

UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

September 16, 1941

Legal Field Letter

No. 64

Attached Opinions

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

MEMORANDA

<u>Date</u>	<u>From</u>	<u>To</u>	<u>Subject</u>
8-29-41 (SE)	Acting Assistant Solicitor	George A. Downing	Request by Inspector Tisdale for opinion regarding coverage of an employee of the Castleberry Food Company (Whether money paid employee to transport other employees of same company to and from work should be included in computing such employees' regular rate of pay and whether time so spent should be considered hours worked.) (p. 125, par. 18; p. 245, par. 2.)
8-29-41 (GFH)	Acting Assistant Solicitor	Beverley R. Worrell	Chair Rental Company (Application of Act to employees of a company engaged in purchasing chairs from outside the state, but selling and renting them to theatres, hotels, etc., within the city where company is located.) (p. 188, before par. 4(d).)
9-3-41 (EGL)	Philip B. Fleming	Walter W. King	Seasonal Exemption -- Grain Elevators (Applicability of Section 7 (b)(3) exemption to office employees of grain elevators.) (p. 27, par. 6; p. 74, par. P; p. 94, par. T.)

(9152)

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Legal Field Letter

No. 64

MEMORANDA

<u>Date</u>	<u>From</u>	<u>To</u>	<u>Subject</u>
9-4-41	Acting Assistant Solicitor (KCR)	Jerome A. Cooper	Section 3(d) (Application to employees of a liquidator for the Federal Deposit Insurance Corporation, and to employees engaged in liquidation of industrial properties taken over by the Reconstruction Finance Corporation.) (p. 81, par. D; p. 177, par. 1.)
9-4-41	Acting Assistant Solicitor (FUR)	George A. Downing	Southern Bell Telephone and Telegraph Company (Whether Section 13(a)(11) exemption is applicable on a weekly basis or whether the number of stations may be averaged over a period longer than a week.) (p. 76, par. R; p. 115, par. LL.)
9-6-41	Acting Assistant Solicitor (EGL)	Donald M. Murtha	Egg and Poultry Dealers Bulletin (Dressing of Poultry - meaning of, under Section 7(c).) (p. 66, par. L; p. 98, par. 2(b); p. 257, before par. G.)
9-8-41	Acting Assistant Solicitor (EB)	Jerome A. Cooper	Coverage of Policemen Employed as Night Watchmen At a Plant (Whether employees of the city or of the manufacturing plant.) (p. 41, par. 9; p. 81, par. D; p. 147, par. 5(b).)

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Legal Field Letter

No. 64

LETTERS

<u>Date</u>	<u>To</u>	<u>Subject</u>
9-11-41	Nicholas M. Salinka New York, New York (KCR)	(Outside salesman exemption - application of, to employees in training inside a plant to learn how to become outside salesman.) (p. 72, par. N; p. 102, par. 5.)
9-12-41	P. A. Riordan New York, New York (GFH)	(Application of Act to a voice culture school which conducts correspondence courses outside the state and mails speech pamphlets outside the state.) (p. 185, par. 3.)

George A. Downing, Esquire
Regional Attorney
Atlanta, Georgia
Attention: A. B. Steed, Associate Attorney

SOL:SE:SJV

Acting Assistant Solicitor

AUG 29 1941

Request by Inspector Tisdale for opinion
regarding coverage of an employee of the
Castleberry Food Company

This will reply to your memorandum of October 26, 1940 concerning the above company. I regret that, due to the fact that your memorandum was mislaid in our file, an earlier reply was not possible.

Inspector Tisdale has requested an opinion on the basis of the following facts:

"A question concerning hours worked and consideration of sums paid in computing overtime rates arose during the course of inspection of the subject company (Castleberry Food Company). It was noted that each week one employee was listed on the payroll twice - once for the hours shown on the time card and again for \$4.00. Upon inquiry, I was informed that most of the employees of this concern lived in the country and rode into town with this particular employee in his station wagon and the company gave him \$4.00 each week for transporting the other employees.

"The vice-president of the company informed me that the reason this was shown on the payroll was that he had been instructed to do so by the Social Security Board and the State Unemployment Compensation Board. The station wagon is owned by the employee who transports the others. The company requested that I secure an opinion from you as to whether this \$4.00 should be added to the employee's earnings in computing the overtime rate; he also requested information as to whether or not this employee should be given credit for the time spent coming to and from work."

(9152)

George A. Downing, Esquire

Page 2

We agree with your conclusion that the employee, while performing the driving operations, should be considered an employee of the company and not an independent contractor. We also believe that the time spent by this employee in transporting the other employees is part of his employment and must, therefore, be considered "hours worked" for overtime purposes.

The \$4 which is paid the employee each week "for transporting the other employees" should be included in computing his regular rate of pay only to the extent that it exceeds actual costs incurred by the employee on behalf of his employer. You state that determination of the cost of operating the automobile will be a difficult matter from an administrative standpoint. However, this must be done to get the true regular rate of pay and a reasonably accurate per mile cost of operation can undoubtedly be calculated.

166637

Beverley R. Worrell, Esquire
Regional Attorney
Richmond, Virginia

Acting Assistant Solicitor

SOL:GFH:MGM

August 29, 1941

Chair Rental Company

We regret the delay in replying to your memorandum of June 10, 1941 on the above named subject. In that memorandum you inquired concerning the status under the act of employees of a company in Baltimore engaged in purchasing chairs from outside the State of Maryland, but selling and renting them to various theatres, halls, taverns, and hotels throughout the city.

We agree with your conclusion that employees engaged in selling the chairs locally are covered by the act. Likewise, work performed in connection with the first rental of chairs would be covered. We express no opinion regarding work performed solely in connection with subsequent rentals. Of course, if no valid segregation of the company's employees has been made, all of the employees are covered by reason of the sales of the chairs, which you describe as being made in large quantities.

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(9152)

Mr. Walter W. King
Regional Director
Kansas City, Missouri

September 3, 1941
SOL:EGL:ELW

Philip B. Fleming
Administrator

Seasonal Exemption -- Grain Elevators

In your memorandum of June 20, 1941, you inquire whether office employees of grain elevators are within the section 7(b)(3) exemption which is applicable to the storage of grain by country elevators, by public terminal and sub-terminal elevators, and by mill elevators. If a grain elevator is entitled to the section 7(b)(3) exemption, office employees of that elevator are within the exemption. This is also true in the situation which you describe where the office is located in a downtown building and the elevator is near the city limits on a railroad siding.

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elm

(9152)

Jerome A. Cooper, Esquire
Regional Attorney
Birmingham, Alabama

SOL:KCR:SMT

Acting Assistant Solicitor

SEP - 4 1941

Section 3(d)

Reference is made to your memorandum of August 21, 1941, in which you inquire if employees of a liquidator for the Federal Deposit Insurance Corporation and employees engaged in liquidation of industrial properties taken over by the Reconstruction Finance Corporation are excluded from the coverage of the act by section 3(d).

The applicability of section 3(d) to the employees in question will depend primarily upon the method whereunder the employees are hired to perform the liquidation functions. For example, if the employees of the Federal Deposit Insurance Corporation liquidator are hired as employees of the Federal Deposit Insurance Corporation, are paid their wages by federal check, and otherwise have the attributes of government employees, such employees would be considered to be employees of the United States. Similarly, if the Reconstruction Finance Corporation hires and directly compensates employees from federal funds to liquidate industrial properties taken over by the Reconstruction Finance Corporation, such employees would be considered to be employees of the United States for the purpose of section 3(d). On the other hand, if a liquidator of the Federal Deposit Insurance Corporation merely hires employees to assist him in the liquidation, and compensates such employees not with federal funds but with assets of the bank, it would appear that generally such employees would not be considered employees of the United States. So also if an agent of the Reconstruction Finance Corporation hires employees and compensates the employees liquidating industrial properties from the assets of such properties, they would not be considered employees of the United States.

The questions you raise are of too general a nature to permit specific replies. In each case we would have to know all the facts in order to render a definite opinion as to that case.

#271755

(9152)

George A. Downing, Esquire
Regional Attorney
Atlanta, Georgia
Attention: Mr. Shelton

SOL:FUR:FD

Acting Assistant Solicitor

SEP - 4 1941

Southern Bell Telephone and Telegraph Company

This will reply to your memorandum of August 22, 1941 in which you inquire whether the section 13(a)(11) exemption is applicable on a weekly basis or whether the number of stations may be averaged over a period of longer than a week to determine whether the exchange in question has less than 500 stations.

It is our opinion that this exemption is applicable on a weekly basis.

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(S184)

Donald M. Murtha, Esquire
Regional Attorney
Minneapolis, Minnesota

Acting Assistant Solicitor

Egg and Poultry Dealers Bulletin

In your memorandum of August 26, 1941, you quote the following statement from an advanced copy of the egg and poultry dealers bulletin, which is to be issued by the Wage and Hour Division in the near future:

"The dressing of poultry includes scalding, removal of feathers and other inedible portions, eviscerating, cleaning, bleaching, wrapping, cooling, and placing the dressed poultry into boxes or other containers."

You inquire whether this statement is not inconsistent with the opinion expressed in our memorandum to you of March 15, 1941 that the section 7(c) exemption does not apply to employees who grade and pack poultry after it has been in the coolers.

It is still our opinion that the section 7(c) exemption is inapplicable to such employees, and an erratum has been added to the new bulletin which replaces the sentence you quote and the sentence following with this statement:

"The dressing of poultry includes scalding, removal of feathers and other inedible portions, eviscerating, cleaning and bleaching. It does not include the holding in storage of dressed poultry."

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To: Jerome A. Cooper, Esquire
Regional Attorney
Birmingham, Alabama

In Reply Refer To:
SOL:EB:PG

September 8, 1941

From: Acting Assistant Solicitor

Subject: Coverage of Policemen Employed as Night Watchmen
At a Plant

This will reply to your memorandum of July 31, 1941 in which you inquire concerning the application of the Fair Labor Standards Act to a city policeman who is exclusively engaged as a night watchman at a plant in which goods are produced for commerce. You state that the man is paid as follows:

"The executives of the plant forward a check to the Chief of Police. The check is made payable to the Chief of Police; he cashes it and then gives the employee the proceeds in cash, as his wages."

In our opinion the policeman should be considered an employee of the manufacturing plant and not of the city. The fact that the policeman has been appointed by the Chief of Police of the city and is, nominally at least, paid by the city, is not necessarily decisive in determining whether or not he is an employee of the city. One of the most important tests in ascertaining the existence of public employment is that the employee must be engaged in exercising duties of a public and official character. This test is not met in this case. The employee works exclusively in the interest of a private manufacturing company and not in the interest of the public. He takes his orders from the executives of the plant and not from the Chief of Police. He is also, in reality, paid by the plant. To hold otherwise would mean that the indirect method of paying the employee through the Chief of Police would open up an easy method of subterfuge to evade responsibility under the Fair Labor Standards Act.

In view of these facts section 3(d) does not appear to be applicable in this case.

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(9152)

COPY

In Reply Refer To:
SOL-KCR-GMS

September 11, 1941

Nicholas M. Salinka, Esquire
Rice Corlett & Canfield
122 East Forty Second Street
New York, New York

Dear Mr. Salinka:

Mr. Arthur E. Reyman, Regional Attorney of the Wage and Hour Division in New York City, has referred to this office for reply your letter of August 26, 1941, in which you inquire with reference to the applicability of the outside salesman definition contained in section 541.5 of the Regulations of the Administrator to some five or ten employees whom your client plans to train as outside salesman.

You state that the prospective salesmen will be employed for approximately three months inside the plant of your client and will devote their time to the study of the products being manufactured by your client. At the end of the three months period it is expected that the salesmen will be engaged as outside salesmen.

I am enclosing a copy of Regulations, Part 541, together with a copy of the Report and Recommendations of the Presiding Officer, upon the basis of which the definitions were amended effective October 24, 1940. Pages 48 and 49 of the Report and Recommendations of the Presiding Officer indicate that the only work connected with the training of other salesmen which complies with the outside salesman definition is work performed away from the place of business of the employer in the actual making of sales. Upon the basis of the facts contained in your letter it is our opinion that the employees while engaged during the three months period of time in learning to become outside salesmen are not exempt as outside salesmen under section 541.5 of the Regulations.

Very truly yours,

For the Solicitor

By _____
Acting Assistant Solicitor

Enclosures (2)
273931

(9152)

In Reply Refer To:
SOL:GFH:MPJ:CMM

Miss P. A. Riordan
The Research Institute of America, Inc.
292 Madison Avenue
New York, New York

Dear Miss Riordan:

We regret the delay in replying to your letters of June 11 and August 27, 1941.

In your most recent letter you inquire:

"Ordinarily, a voice culture school operated only within one state would not be subject to the Wage and Hour Law. However, such an organization sells through the mails speech pamphlets and conducts correspondence courses outside the state. The latter activities are less than 10% its total volume of business. Would such transactions be considered in the same light as publishing houses?"

It is our opinion that employees engaged in connection with the sale through the mails of speech pamphlets, and in conducting correspondence courses across state lines are covered by the Fair Labor Standards Act. See in this connection International Textbook Company v. Figg (1909) 217 U.S. 91, holding institutions, such as correspondence schools, which send instructive materials across state lines, are engaged in commerce. We are enclosing for your convenience copies of the act and Interpretative Bulletins Nos. 1 and 5 dealing generally with the act's coverage. Your attention is directed to paragraphs 2, 4, 8 and 9 of Interpretative Bulletin No. 5.

A reply to your question regarding the coverage of the wage order for the portable lamp and shade industry has been forwarded to you in a separate communication.

Very truly yours,

For the Solicitor

By _____
Acting Assistant Solicitor

Enclosures (3)

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