UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

April 8, 1941

Legal Field Letter
No. 51

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
3-28-41	Rufus G. Poole (LPH)	Aaron A. Cohen	Re Your Request for Opinion on the Herbert Custom Tailoring Company. (Applicability of Apparel Wage Order to segregated employees in two factories manufacturing men's clothes and rainwear, who prepare swatchings or samples of various fabrics from which garments are manufactured.) (p. 199, par. C; p. 256, Par.R.)
4-1-41	Rufus G. Poole (ILS)	Dorothy M. Williams	C. W. Heim Redwood, Oregon File No. 36-320 Application of Section 13(a)(10) to Handling of Livestock. (Words and Phrases - "packing" and "handling".) (p. 57, par. p. 112, par. 1(d); p. 258, before par. O; p. 260, before par. ".)
4-1-41	Rufus G. Poole (FR)	George A. Downing	Request for Interpretative Opinion (Whether booking employees of a motion picture company, who work after hours in distributing trailers for the War Department to encourage enlistment in the armed forces should be compensated for such extra hours according to provisions of Act, since the motion picture company has volunteered to handle the films and get them to and from various theatres without charge to the War Department.) (p. 120, par. B; p. 179, par. 1(b); p. 197, par. 13.)

Legal Field Letter
No. 51

MEMORANDA

Date	From	To	Subject.
4-1-41	Rufus G. Poole (WTN)	Baird Snyder	Memorandum of L. A. Hill, Regional Director, relative to the fluctuating workweek. (p. 130, par. M.)
4-1-41	Rufus G. Poole (GFH)	Herman Marx	Industrial Utilities Corporation (Whether Act is applicable to man employed by a service company engaged in cleaning freight cars which have been taken to the so-called "dead track" in the railroad yards.) (p. 39, par. I; p. 190, par. 4.)
4-1-41	Rufus G. Poole (ILS)	Donald M. Murtha	Application of Section 7(c) to so-called "Wax Men" in poultry plants. (p. 66, par. L; p. 98, par. 2(b).)
4-3-41	Rufus G. Poole (ILS)	Arthur E. Reyman	Fairmont Creamery Company File No. 31-6304 Application of Section 7 to dairy operations. (When part of such operations falls under Section 7(c) and part is outside the coverage of the Act.) (p. 67, par. 3; p. 98, par. 3.)
4-4-41	Rufus G. Poole (FR)	Samuel P. McChesney	Colorado Costume Company Denver, Colorado File No. R-5-150 (Applicability of Section 13(a)(2) exemption to a theatrical costume house which rents costumes, etc., to public schools, etc., 60% of its business being with schools located within the state and 20% with institutions located outside the state; the company accumulates the costumes from various sources and only made 6 costumes during the past year.) p. 6[illegible], par. M; p. 102, par. DD; p. 16[illegible], par. 2.)

Legal Field Letter
No. 51

MEMORANDA

Date	From	To	Subject
4-5-41	Rufus G. Poole (ADH)	D. Lacy McBryde	Deductions by the Whitley Cotton Mill, Inc., Clayton, N. C. (Whether deductions can be made for purchases from a store owned by the Secretary-Treasurer of a Company.) (p. 88, par. K; p. 248, par. 2.)
4-4-41	Rufus G. Poole (FR)	Charles H. Livengood, Jr.	Definition of selling in intrastate commerce under Section 13(a)(2). (p. 69, par. M; p. 102, par. DD)

LETTERS

Date	To	Subject
4-1-41	B. G. Dwyre Santa Fe, New Mexico (GFH)	(Whether contracts entered into between a state highway department and a contractor should contain provisions that the wage and hour provisions of the FLSA should be complied with, and whether such construction work is subject to the Act.) (p. 175, par. 3; p. 182, par. 5.)
4-1-41	V. P. Ahearn Washington, D. C. (GFH)	(Distinction to be drawn between operations which constitute a mere incident of the interstate distribution of goods and those which constitute a production of goods for local use or consumption. Coverage of the Act with respect to a ready mix concrete concern which receives raw materials from outside the state which they process and use on construction work wholly within the state in which the concrete is processed or mixed from the raw materials.) (p. 174, par.B)
4-1-41	Horace H. Herr Washington, D. C. (EB)	(Whether salesmen employed by wholesale distributors of fruits and vegetables are exempt as "administrative employees" under Regulations, Part 541.) (p. 62, par. H; p. 101, par. 2; p. 233, par. A.)
4-2-41	William O. Buettner Brooklyn, New York (GFH)	(Applicability of Act to a company which exterminates pests, i.e., bugs, mice, etc., from business establishments and private homes in different states.) (p. 39, par. I; p. 197, par. K.)
4-3-41	Hirschberg, Nashel, Zorn & Cronson West New York, N. J. (GFH)	(Whether tuition payments by student learners may be deducted from wages due them; whether tuition is a "facility" under Section 3(m).) (p. 88, par. K; p. 248, par. E; p. 258, before par. J.)
4-4-41	Hon. Jere Cooper Washington, D. C. (EGL)	(Applicability of Section 13(a)(10) exemption to truck drivers; and whether total number of persons working in shifts need to be counted in determining the ten employees under this exemption, or whether the number of employees in each shift should be considered separately.) (p. 38, par. 9; p. 56, par. B; p. 111, par. KK.)
4-4-41	A. A. Applegate East Lansing, Michigan (GFH)	(Whether journalism students who do work for newspapers are employees of the newspaper.) (p. 23, par. P; p. 49, par. B; p. 160, par. 7.)

COPY

Aaron A. Cohen, Esquire
Acting Regional Attorney
Cleveland, Ohio

March 28, 1941

LE:LPH:PG

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

Re Your Request For Opinion on The
Herbert Custom Tailoring Company

You state in your memorandum that segregated employees in two factories manufacturing men's clothes and raincwear, respectively, are employed for the purpose of preparing swatchings or samples of the various fabrics from which garments are manufactured. In the latter case employees paste samples of the waterproof material onto advertising pamphlets.

It is our opinion that employees so engaged come within the terms of the applicable wage order for the Apparel Industry, since the orders were intended to include employees engaged in the production of or necessary to the production of goods for interstate commerce in such industry.

204352

COPY

AIR MAIL

Miss Dorothy M. Williams
Regional Attorney
San Francisco, California

LE:ILS:MB

April 1, 1941

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

C. W. Heim
Redwood, Oregon
File No. 36-320
(Application of Section 13(a)(10)
to Handling of Livestock)

With reference to your memorandum of February 13, 1941, it is our opinion that employees engaged solely in handling livestock for market within the area of production are within the section 13(a)(10) exemption. We have never expressed a view contrary to this.

Paragraph 27 of Interpretative Bulletin No. 14, to which you refer, simply states that the word "packing" does not include operations conducted in meat-packing houses. The specific exemption for handling, slaughtering, and dressing livestock contained in section 7(c) was mentioned as one of the reasons for an opinion that "packing" in section 13(a)(10) does not include meat packing. In referring to meat packing in paragraph 27, however, we were thinking of the great variety of operations conducted in meat-packing plants which involved slaughtering and operations subsequent to slaughtering. We were not thinking of "handling" operations although such "handling" operations when conducted at a meat-packing plant would not be exempt because they would not be conducted "for market."

Nevertheless, in the case you present where livestock is handled "for market" and such activity is not part of the operations at a meat-packing plant, the exemption provided for in section 13(a)(10) clearly applies. The word "handling" specifically appears in section 13(a)(10) as well as in section 7(c), and therefore the reasoning of paragraph 27 would hardly apply to "handling" of livestock "for market."

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LE:FR:VAS

George A. Downing, Esquire
Regional Attorney
Atlanta, Georgia

April 1, 1941

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

Request for Interpretative Opinion

This will reply to your memorandum of March 20, 1941, in which you inquire as to the applicability of the act to the booking employees of Paramount Pictures, Inc., of Atlanta, under the following circumstances. The War Department has issued 12 one-minute "trailers" to be displayed in various movie theatres throughout the country for the purpose of encouraging enlistment in the armed forces. Paramount has volunteered to handle these films and get them to and from the various theatres without charge to the Government. However, the employees of Paramount who have volunteered their services for this work will be unable to accomplish it during regular office hours. Paramount has, accordingly, requested that these employees be permitted to work additional hours in which to perform this work without cost to them for overtime.

We have frequently held that such booking employees are covered by the act. Under the circumstances here presented, they remain fully as entitled to the benefits of the act as would employees of any other private contractor who does work for the Government. The time spent by these employees on this work must be considered hours worked and, accordingly, the employees should be compensated for this time in accordance with sections 6 and 7 of the act.

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COPY

Mr. Baird Snyder
Deputy Administrator
Wage and Hour Division

LE:WTN:GW

April 1, 1941

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

Memorandum of L. A. Hill, Regional Director, relative to the fluctuating workweek.

You have asked for our comment on several memoranda from Mr. Hill, all of which deal with the general subject of salaried employees working an irregular or fluctuating workweek. Mr. Hill presented his views on the matter and outlined a number of typical situations. He also asked for a definitive statement distinguishing between an irregular or fluctuating and a regular workweek.

Mr. Hill states that inspectors frequently encounter great difficulty in determining whether to compute overtime on the basis of a rate of pay which remains constant from workweek to workweek or upon the basis of a rate of pay varying from workweek to workweek conversely with the hours worked. As Mr. Hill points out, the answer to this question depends upon a definition of what constitutes a regular, as contrasted with an irregular, workweek. The problem, of course, arises only with respect to salaried employees. As Mr. Hill also points out, the answer to this question, in turn, depends upon an evaluation of the facts and circumstances of each individual case. He states that in his estimation an employee is employed on a basis of an irregular or fluctuating workweek when employed to do a job rather than to work a certain number of hours. This would include an employee whose starting time was regular and fixed but whose quitting time depended upon the "cleaning up" of the work on hand for the day. Mr. Hill refers to the fact that as a general rule, bank employees would come within such a definition. He says, however, that it has been the experience of their office that bank employees in some cases contend that they were employed at a salary for a specified number of hours per week, in which event, of course, the definition would not apply.

In discussing this question, it is necessary to bear in mind that although by reason of the terminology used in Bulletin No. 4 we fall into the habit of referring to an irregular or

fluctuating, as contrasted with a regular workweek, the real problem we have to determine is whether or not the employee's hourly rate of pay remains constant or varies from workweek to workweek. In making such determination we have two factors to consider, namely, salary and hours of work. If, on all the facts and circumstances, it appears that the salary and the hours of work remain constant in relationship to each other, the hourly rate of pay is of course constant and invariable from workweek to workweek. However, if on the other hand, the hours worked from workweek to workweek are variable in relation to a fixed salary, the hourly rate of pay necessarily varies. The question is one of fact. No rule can be laid down to be applied in all instances. The situation is much the same as one which would arise in contract law if an employee brought suit to recover an amount in excess of the regular salary paid him, alleging that the salary was compensation for a specified number of hours and that he had on certain occasions worked in excess of that specified number. The court would then proceed to determine the facts, and if on all the facts it determined that the employee had not been fully paid, it would award him additional compensation on a basis which in legal terminology is known as quantum meruit; that is, the employee having been employed at a fixed rate of pay, is entitled to compensation at that rate for all services rendered. For our purposes the distinction between so-called irregular and fluctuating or regular workweek is much the same. The test is, does the employer hire the employee at a salary for a certain number of hours and does he, therefore, owe the employee additional compensation on a pro rata basis when that specified number of hours is exceeded; or can the employer successfully contend that the facts and circumstances of employment are such that the salary is the employee's regular compensation for all hours worked, no matter what the exact number of hours may be. Of course, an employee might be on both bases during a single week. That is, he might work, for example, at a salary for a workweek of any length up to 50 hours and at an hourly rate thereafter, or at a salary for a regular 40 hour week with additional work of irregular duration likewise compensated for at a fixed salary. In such event the salary for no regular number of hours affects the entire computation. In both cases there will be a varying rate of pay from workweek to workweek.

In the record-keeping regulations we refer to a regular workweek established by "agreement or custom." By agreement we mean, of course, an understanding between employer and employee, either written or oral, which governs the number of hours the employee is expected to work in exchange for his salary. Where no such understanding exists, the number of hours the employee works in exchange for his salary may be fixed by custom and practice. Thus, if an employee works a certain number of hours week after week and variations from that number of hours occur on only infrequent and widely separated occasions, there is in all likelihood a regular workweek established by custom. In other words, slight and occasional variations from the regular workweek will not modify the rule. Custom and practice may come into play in another way, however; that is, to modify a regular workweek set by agreement. Thus, if employer and employee agree to a certain number of hours in exchange for a salary but over a substantial period of time the employee customarily works a different number of hours or works a varying number from week to week, such custom and practice may serve to alter the agreement. For example, if an employee is employed at a salary of $50 a week with 50 hours "agreed" as the regular number of hours to be worked for the workweek but the employee in practice works regularly only 40 hours per week over a substantial period of time, the 40 hour rather than the 50 hour workweek would determine such employee's regular hourly rate of pay.

In summing up we may state the rule as follows: Given an employee employed on a salary basis it is necessary to determine as a matter of fact how many hours of work per workweek the employer may exact from the employee in exchange for such salary. As we stated before, the answer to such question depends upon an examination and evaluation of all the pertinent facts and circumstances in a given case. We have to know when an employee works 60 hours and receives a salary of $30 in a given workweek, whether or not that $30 is all that the employer owes the employee as his regular compensation for a workweek of such length.

A test such as the following may prove workable: Is the salaried employee hired to do a job rather than to work a schedule of hours? Does the job necessarily involve irregular or fluctuating hours per day or week? The questions taken together constitute a single test; one question is not complete in itself.

211907

COPY

Herman Marx, Esquire
Attorney in Charge
Newark, New Jersey

LE:GFH:HES

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

April 1, 1941

Industrial Utilities Corporation

This is with reference to your communications of November 4, 1940; November 14, 1940; January 17, 1941; and February 27, 1941. I regret that, due to the great flood of inquiries which we have received in recent months, an earlier reply has not been possible.

It appears from these communications and the attachments submitted therewith that the subject company is engaged in the cleaning of freight cars. It is stated that when the cars are cleaned they are taken to a so-called "dead track" in the railroad yards. The subject company denies that the act is applicable to its employees partly by reason of its contention that at the time their work is being performed the company has no knowledge of whether the cars will be used in intrastate or interstate commerce, or when, in the future, the cars may again be put into use.

While the description of this company's activities is not as clear as might be desired, it is believed that even on the basis of the limited facts submitted, its employees fall within the general coverage of the act. It can hardly be denied that in the usual case freight cars are essential instrumentalities of commerce. The cleaning of such cars would quite clearly appear to constitute maintenance operations of the type referred to in paragraph 13 of Interpretative Bulletin No. 5.

While I am not entirely certain what is meant by the statement that the cars are moved to a "dead track" during the cleaning operations, I assume that the company means that the cars are sidetracked during such operations in order that they will not obstruct the switching operations and other railroad traffic in the yards. Surely, it seems that this factor should have no bearing on the coverage of the company's employees. Neither do we believe that the individual beliefs or the personal convictions of the employer regarding the future use to which the cars may be put are material. It is a matter of common knowledge that freight cars are normally employed as essential instrumentalities of interstate commerce in the interstate transportation of goods, and that they are normally cleaned in contemplation of their future use as such instrumentalities of interstate commerce.

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C O P Y

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

April 1, 1941

LE:ILS:MGA

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

Application of Section 7(c) to so-called "Wax Men" in poultry plants.

With reference to my memorandum to you of March 15, 1941, concerning the subject problem, I wish to state that I agree with the opinion you expressed concerning these employees in your memorandum to Mr. Hill of February 27, 1941. It appears that the employees who are engaged in operating the wax machines and who rejuvenate the wax are engaged in operations which are so closely interwoven with the poultry processing operations as to be included within the section 7(c) exemption.

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C O P Y

Arthur E. Reyman, Esquire
Acting Regional Attorney
New York, New York

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

April 3, 1941

LE:ILS:HES

Fairmont Creamery Company
File No. 31-6304
Application of section 7 to
dairy operations

This will reply to your memorandum of February 28, 1941 which raises a question concerning the status under section 7(c) of employees who, during the same workweek, perform the following two operations:

(1) manufacture of ice cream mix, all of which is produced for local consumption;

(2) production of cream cheese which moves in interstate commerce.

As you state, the production of cream cheese is within the section 7(c) exemption, but the production of ice cream mix is not.

In a case of this sort, we doubt that the Congressional purpose would be effectuated if the maximum hour provisions of the act were held to apply. Accordingly, in our opinion, for administrative purposes these employees may be considered outside the maximum hour provisions of the act.

210866

Samuel P. McChesney, Esquire
Regional Attorney
Kansas City, Missouri

LE:FR:MPJ

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

April 4, 1941

Colorado Costume Company
Denver, Colorado
File No. R-5-150

This will reply to your memorandum of March 22, in which you inquire as to the applicability of the act to the subject company. You state:

> "The subject is engaged in supplying costumes, wigs, make-up, cosmetics and similar materials to customers in Nebraska, Wyoming, Kansas and New Mexico.
>
> "About 60% of the income is derived from rentals to public schools for plays and pageants; 15% to 20% of the business is in the rental of dress suits, tuxedos and other formal wear to individuals; and the greater part of the remaining business is with local institutions such as lodges, clubs, etc., to whom costumes and regalia are rented.
>
> "Approximately 20% of the total business of the firm is with out of State customers.
>
> "The firm's present stock of costumes was accumulated through purchases of stock of other local companies, bankrupt eastern firms, local lodges and churches. It is estimated that less than one-half of one per cent of the stock was actually made in the establishment. Costumes are occasionally produced but only when the stock of costumes as to variety or size is proved insufficient. The company, for example, made only six costumes during the past year. Mr. Montgomery comments that the most recent 'creation' was a gown for the Goddess of Liberty who made her appearance on the stage at a Denver school."

The mere alteration and adjustment of store costumes would not defeat the 13(a)(2) exemption if it should be applicable to this establishment. However, the making of new costumes constitutes a manufacturing operation, and an establishment carrying on such activities is not exempt under section 13(a)(2). If, however, the manufacturing is segregated from the distributional activities of the company, the exemption if otherwise applicable would still apply to employees in the distributional "establishment."

It is not clear to me, however, that the 13(a)(2) exemption is ever applicable to this establishment. I note that from 80 to 85 percent of its business is with nonprivate customers. Accordingly, it seems to me that regardless of the processing activities, the 13(a)(2) exemption is inapplicable, particularly if the costumes are furnished to the nonprivate customers in larger quantities and at lower prices than they are furnished to private individuals.

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D. Lacy McBryde, Esquire
Regional Attorney
Raleigh, North Carolina

LE:ADH:ELW

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

April 5, 1941

Deductions by the Whitley Cotton Mill, Inc.
Clayton, N. C.

This is in reply to your memorandum of January 28, 1941, in regard to deductions made by the subject company.

1. A deduction from wages made for goods purchased at the store operated by the Secretary-Treasurer of the subject company would be considered in the same category as deductions for goods purchased at a company store. The Secretary-Treasurer is considered to be an affiliated person within the meaning of Regulations, Part 531. See paragraph 14 of Interpretative Bulletin No. 3.

2. The proposal of the company to issue to their employees trade coupon books redeemable as cash and which may be used by the employees as cash in any store within the city limits of Clayton will not meet the requirements of the act. Such tokens are not proper mediums of payment under the act. See paragraph 4 of Interpretative Bulletin No. 3.

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Charles H. Livengood, Jr., Esquire
Regional Attorney
Nashville, Tennessee

LE:FR:MPJ

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

April 4, 1941

Definition of selling in intrastate commerce under section 13(a)(2)

Please refer to my memorandum to you of last fall reported in Legal Field Letter 35 at page 13. At that time I replied to your memorandum of September 6, 1940 in which you inquired as to the applicability of the 13(a)(2) exemption to a concern, 79 percent of whose sales were at retail but which received all its goods from outside the state. Thirty percent of its total sales were made at retail outside the state; 21 percent of its total sales were made at wholesale within the state; and 49 percent of its total sales were made at retail within the state. At that time I expressed the opinion that sales at wholesale within the state of goods received from outside the state should be considered sales in interstate commerce for purposes of the 13(a)(2) exemption, so that the exemption was defeated in the case in question inasmuch as 51 percent of the sales were in interstate commerce.

I have been reconsidering that problem in connection with our current revision of Interpretative Bulletin No. 6 which should be released within a month. I believe now that I was in error in the earlier memorandum and that for pruposes of section 13(a)(2), selling is in intrastate commerce if all of the elements of the particular transaction take place within one state.

Sections 6 and 7 of the act refer to employees engaged in interstate commerce. An employee is engaged in interstate commerce if he is connected with the sale at wholesale within a state of goods received from outside the state. Section 13(a)(2), on the other hand, refers to the intrastate selling of an establishment. There is a clear distinction between an employee's engaging in interstate commerce (which he does by handling out-of-state goods moving through a wholesale establishment) and an establishment's selling in interstate commerce. In the case put by you in your memorandum of September 6, 1940, we believe that 70 percent of the selling of the establishment is, therefore, in intrastate commerce.

In Reply Refer To:
LE:GFH:EH

April 1, 1941

Mr. B.G. Dwyre
State Highway Engineer
New Mixico State Highway Department
Santa Fe, New Mexico

Dear Mr. Dwyre:

This is in reply to your letter of September 10, 1940, I regret that, due to the fact that your letter was mislaid in our files, an earlier reply has not been possible.

As you know, the Fair Labor Standards 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. We are enclosing copies of our Interpretative Bulletins Nos. 1 and 5 which deal generally with the scope of coverage of the Act. You will note by reference to paragraph 13 of Interpretative Bulletin No. 5 that employees engaged in maintaining, repairing or reconstructing highways are deemed "engaged in commerce" and within the general coverage of the act. We are also enclosing a copy of release G-2, which further explains the application of the act to highway repair and reconstruction.

In answer to your specific question, it would appear to be a matter within the determination of the State Highway Department of New Mexico as to whether or not contracts made between the State Highway Department and the contractor shall contain the provision that the minimum wage and maximum hour standards of the Fair Labor Standards Act shall be complied with, regardless of whether such contract was financed under federal appropriations. Of course, where the act applies to such work, a contractor will not be relieved from compliance because of the absence of such a provision in his contract with the Sate Highway Department.

Very truly yours,

For the Solicitor

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

Enclosures (4)
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COPY

In Reply Refer To:
LE:GFH:HO

April 1, 1941

Mr. V.P. Ahearn, Executive Secretary
National Ready Mixed Concrete Association
Munsey Building
Washington, D.C.

Dear Mr. Ahearn:

This is in answer to your letter of March 12, 1941, in which you inquire concerning the application of the Fair Labor Standards Act to certain employees of ready mixed concrete companies.

It is my information that the employees to whom you refer are engaged in the mixing of various raw materials and in transporting such materials to the sites of construction jobs, either while or after such mixing operations have been performed. Cement and water are mixed with either gravel, crushed stone, or slag. As a result of this mixing process, concrete is obtained by one or two methods. Some concerns maintain a large central mixing plant in which the mixing of all the ingredients, including the water, is performed. The mixture is then removed to trucks equipped with special drums which agitate the concrete in order to prevent it from "setting up" while it is en route to the construction job. Other concerns, however, follow a somewhat different method. According to this second method, all the ingredients are carefully weighed and measured in a so-called "batching plant." The dry ingredients are placed in the special drum of the truck, while the water is placed in a special tank with which the truck is equipped. En route to the job, the water is mechanically fed from the water tank into the mixing drum, which, by constantly revolving, serves both to mix the various ingredients and to prevent the concrete from "setting up" before it is used in the actual construction work.

You ask if the act is applicable to employees of ready mixed concrete concerns of this type which have received their raw materials from outside the state, but whose concrete issued solely for construction work within the state in which the concrete is mixed. It is your opinion that such employees are not covered under the principles expressed in section 14 through 16 of Interpretative

Bulletin No. 5, since their activities constitute rather a processing or production of goods for local use than a mere incident of the interstate distribution of raw materials. It is likewise your opinion that under the principles set forth in paragraph 10 of Interpretative Bulletin No. 5, employees so engaged are not to be deemed within the coverage of the act.

In our opinion, the line to be drawn between operations which constitute a mere incident of the interstate distribution of goods and those which constitute a production of goods for local use or consumption is one of degree. This division has never attempted to formulate any infallible test which would serve to resolve every conceivable situation of this type which might arise, since it has not been believed that the formulation of such a test is possible. However, in the particular case presented in your letter, in view of the somewhat technical character of the operations performed, and of the apparent differences in form, utility, and chemical composition existing between the raw ingredients and the finished product, it is the opinion of the Wage and Hour Division that the mixing of concrete in the situation which you present is rather to be regarded as a processing or production of goods for local consumption than as a mere incident of the interstate distribution of goods.

Of course, it is also pointed out in paragraph 10 of Interpretative Bulletin No. 5 that particular employees of concerns of the type which you describe who are engaged in purchasing raw materials from other states, or in handling or unpacking them upon receipt from other states, are properly deemed to be "engaged in commerce" and subject to the act. In addition, I wish to refer you to paragraph 13 of Interpretative Bulletin No. 5, where principles are set forth under which employees of such companies would fall within the coverage of the act provided that in any workweek they took any actual part in the maintenance, repair, or reconstruction of essential instrumentalities of commerce, or of buildings or machinery used to produce goods for commerce. Thus, for example, employees of ready mixed concrete companies who in any workweek poured concrete on the roadbed of a highway which was being repaired or reconstructed would be within the general coverage of the act during all workweeks when they were so engaged. In addition, you are no doubt familiar with the principle which we have often expressed, that if an employee during any workweek performs work that is within the coverage of the act, and also work

that would not otherwise be within the act's coverage, his entire employment for that workweek is deemed covered by 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

214684

In Reply Refer To:
LE:EB:HS

April 1, 1941

Mr. Horace H. Herr, Secretary
National League of Wholesale Fresh Fruit
and Vegetable Distributors
512 F Street, N. W.
Washington, D. C.

Dear Mr. Herr:

Reference is made to your letter of February 17, 1941, in which you inquire concerning the application of the Fair Labor Standards Act to certain salesmen employed by wholesale distributors of perishable and seasonal fresh fruits and vegetables.

These salesmen, as you point out, make sales in the wholesaler's establishment or at receiving platforms where carloads or truck loads are unloaded on the platform and sold directly to buyers. They are being paid $200 or more per month on a salary basis and are using their own discretion and judgment in agreeing with the buyers on prices applicable in the transaction. You inquire as to whether such salesmen are exempt from the Act as "employees employed in a bona fide administrative capacity" within the meaning of section 13(a)(1).

It is the opinion of the Wage and Hour Division that these salesmen, if as a matter of probable fact and as a matter of regular and continuing practice they exercise their own discretion and judgment with regard to prices, may be classified as "administrative employees" within the definition of section 541.2 of Regulations, Part 541 and as such be exempt from the wage and hour provisions of the Act.

Very truly yours,

For the Solicitor

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

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In Reply Refor To:
LE:GFH:ESG

April 2, 1941

Mr. William O. Buettner, Secretary
National Pest Control Association, Inc.
3019 Ft. Hamilton Parkway
Brooklyn, New York

Dear Mr. Buettner:

This will reply to your letter of January 18, 1941, in which you inquire concerning the application of the Fair Labor Standards Act to a situation which you present. I regret that an earlier reply has not been possible.

You state that members of your association are engaged in the extermination of pests, such as roaches, ants, bedbugs, mice, rats, etc. Such services are performed through the use of powder, insecticides, or gases in private homes, apartments, hotels, barber shops, meat markets, grocery stores, restaurants, theatres, colleges, hospitals, and industrial plants. In some instances, employees engaged in such activities cross state lines in order to render such services in homes or business establishments in other states.

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. It will be noted from paragraph 13 of Interpretative Bulletin No. 5 that employees engaged in maintaining buildings used to produce goods for interstate commerce are deemed engaged in a process or occupation necessary to the production of the goods within the meaning of section 3(j) of the Act, and hence fall within the Act's general coverage. It is our opinion that the extermination of pests is an activity which falls within the coverage of such covered maintenance operations. Hence, employees of your members would fall within the general coverage of the Act during all workweeks when they are engaged in such activities in buildings used to produce goods for commerce. However, during workweeks when an employee rendered these services purely in other

types of buildings, assuming such buildings were not essential instrumentalities of interstate commerce and that the employee performed no other work within the coverage of the Act during that workweek, it is our opinion that the Act would not apply to his employment. Even in such weeks the Act would apply, however, if the particular employee was engaged in the interstate transportation of materials or in other forms of interstate commerce.

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." We are enclosing a copy of Interpretative Bulletin No. 6 which discusses this exemption, and your attention is particularly directed to paragraphs 10 through 15 thereof. On the basis of the information contained therein, you will note that your business is not considered to be a "service establishment" within the meaning of this exemption. The exemption is further discussed in the enclosed release G-27.

Sincerely yours,

Philip B. Fleming
Administrator

Enclosures (5)

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In Reply Refer To:
LE:GFH:EG

April 3, 1941

Hirschberg, Nashol, Zorn & Cronson
415 Sixtieth Street
West New York, New Jersey

Gentlemen:

This will reply to your letter of March 5, 1941, in which you inquire concerning the application of the Fair Labor Standards Act to a situation which you present.

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 and 9 of Interpretative Bulletin No. 5. If, as is stated in your letter, the goods produced by the persons whom you describe move in interstate commerce, their employment would appear to be subject to the Act.

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. If these student-employees are within the coverage of the Act, the tuition payments may not be deducted from the wages required to be paid to them under the Act. Tuition is not a "facility" under section 3(m) of the Act, to which I direct your attention, nor can tuition be paid by the employees by way of "kick-backs" to the employer. I am enclosing copies of Interpretative Bulletin No. 3 and Regulations, Part 531.

Section 14 of the Act authorizes the Administrator where necessary to prevent curtailment of opportunities for employment to issue special certificates authorizing the employment of learners at

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wage rates below the statutory minimum. I am enclosing Regulations, Part 522, which set forth the procedure under which application may be made for learners' certificates. It should be pointed out that unless and until this certificate is secured the minimum wage prescribed in the Act must be paid. For further information I suggest that you communicate with Mr. Merle D. Vincent, Director of the Hearings Branch of the Wage and Hour Division here in Washington.

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 (5)

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In Reply Refer To:
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April 4, 1941

Honorable Jere Cooper
House of Representatives
Washington, D. C.

Dear Congressman Cooper:

I have received your letter of February 28, 1941, in which you enclosed a letter from Mr. J. L. Margrave of Castleman & Margrave. Mr. Margrave asks about the interpretation of the term "area of production" as it is used in section 13(a)(10) of the Act.

I am enclosing copies of the Act and of Interpretative Bulletins Nos. 1 and 5 dealing with its general coverage. Mr. Margrave's attention is particularly directed to paragraphs 2, 4, and 5 of the latter bulletin. As you know, employees "engaged in commerce or in the production of goods for commerce" are covered by the Act, and unless they are otherwise exempt are entitled to receive at least 30 cents an hour and one and one-half times their regular rate of pay for all hours they work in excess of 40 in any workweek.

The exemption provided by section 13(a)(10) of the Act, as it applies to the handling and packing of fruits and vegetables, is discussed in paragraphs 25 through 28, 33, and 37 of the enclosed copy of Interpretative Bulletin No. 14. The term "area of production" which qualifies the exemption is defined in section 536.2(a) of Regulations, Part 536, a copy of which is enclosed. Mr. Margrave asks whether an employee continues to be employed within the area of production in a workweek where no more than 10 employees are employed at any one time at the establishment, but where some of the 10 are replaced during the workweek by other employees. If the employee during the workweek is engaged in no other activities than those enumerated in section 13(a)(10), and if he performs his operations on materials all of which come from farms within the general vicinity of the establishment where he is employed, and if at no time during the workweek the number of employees engaged in those operations at that establishment exceeds 10, then that employee during that workweek is within the scope of the section 13(a)(10) exemption. The replacement of some of the employees

during the workweek by others would not seem to take the employees of the establishment outside of the exemption. If, however, more than one shift of employees works in the establishment during a workweek, the employees of all the shifts must be totaled to determine whether the area of production definition has been satisfied. The enclosed R-1314 explains Regulations, Part 536.

Mr. Margrave also asks "whether or not the law applies to truck drivers who drive the trucks hauling farm produce that we ship, such as sweet potatoes, strawberries, cabbage, tomatoes, beans and cucumbers, from the farms, warehouses and packing sheds in this section to the northern markets."

In our opinion, truck drivers who handle "agricultural commodities" for market are to be counted among the employees in the establishment engaged in the operations described in section 13(a)(10). If the establishment is within the "area of production," the truck drivers engaged in handling "agricultural commodities" for market are within the section 13(a)(10) exemption.

Section 7(c) 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, Mr. Margrave's attention is directed to paragraphs 14, 19 and 22 through 24 of bulletin No. 14.

Under section 7(b)(3) of the Act employees engaged in an industry 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, provided that during those 14 workweeks they are paid overtime compensation at the rate of 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 handling, packing, and preparing in their raw or natural state of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature. (See the enclosed releases G-61 and R-974.)

I trust that Mr. Margrave after reading the material referred to will be able to determine whether the employees to whom he refers are covered by the provisions of the Act. If he has any further questions, please advise me and I shall be happy to assist him.

As requested by you I am returning Mr. Margrave's letter.

Sincerely yours,

Philip B. Fleming
Administrator

Enclosures (9)

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In Reply Refer To:
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April 4, 1941

Mr. A. A. Applegate, Head
Department of Journalism and Publications
Michigan State College
of Agriculture and Applied Science
East Lansing, Michigan

Dear Mr. Applegate:

This will reply to your letter of April 4, 1940, in which you inquire concerning the application of the Fair Labor Standards Act to a situation which you present. We regret that an earlier reply has not been possible.

We quote from your letter:

"The situation is this: For some years we have required students majoring in journalism at Michigan State College to spend six weeks, preferably between their junior and senior year, working in newspaper offices, to get a practical slant on the work. Payment of wages to them has not been obligatory, although in nearly all cases the students have received remuneration sufficient to pay their living expenses. This year, the replies I have from publishers is, that as much as they would like to cooperate in providing practical experience for these students, they are unable to do so because of the limitations of the wage and hour law."

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. We are enclosing copies of our Interpretative Bulletins Nos. 1 and 5, and direct your attention particularly to paragraphs 1, 4 and 5 of bulletin No. 1 and paragraphs 2, 4, 8 and 9 of bulletin No. 5. In our opinion, newspapers are generally within the coverage of the Act.

As you may know, section 13(a)(8) of the Fair Labor Standards Act exempts from the wage and hour provisions "any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county

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where printed and published." If these students of journalism are obtaining experience on a newspaper of the type described in section 13(a)(8), such students would not be subject to the Fair Labor Standards Act.

If such is not the case, however, I do not believe that it is possible for us to state categorically whether or not such students are employees of the newspapers during the periods of time when they are gaining experience on newspapers. The mere fact that the student is not formally hired by a newspaper is not conclusive, since section 3(g) of the Fair Labor Standards Act defines "employ" as including "to suffer or permit to work." We should say that if a student's connection with a newspaper is for the benefit of the student and not for the newspaper, if his presence there does not displace or substitute for any regular member of the staff, and if his experience with such newspaper is a part of his curriculum, it is our opinion that such a student is not an employee within the meaning of the Act.

A distinction should be drawn between the situation and one in which the student is expected to keep regular office hours or is relied on to cover particular assignments with a view to the newspaper's training him so that he may ultimately be sufficiently experienced to be one of the working staff. In a case of this sort the student is really a "learner" within the meaning of section 14 of the Act and should be employed in conformity with the new vocational training regulations on this subject recently issued, requiring a special student-learner's permit. We are enclosing a copy of such regulations.

Very truly yours,

For the Solicitor

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

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