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LEGAL FIELD LETTER

NO. 54 (Revised 10/41)

SUBJECT: Relationship of Manufacturers, Contractors and Home  
Workers--Who is the Employer--The Manufacturer or  
the Contractor?

I. Statutory Provisions and Regulations

The act applies to "employees" engaged in interstate commerce or in the production of goods for interstate commerce. It makes no distinction on the basis of the place where the employee works; employees otherwise coming within the terms of the act are entitled to its benefits whether they perform the work in the factory, the home, or elsewhere. The employer-employee relationship is defined in sections 3(d), 3(e), and 3(g) of the act. The Regulations on Records To Be Kept by Employers, Part 516, provide in section 516.4 that the term "employee" shall include industrial home workers or other employees who produce goods for the employer from materials furnished by him. Section 516.90 of the regulations defines the term "industrial home worker" to include "any person producing in or about a home, for an employer, goods from material furnished directly by or indirectly for such employer."

The record-keeping regulations provide for the keeping and

preserving of records containing information with respect to the hours worked by industrial home workers. . There is provided for the use of employers of these home workers handbooks "and the information required therein shall be entered by the employer or the person distributing home work on behalf of such employer each time work is given out to or received from an industrial home worker."

II. General Principles to be Used in Determining the Employment Relation Between Home Worker and Manufacturer

No single test or precise formula can be prescribed for determining the question of whether a manufacturer is the employer of a home worker.

Several factors should be considered before attempting to answer the question:

1. Does the manufacturer possess the right to control the manner or time in which the work is to be done?
2. Does the manufacturer furnish the material or finance, directly or indirectly, the purchase of the material with which the work is to be done?
3. Does the manufacturer furnish the equipment or finance the purchase of the equipment which must be used in the performance of the work?
4. Does the manufacturer fix the price which is to be paid for the work?
5. Is the manufacturer the employer of the contractor or agent who distributes the work to the home worker?
6. Does the manufacturer call for or collect the work done by the home worker, or, if the goods are mailed to the manufacturer, does the latter pay for postage, insurance, etc.?
7. Did the employer-employee relationship exist between the manufacturer and the homemaker prior to the passage of the Wage-Hour law?

8. Does the manufacturer pay social security and similar taxes with respect to the homemaker, or does the manufacturer reimburse the contractor, in whole or part, for such taxes paid by the contractor?

9. Has the manufacturer taken out homework certificates covering the homeworkers pursuant to state law?

Not all these questions need be answered in the affirmative to establish the employment relation between the manufacturer and the home worker nor can it be said that without exception anyone of them standing by itself is sufficient. The most important element in determining the existence of the employment relation is the possession by the manufacturer of the right to control the manner in which the work is done. As a general rule, the manufacturer will be regarded as the employer of the homemaker if he possesses such right, although he may not exercise it to the fullest extent. The fact that the so-called contractor is allowed to parcel out the work to home workers of his own selection is unimportant. In such cases the manufacturer exercises his right of control insofar as the matters of business may require. He may prescribe what materials may be used, the pattern to be followed, and the rate of pay.

Further, since the products are manufactured in many cases to fill specific orders, the manufacturer may prescribe the length of time within which the finished product shall be returned. If there is a uniform standard of the manner in which the processing must be done, the manufacturer, through the contractor, controls the details of the work. This would be particularly true in a case of a process which requires a special type of machine. In such a case the work performed may be of so routine a character that no control over

the details of the work is possible or necessary. The uniform standard set by the manufacturer constitutes sufficient control.

### III. Specific Examples of Cases Presented to the Division

With few exceptions, the manufacturer rather than the so-called contractor has been determined by the Wage and Hour Division to be the employer of the home workers. Usually the contractor has no voice in determining any important factor of the work. He is merely the hand that distributes the work and when the job is completed the manufacturer may reject it.

Some examples may be helpful in showing the existence of the employment relationship between the manufacturer and home workers:

1. Manufacturer A has finished all of the processes in the manufacture of handkerchiefs except the embroidering of an initial or design. He contracts with Contractor B to furnish the embroidery desired at a certain rate per dozen. Contractor B may own one or more hand embroidery machines which may be in his home or in a shack at the rear or in an entirely separate building. Contractor B is an employee of Manufacturer A. Home workers working under the direction of Contractor B are likewise considered to be employees of Manufacturer A, if Manufacturer A knows or has reason to believe that such homeworkers are being employed.

2. In a case involving "distributing agents" of a manufacturer it was determined that the home workers were employees of the manufacturer. The facts so indicating were that the agents were paid on a salary basis as distinguished from a commission basis and were carried on the pay roll records of the manufacturer; the manufacturer exercised direction and control over the agents in the distribution of the product; he required the

agents to submit reports and to make a standard contract with the home workers. Such factors are typical of those which must be considered in each case.

3. In the case of Jacobs v. Hand Knitcraft Institute, et al., the manufacturers, who were determined to be employers of the homeworkers, drew up contract forms for the use of their intermediaries or contractors and the home workers. Under the contracts, the home workers designated the contractors as "selling agents" to sell the home workers' products to the manufacturers. The home workers were designated "independent producers" or "independent manufacturers." The home workers purchased the yarn from yarn companies suggested by the manufacturers, worked up the raw materials into finished garments, and upon the completion of the manufacturing process the contractors received the garments from the home workers and routed them to the manufacturers. Sometimes the contractors executed contracts with yarn companies, also on forms prepared by the manufacturers, whereby the contractors became the "selling agents" of the yarn companies to sell yarn to the home workers. In some instances the contractors acted as "selling agents" of both the yarn companies and the home workers. Under this procedure the contractors distributed the yarn to the home workers. It was determined that although the home workers were nominally purchasing their yarn from sources independent of the manufacturers, actually the yarn companies were acting as distributing agents for the manufacturers. Some of the factors indicating the existence of the employment relationship between the manufacturers and the home workers were that the home workers received samples and instructions from the manufacturers as to the types of yarn to be used and the garments desired, and all the forms,

correspondence and related documents sent out to the home workers were drafted or checked by the manufacturer. Further indicative of the employer-employee relationship between the manufacturers and the home workers was the fact that the "buy-sell" arrangement described above was instituted after the Wage-Hour law went into effect. Prior to that time the manufacturer had admittedly been employing the home workers directly.

#### IV. Example Where the Contractor is the Employer

In some cases, of course, the contractor may be an independent contractor and not an employee; in such cases home workers working under his direction should be considered to be the contractor's employees. An example of this is the case where the manufacturer turns over the product to a contractor who has a regular factory, usually equipped with his own machinery. The contractor distributes the work to home workers and exercises the control over the home workers which is normally exercised by the manufacturer in the examples discussed above.

Just where the exact line is to be drawn between the situations in which the manufacturer is the employer and those in which the contractor is the employer cannot be stated with particularity. Of course, in those cases in which the manufacturer can show that he is not the employer of the home workers, he would not be required to keep records for such home workers. The "hot goods" provisions of section 15(a)(1), however, would be applicable to a manufacturer who purchased the product from the contractor.