking advantage of this seasonal exemption. However, for section 7(b)(3) to apply to any employee, he, the employee, must be exclusively engaged in the exempt industry, performing the described operations on raw fur.

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AIR MAIL LE:EGL:LL

Miss Dorothy M. Williams
Regional Attorney
San Francisco, California

3/25/41

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

Section 7(b)(3)

In your memoranda of February 21, 1941, and March 15, 1941, you ask whether an employer must take the section 7(b)(3) exemption for all of his employees in the establishment during the same workweeks or whether the exemption applies to each employee on an individual basis. The question has been raised by a cannery that intends to operate for a 20 workweek period. The employer desires to take the section 7(b)(3) exemption for a night watchman during the same 14 workweek period in which he applies the section 7(c) exemption to other cannery employees; for the last six workweeks the employer intends to take the section 7(b)(3) exemption for these other employees.

In our opinion, the section 7(b)(3) exemption does not apply on an individual employee basis. Were the exemption construed to be applicable to individual employees, an employer in an industry found by the Administrator to be of a seasonal nature could, by constantly replacing his employees with others, obtain the advantages of the seasonal exemption the year around. Such a result would obviously defeat the purpose of the exemption. Furthermore, such a construction would involve the Wage and Hour Division in great administrative difficulties, because it would be necessary to determine whether each employee engaged in a seasonal industry had previously worked during the calendar year for another employer in the same industry.

For these reasons we are of the opinion that an employer may not take the section 7(b)(3) exemption for each of his employees on an individual basis. The canning company to which you refer may apply the section 7(b)(3) exemption to its night watchman during the same period that it applies the section 7(c) exemption to the rest of its employees, but if it does, it will exhaust the 7(b)(3) exemption at the same time that it exhausts the 7(c) exemption.

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AIR MAIL

Mr. Russell Sturgis
Acting Territorial Representative
San Juan, Puerto Rico

LE:GFH:HES

March 28, 1941

Philip B. Fleming
Administrator

Coverage of gardener tending factory yard.

This is in reply to your communication of January 31, 1941, in which you inquire concerning the status under the act of a gardener employed to cut the grass and trim the flowers in the yard outside a rum factory, which is engaged in the production of rum for interstate commerce.

If the yard is adjacent to the factory building and maintained as a part of the plant premises, which we assume is the case, it is our opinion that such an employee is within the general coverage of the act as being engaged in maintaining a building used to produce goods for commerce. In our opinion, the duties of such an employee from a functional point of view are not sufficiently different from those of a janitor servicing the building itself to warrant drawing a distinction between the two situations.

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(7776)

Llewellyn B. Duke, Esquire
Regional Attorney
Dallas, Texas

LE:FR:DCW

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

March 29, 1941

Request for Opinion

This will reply to your memorandum of February 28, 1941, with which you attached a copy of a letter from Mr. Rice M. Tilley raising certain questions concerning the applicability of the act to oil well contractors. Mr. Tilley inquires as to the proper manner of determining hours worked in cases in which the employees must travel by boat to reach the well at which they work. The employer furnishes transportation from a wharf to the well but does not require that the men report at the wharf, permitting them to come in their own boats. If, as a matter of fact, the employees have a bona fide option as to the means of conveyance, the employer need not consider the time spent traveling from the wharf to the well to be hours worked unless, as indicated in paragraph 12 of Interpretative Bulletin No. 13, it is unreasonably disproportionate to the normal time required in reporting for work. If, however, the employees have no real choice but to travel by the boat furnished by the employer, then transportation from the wharf to the well and back should be considered as hours worked. Where the employee is detained at the job site because of atmospheric conditions, such time should be considered hours worked under paragraph 4 of Interpretative Bulletin No. 13.

In regard to the propriety of possible deductions from employees' wages for the boat fare, it is our opinion that this is improper. This is not a facility within the meaning of section 3(m) of the act. Further, even if it is a facility, it seems primarily for the benefit of the employer.

Assuming that the hours worked involve overtime under the act, computations of regular rate of pay and overtime compensation should be made according to the methods outlined in Interpretative Bulletin No. 4. The attention of your inquirer may be called particularly to paragraphs 1, 3 through 7, and 14 of the bulletin.

With respect to the proposal for reducing the employees' rate of pay you may direct his attention to the fact that section 7 of the act requires that an employee receive overtime compensation for the hours in excess of 40 per week "at a rate not less than one and one-half times the regular rate at which he is employed."

In enacting this section Congress sought, by penalizing overtime, to induce employers to reduce hours and hire more employees. Any reduction in a rate of pay designed to offset the effect of the overtime penalty is contrary to the purpose of the act. In section 18 Congress said specifically that no provision of the act would justify an employer in reducing a wage paid in excess of the minimum. However, no penalty is provided in the act for action contrary to its purpose in this respect. The Wage and Hour Division does not, therefore, proceed against an employer who reduces a rate of pay to avoid the effect of the overtime penalty.

If, however, the employer does not in fact reduce the rate of pay but manipulates the rate so as to avoid paying an overtime penalty the division will look upon his action as a violation of the express language in section 7. In this connection, see paragraphs 16 through 27 of Interpretative Bulletin No. 4.

210876

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

LE:GFH:MF

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

March 31, 1941

Lametti & Lametti
Townsend, Montana
File No. 25-115

- 3 -

(7776)

This is with reference to your memorandum of February 4, 1941, addressed to Walter F. Scherer, Esquire, on the above subject.

I quote from your memorandum:

> "The above firm is engaged in placer mining of gold. The work in question consisted of digging test holes, loading the earth and gravel into a truck and hauling it down the gulch. The men also cleaned out the dirt and handled it through the sluice box. This was all done to determine just where to start operations when the washer arrived. There were four men employed who received board, lodging, tobacco and a little cash for their work. No wages were paid."

It is our opinion that the employees whom you describe were covered by the act provided that the employer at the time the described operations were being performed intended or hoped or had reason to believe that the gold produced as a result of such activities would move in interstate commerce. See in this connection Legal Field Letter No. 26, page 57, and Legal Field Letter No. 34, page 21.

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(7776)

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COPY

In reply refer to:
LE:FR:SL

MAR. 24, 1941

Ira Butler, Esquire
W. T. Waggoner Building
Fort Worth, Texas

Dear Mr. Butler:

This will reply to your letter of March 11, 1941 in which you inquire as to the applicability of the Fair Labor Standards Act of 1938 to a situation which you present. You state:

> "If a crew of workers at their option report to a designated place at a specified hour and are then driven to the place where they are to perform work, in lieu of proceeding directly to the place of work, should the time spent in riding to such place of work in the employer's conveyance be considered hours worked, provided the traveling time required to reach the place where the productive work is to be performed is not unreasonable?
>
> "In the above case, if the employer also furnishes transportation from the place of work to a designated place, which transportation the employees may use at their option, should the time thus spent in returning be considered hours worked? The transportation to and from work is furnished by the employer as a matter of convenience for the employees, and they may proceed directly to and from the place where they are to perform work if they prefer."

The views of this office with respect to the proper determination of hours worked are to be found in Interpretative Bulletin No. 13. Your attention is specifically directed to paragraphs 2 and 9 through 14 thereof.

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If the employees are not required to report at a place other than the job site, if other reasonable means of transportation to the job site are available, and if the time required to reach the job site is not unreasonably disproportionate to the normal traveling time required to reach the employees' usual place of employment, the mere fact that the employer furnishes transportation to the job site need not cause the travel time to be considered hours worked.

If, however, the men after reporting for work are transported from one place to another where they continue working, the travel time should be considered hours worked whether the employees travel in the employer-furnished conveyance or otherwise.

Yours very truly,

For the Solicitor

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

Enclosure
214685

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March 25, 1941

In Reply Refer To:
LE:EB:EH

Mr. J. G. Youngquist
Publishers' Advisory Section
International Council of Religious Education
639 - 38th Street
Rock Island, Illinois

Dear Mr. Youngquist:

Reference is made to your letter of November 20, 1940, addressed to General Fleming, in which you inquire concerning the application of the Fair Labor Standards Act of 1938 to certain regular and occasional writers and editors who are doing part time work for your publication houses. I regret that, due to the great flood of inquiries which we have received in recent months, an earlier reply has not been possible.

The Wage and Hour Division has announced the position that part time correspondents whose performance of work is subject to the supervision or control of the publisher, or who are employed on a salary basis, are employees within the meaning of the statutory definition of the employer-employee relationship contained in section 3(d), (e) and (g) of the act. On the other hand, if part time correspondents are paid on space rates and submit copy only upon their own initiative and within their own discretion, such correspondents may not be employees under the act if the publisher exercises no supervision or control over their work.

For your further information I am enclosing our Regulations, Part 541, and the report and recommendations of the presiding officer upon which these regulations are based. The requirements that must be satisfied by a professional employee in order to be exempt are set forth in section 541.3 of the regulations. These requirements must be fully complied with in order for the exemption to apply. I am also directing your attention to pages 40 and 41 of the enclosed report.

Very truly yours,

For the Solicitor

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

Enclosures (3)
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(7776)

COPY

In reply refer to :
LE:FR:SL

March 26, 1941

William J. Higley, Esquire
515 Security Bank Building
Toledo, Ohio

Dear Mr. Higley:

This will reply to your letter of March 4, 1941, in which you discuss further the applicability of the Fair Labor Standards Act of 1938 to employees engaged in making clothes to order.

With respect to the possible applicability of the exemption provided by section 13(a)(2), it is our opinion that the exemption is inapplicable in the case of an establishment engaged in manufacturing operations. In regard to the specific cases to which you allude, it is our opinion that the bakery engaged in producing goods is not a retail establishment within the exemption and the restaurant is exempt not as a retail establishment but rather as a service establishment. In the case of department stores or home furnishing stores the exemption is likewise defeated with respect to any departments which engage in manufacturing. Of course, in a typical case the processing in a department store consists merely in cutting an already finished article to a specified size, and this will not defeat the exemption any more than will alterations to garments carried on in a retail clothing store. The apparel wage orders apply to the products specified therein, no matter by whom or where produced.

Hence, the employees of a custom tailor are included within any applicable order. In this connection note the enclosed general definition of the apparel industry contained in release R-131.

Very truly yours,

For the Solicitor

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

Enclosure
212438

(7776)

Copy

In reply refer to:
LE:MCD:SAF

March 28, 1941

American Can Company
New York Central Building
New York, New York

Gentlemen:

There has been referred to us the question presented by you of whether "road service men," employed by can companies, are within the exemption which has been granted under section 7(b)(3) of the Fair Labor Standards Act to the canning of fresh fruits and vegetables.

It is the duty of "road service men" to visit customers of the company during canning season so as to insure proper operation of the closing machines. They see to it that cans as they come to the customer are in a satisfactory condition, so that when filled the contents will be properly preserved. They give advice to the customers with respect to their operating problems, and in addition, they make adjustments on the machines which are leased to the canners. In the event of an emergency these service men will replace work parts. Their most essential function is to locate quickly sources of operating troubles. Generally they see to it that canning conditions are in accord with recommended practice.

It is stated that the hours worked by these employees are entirely governed by the hours of operation of the canner. Each service man is assigned at the start of the canning season to a certain territory which may include many canning plants; he establishes headquarters at some central point and his whereabouts are made known to all canners who may require his services. A thorough inspection of all plants within his area is conducted. The service man may be assigned to one area for the pea canning season and, when that is completed, assigned to another area during the tomato packing season. The remainder of his time is spent in closing machine stations, overhauling, testing, and building new closing machines.

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It is our opinion that the exemption which has been granted under section 7(b)(3) to the canning of fresh fruits and vegetables applies only to those employees who can be said to be employed in the "canning" industry. The exemption does not apply to employees in the can manufacturing industry, even if their work is closely related to the canning operations. Since it seems very clear that the "road service men" are employed in the can manufacturing industry and not in the canning industry, it is our opinion that the section 7(b)(3) exemption is inapplicable to them.

Very truly yours,

For the Solicitor

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

211507

COPY

In Reply Refer To:
LE:EGL:FB

March 31, 1941

Mr. S. J. Campbell
Central Canners, Inc.
Fayetteville, Arkansas

Dear Mr. Campbell:

This is in reply to your letter of March 4, 1941, in which you inquire whether the members of a canner's family working in a cannery are to be counted in determining whether the number of employees in the establishment engaged in canning operations exceeds ten within the meaning of the term "area of production" as defined in section 536.2(II) of Regulations, Part 536.

Section 3(e) of the Fair Labor Standards Act, a copy of which is enclosed, states "'Employee' includes any individual employed by an employer." Section 3(g) states "'Employ' includes to suffer or permit to work." Thus in determining whether employees of a cannery are employed within the area of production, the members of the family of the canner, that are engaged in the establishment in the operations described in section 13(a)(10), must be counted along with the other individuals in the establishment that are engaged in those operations. If that number exceeds ten, none of the employees are employed within the area of production and the section 13(a)(10) exemption would be inapplicable.

Your next question is in regard to a cooperative canning company that is organized by a group of farmers and that cans only the tomatoes grown by these farmers. You ask whether the members of the families of these farmers working in the cannery are exempt from the provisions of the act even though there are more than ten employees in the establishment. You ask the same question about employees who are not members of these families. As it is pointed out in Interpretative Bulletin No. 10, a copy of which is enclosed, employees are not exempted from the benefits of the act merely because they are employees of a farmers' cooperative association. Thus, if there are more than ten employees in the cannery to which

you refer, engaged in the operations described in section 13(a)(10), the employees would not be employed within the area of production as that term is defined in section 536.2(II). This would be true whether or not some of the employees belong to families of members of the cooperative.

On April 1, 1941, new regulations defining the term "area of production" becomes effective. A copy of these regulations and of a press release concerning them is enclosed. The opinion we have expressed concerning your questions is also applicable to the new regulations.

In the event section 13(a)(10) is inapplicable to your situation, section 7(c) should be considered. That section provides an exemption from the maximum hour provisions only, for an aggregate of 14 workweeks in a calendar year, for the employees of an employer engaged in the first processing of or in canning or packing perishable or seasonal fresh fruits or vegetables. For information concerning this exemption your attention is directed to paragraphs 14, 19 and 22 through 24 of the enclosed copy of Interpretative Bulletin No. 14. The exemption is not limited by the term "area of production." However, it does not relax the minimum wage provisions of the act.

Section 7(b)(3) provides that employees engaged in industries which are found by the Administrator to be of a seasonal nature may be employed in excess of the prescribed maximum hours for not more than 14 workweeks in the aggregate in any calendar year provided they are paid overtime compensation at one and one-half times their regular rate of pay for employment in excess of 12 hours in any workday and in excess of 56 hours in any workweek. The Administrator has determined that the first processing, canning and packing of perishable or seasonal fresh fruits and vegetables is a branch of a seasonal industry (see the enclosed releases G-61 and R-974).

Very truly yours,

For the Solicitor

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

Enclosures (7)

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