UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

July 11, 1941

59

Legal Field Letter

No. 59 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
6-26-41	Rufus G. Poole (EB)	Donald M. Murtha	Applicability of the Fair Labor Standards Act to National Park Areas (p. 1, par. B; p. 81, par. B.)
6-28-41	Rufus G. Poole (WTN)	Dorothy M. Williams	California-Oregon Power Company and The International Brotherhood of Electrical Workers (Whether expense allowance paid by a company to its employees should be regarded as a part of the employee's compensation for the purposes of determining their regular rates of pay.) (p. 244, par.C; p. 249, par. 5.)
7-8-41	Rufus G. Poole (EGL)	Charles H. Livengood, Jr.	Application of the Act to the Training of Horses Obtained From Other Breeders. (p. 53, par. 2(b); p. 107, par. 2(a).)

LETTERS

Date	To	Subject
6-6-41	J. W. Burch Washington, D. C. (KM)	(Whether luggage and leather goods industry applies to workers who affix leather decorations to cosmetic compacts or who cover these compacts with a leather cover.) (p. 199, par. C; p. 256, par. R.)
6-26-41	Roger J. Whiteford Washington, D. C. (WTN)	(Whether it is proper to pay employees overtime on a daily basis rather than on a weekly basis so that when an employee loses a part of a week he will still receive some overtime compensation for each day that he is at work.) (p. 242, par. 5; p. 244, par. C.)
6-28-41	E. E. Little Pelham, New York (EB)	(Whether janitors may be exempt as being engaged in a local retailing capacity under Section 13(a)(1).) (p. 40, par. 8; p. 101, par. 3; p. 235, par. 4.)

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Donald M. Murtha, Esquire
Regional Attorney
Minneapolis, Minnesota

LE:EB:FK

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

June 26, 1941

Applicability of the Fair Labor Standards Act
to National Park Areas

This will reply to your memorandum of June 14, 1941, in which you request our opinion regarding the applicability of the Fair Labor Standards Act to employees of a Montana corporation engaged in the manufacture of foodstuffs. The corporation distributed the foodstuffs within the State of Montana except for less than three percent of the total volume of its goods which enter Yellowstone National Park or Glacier National Park during the park season. The question is whether (a) employees of the corporation engaged in general production, and (b) employees engaged in the transportation of the goods which enter the park area are within the coverage of the act. The question is also raised as to how National Park areas are to be treated generally under the Fair Labor Standards Act.

Section 3(b) of the act defines commerce as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." In our opinion, commerce from a state to a National Park located entirely within its exterior boundaries cannot be deemed to be commerce "from any State to any place outside thereof" within the meaning of section 3(b). Hence, employees of a manufacturer of food products producing goods for consumption entirely within the State of Montana will not be considered engaged in the production of goods for interstate commerce because a fraction of the goods enters Glacier National Park, a national park located entirely within the confines of the State of Montana. It is true, of course, that the territory embracing Glacier Park has been ceded to the United States by the State of Montana and is under the exclusive control of the Secretary of the Interior (16 U.S.C.A. sec. 162). However, the State of Montana has been reserved the right to serve civil or criminal process, as well as the right to tax persons and corporations in the park area (16 U.S.C.A. sec. 163). Furthermore, the criminal laws of Montana are applicable to any offense not prohibited and punished by the laws of the United States.

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Dorothy M. Williams
Regional Attorney
San Francisco, California

LE:WTN:FM

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

June 28, 1941

California-Oregon Power Company and
The International Brotherhood of Electrical
Workers

You requested our opinion as to whether or not expense allowances paid by this company to its employees should be regarded as a part of the employees' compensation for the purposes of determining their regular rates of pay. According to your statement, two different situations are prevalent. In one, the employee receives a flat sum such as a per diem allowance while in the other, the employee receives an expense allowance of so much per hour in addition to base pay.

As you know, expense allowances are not considered as board, lodging or other facilities and are, therefore, outside the provisions of section 3(m). The question is, therefore, whether the allowance represents reimbursement for expense actually incurred by the employee in the course of his work for the employer or whether all or part of the allowance represents added compensation for services rendered. In this connection, it has been our position that expense allowances need not be included in regular rate of pay calculations where the allowance is the approximate equivalent for the expenses actually incurred. Where, however, the allowances are "padded" so as to be in excess of actual expenses, such excess should properly be included in regular rate of pay computations.

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(16 U.S.C.A. sec. 169). The reservation of these rights to the State of Montana is based on the recognition that the park area is part of the territory of the state, and it would not be compatible with the assumption that the park should be considered a "place outside" of the state.

The case of Yellowstone Park is different. The area of this park covers territory which is located within the boundaries of three states--Wyoming, Montana, and Idaho. The main part of the park is situated in Wyoming. Under these circumstances, production within the state of Montana of goods, a part of which will enter those areas of Yellowstone Park which are located outside of the State of Montana, must be considered production of goods for interstate commerce, and employees engaged in the production of such goods are within the coverage of the act.

It appears that only a very small fraction of the products of the manufacturer in question enters Yellowstone Park. As you know, we have consistently taken the position that the act makes no distinction as to the percentage of the employer's goods or the goods upon which an employee works which move in interstate commerce, and the Supreme Court in the Darby decision sustained our view in this regard. Hence, in the present case, it is our opinion that if this particular employer has reason to believe at the time the foodstuffs are produced that an unsegregated portion of them will move in interstate commerce, his employees engaged in producing such goods are covered by the act.

With regard to employees of the manufacturer who are engaged in transporting goods to Yellowstone Park, crossing state lines, the hours exemption provided by section 13(b)(1) of the act, as explained in our Interpretative Bulletin No. 9, may be applicable. The exemption would not apply to employees engaged in transporting goods entirely within the State of Montana, including the area covered by Glacier National Park. The coverage of such latter employees by the Fair Labor Standards Act would depend upon all of the facts of their employment.

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

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review LE:EGL:LWK

Application of the Act to the Training of
Horses Obtained from Other Breeders July 8, 1941

In your memorandum of June 10, 1941, you inquire about the applicability of section 13(a)(6) to a person who trains for sale horses which he has purchased.

In a memorandum to you dated January 8, 1941, and printed on page 3 of Legal Field Letter No. 42, we expressed the opinion that the section 13(a)(6) exemption is applicable to the training of horses by a breeder. Whether a trainer buys horses or whether they are bred on his farm, in our opinion their training is within the section 13(a)(6) exemption, provided that the horses are trained on a farm.

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COPY

June 6, 1941

In Reply Refer To:
LE:KM:MB

Mr. J. W. Burch, Director
Prentice-Hall, Inc.
Munsey Building
Washington, D. C.

Dear Mr. Burch:

This is in reply to your letter of January 29, 1941, inquiring whether the wage order for the Luggage and Leather Goods Industry applies to workers who affix leather decorations to cosmetic compacts or who cover these compacts with a leather cover.

In our opinion the manufacture of leather decorations and covers for compacts is within the definition of the Luggage and Leather Goods Industry as set forth in the wage order for this industry, a copy of which is enclosed. The operations of attaching leather decorations to cosmetic compacts or of covering these compacts with leather are, however, within the definition of the Jewelry Manufacturing Industry. The definition also covers the manufacture of compacts and vanity cases with the exception of commercial compacts and vanity cases. The recommendations of the industry committee for the Jewelry Manufacturing Industry appointed by Administrative Order No. 66 were disapproved by the Administrator on April 24, 1941, and a new committee has been appointed to reconsider the matter. Attached is a copy of the order appointing the new committee for the Jewelry Manufacturing Industry.

It is not clear from your letter whether any of the employees are engaged in the actual manufacture of leather decorations and covers or whether their work is limited to the attaching of the decorations and covers to the compacts. If any of the employees are engaged in leather goods manufacturing operations, they are entitled to the benefits of the wage order for the Luggage and Leather Goods Industry. If these operations are segregated from the others carried on in the plant or if separate records can be kept of the amounts of time spent by

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employees working on operations calling for different minimum wage rates, the employees engaged in them may be paid at the rate prescribed in the Luggage and Leather Goods Industry Wage Order while the others are paid at the rate applicable to the operations in which they are engaged. In this case, since no wage order has been issued for the Jewelry Manufacturing Industry, the minimum wage applicable to the attaching of leather decorations to cosmetic compacts with leather covers is 30 cents per hour, the minimum required by section 6 of the Fair Labor Standards Act. A copy of the record keeping regulations dealing with this subject is enclosed.

Assuming that your employees are engaged solely in the manufacture of the compact frames and the affixing of the leather decorations and the leather covers, it would appear that the 30 cent minimum is now applicable to all such operations and that your future rates would depend upon the recommendations of the committee for the Jewelry Manufacturing Industry.

I trust this will give you the information you wish.

Very truly yours,

For the Solicitor

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

Enclosures (6)

202228

In Reply Refer To:
LE:WTN:FM

June 27, 1941

Roger J. Whiteford, Esquire
Whiteford, Hart & Carmody
815 Fifteenth Street
Washington, D. C.

Dear Mr. Whiteford:

This is in reply to your letter of May 31, 1941 concerning the overtime provisions of the Fair Labor Standards Act. Enclosed for your general information are copies of the act, an Employers' Digest and Interpretative Bulletin No. 4.

Your letter outlines the provisions of an agreement between your client, the Smoot Sand and Gravel Corporation, and a committee of the Sand and Gravel Workers Local Union No. 22075. The agreement provides hourly rates of pay and overtime compensation for hours worked in excess of 40 per week. Since the employees in question have a normal workweek of 51 hours, rather definite weekly earnings result from the application of the hourly rates which the agreement specifies. The problem you present arises from the fact that when employees work less than their customary workweek, their initial loss of earnings is at the overtime rate provided for in the agreement. You state that the employees have objected to loss of earnings at such rates and the employer wishes to modify its agreement with them so as to remove the ground of their objections.

To accomplish the above mentioned objective you have proposed to pay the employees overtime on a daily basis rather than on a weekly basis so that when an employee loses a part of a week he will still receive some overtime compensation for each day that he is at work. Your proposal is, however, contrary to the Wage and Hour Division's interpretation of what constitutes an employee's regular hourly rate of pay as such interpretation is expressed in paragraph 70(4) of Interpretative Bulletin No. 4.

Under the circumstances of the case you present, the payment of overtime for hours in excess of eight a day is unreal in that the employees' normal daily schedule is nine hours. In

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reality under such an agreement an employee's total daily earnings are exclusively regular compensation for a normal day's work and the sum of such daily earnings represents his regular compensation for an entire workweek. In view of this it is our opinion that the claim that overtime compensation for one hour has been included in the daily wage is unreal and untenable.

It appears to us moreover that the suggestion you made will not achieve completely the objective you have stated, since the schedule set forth on page 2 of your letter provides not only for one hour of overtime compensation in each nine hour day, Monday through Friday, but also for overtime compensation for each of the six hours worked on Saturday. It is not clear to us from your letter whether it is your intention under the agreement to compensate for all Saturday work at overtime rates or whether the Saturday work is to be compensated for at overtime because of the fact that 40 non-overtime hours have been worked prior thereto in a normal workweek. If the latter assumption is correct a man who loses any time during a workweek will inevitably lose his "weekly overtime."

Under an overtime provision such as section 7 of the act provides, it is inescapable that an employee who in fact receives time and one-half his true regular rate of pay for hours worked in excess of 40 per week must suffer a loss of earnings at that same rate down to the 40 hour limit whenever he works less than his customary overtime hours. Any plan which seeks to minimize the effect of this provision will inevitably result in a manipulation of the hourly rates of pay upon which the plan itself was in the first instance based. Thus, if hourly rates of pay are to remain the true hourly rates at which an employee is actually employed, he must be paid at such rates for the hours he actually works in short as well as in long workweeks.

Your letter gives some indication that your purpose is to satisfy the demand of the employees for weekly earnings which will be as nearly constant as possible. In this connection I call your attention to the constant wage procedure outlined in paragraphs 28 through 68 of Interpretative Bulletin

In Reply Refer To:
LE:EB:FM

June 28, 1941

Mr. E. E. Little
205 Pelhamdale Avenue
Pelham, New York

Dear Mr. Little:

Reference is made to your letter of April 19, 1941 in which you inquire concerning the application of the Fair Labor Standards Act to a janitor. You express the opinion that a janitor may be exempt under section 13(a)(1) of the act as being engaged in a bona fide local retailing capacity.

In the opinion of this office janitor work does not involve "making retail sales" or "performing work immediately incidental thereto" within the meaning of section 541.4 of Regulations, Part 541.

Very truly yours,

For the Solicitor

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