UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
February 28, 1946

Legal Field Letter
No. 105

Attached Opinions

Copies of recent opinions on subjects indicated below are furnished herewith for your information and proper notation in the Index to Legal Field Letters.

MEMORANDA

Date	Page	From	To	Subject
1/14/46	1-2	Harold C. Nystrom (AS:SSB:ERG)	Dorothy M. Williams	A. George Volck, Inc. Beverly Hills, California Coverage of clerical employees of employment agency for motion picture industry. 21 AC 414.9 414.95 21 AC 101.61 205.10 205.250 205.27

LETTERS

Date	Page	To	Subject
1/9/46	3-4	Mr. R. E. Helmer Prentice-Hall, Inc. 941 Munsey Building Washington, D.C. (JFS)	Overtime compensation payable to salaried employees whose workweek is reduced from 40 to 38 hours; effect of lowering rate of pay during 39th and 40th hours. 24 AC 302.1 403.1 401 26 CC 26 CD 303 601 701 703.2 26 CE 101 26 DA 27 DA 101

(04137)

LETTERS

21AC414.9
414.95
21AC101.61
205.10
205.250
205.27

AIR MAIL

Dorothy M. Williams, Regional Attorney
San Francisco, California

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:AS:SSB:ERG:YS

January 14, 1946

A. George Volck, Inc.
Beverly Hills, California
File No. 4-4104-C

This will reply to your memorandum of August 22, 1945 concerning the application of the Fair Labor Standards Act to employees of the subject firm, which operates as an agency to obtain jobs in the motion picture industry for approximately 40 clients, including motion picture actors, producers, writers, musicians, etc. You refer to the opinion expressed in Legal Field Letter No. 67, page 15, which discusses a similar type agency and state that you believe that case distinguishable from subject case in that here interstate transactions are rare, the bulk of the transactions taking place entirely within the State of California. You request my opinion as to whether the clerical employees of the subject who prepare the correspondence and do the other clerical work in connection with the obtaining of jobs for persons in the motion picture industry are covered by the Act as being engaged in occupations necessary to the production of motion pictures for interstate commerce.

As you know, it is the position of the Divisions that employees of an employment agency who procure actors, writers, and other persons for the making of motion pictures are engaged in an occupation necessary to the production of the pictures (Vol I, Wage Hour Code 3C29, footnote 288). If such motion pictures are destined for interstate shipment, as is usually the case, such employees would appear to be covered under section 3(j) of the Act.

In this connection, you may recall that a similar view was expressed by former Solicitor Warner W. Gardner in a memorandum to you dated April 6, 1942, concerning Paul Kohner, Inc. The last paragraph of that memorandum states:

> Quite obviously, the procuring of actors, writers, etc., is indispensable to producing moving picture productions, and if agencies such as the subject company did not perform this function, the producers would have to secure the services of the performers themselves.

Since the activities of subject's clerical employees appear to be intimately and functionally related to the procurement of jobs for persons in the motion picture industry and, presumably, are necessary to the continued function of subject firm as an actors' agency, such employees would, in my opinion, be within the coverage of the Act under the "integrated effort" rule enunciated by the Supreme Court in Armour & Co. v. Wantock, 323 U.S. 126, 130. See, in this connection, my recent memorandum to you dated December 11, 1945 concerning the Retail Credit Company, Inc., and the cases cited therein. See, also, Phillips v. Meeker Coop.

Light & Power Assn., 8 Wage Hour Rept. 1127.

The afore-mentioned views find further support, I believe, in the decision handed down in Yunker v. Abbye Employment Agency, 5 Wage Hour Rept. 57. If, of course, the clerical employees in question are engaged in the regular and continuous use of the mails and other instrumentalities of interstate commerce and communication, that would furnish an additional basis for holding subject's employees to be subject to the Act.

24AC302.1
403.1
401
26CC
26CD303
601
701
703.2
26CE101
26DA
27DA101

Washington 25, D. C.

Mr. R. E. Helmer
Prentice-Hall, Inc.
941 Munsey Building
Washington, D. C.

SCL:JFS:HD

Dear Mr. Helmer:

January 9, 1946

This is in reply to your letter of December 12, 1945, addressed to Mr. Murtha, concerning the payment of overtime compensation under the Fair Labor Standards Act. In your first question you state that an employee's scheduled workweek has been 40 hours for which he has received a salary of $40 per week, the agreement having been that $40 was the compensation for the 40-hour week. Subsequently, his workweek was reduced to 38 hours but he continued to receive his weekly salary of $40, it being expressly agreed that the $40 was to be his only compensation for weeks that did not exceed 40 hours. In other words, you state, although his hourly rate was increased to $1.05 by reason of reducing his regular workweek to 38 hours, the employee agreed that in any week in which he works 39 or 40 hours, he would still receive only $40. In actual practice, the employee frequently works more than 38 hours but not more than 40 hours and still receives only $40. In your second question you assume the same set of facts, except, you state that instead of the employee's receiving nothing for the 39th and 40th hours, he is paid an arbitrary rate of 53 cents for these two hours.

As you know, the act requires that an employee under the requirements of section 7 must be paid at a rate not less than one and one-half times his regular rate of pay for all hours worked in excess of 40 per week. Before an employee can be said to be paid the full amount of extra overtime compensation required by the act he first must be paid his straight-time compensation in full for all hours worked.

Your first inquiry presents a question of fact. If under the employment contract the $40 is intended to pay in full for each and every hour worked through 40 per week, even though during some weeks less than 40 hours are worked, then during a week when the employee works 44 hours he would be due $46 under the act ($40 + (4 x $1.50)).

On the other hand, if under the employment contract the $40 is intended to pay in full for each and every hour worked through 38 per week, and nothing more, then, during a week when 44 hours are worked he would have to be paid, under the act, full straight-time compensation for each and every one of the 44 hours and an extra half-time for the 4 overtime hours, or a total of $48.30 (44 x $1.05) + (4 x $.525). However, during a nonovertime workweek it would not be a violation of the act to work the

(04137)

employee for 40 hours without additional pay for the 39th and 40th hours. An employer could not effect compliance with the act by paying an arbitrary and fictitious rate of 53 cents for the 39th and 40th hours, if in fact under the employment contract a rate of $1.05 is due for each of these hours.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

(04137)

21AC102.120
21BJ602.1
602.3
21AC101.620
408.1
411.42

Mr. Morris Back
Back & Gould
51 Chambers Street
New York 7, New York

SOL:MWP:ERG:CTN

Dear Mr. Back:

January 25, 1946

This will reply to your letter in which you inquired concerning the applicability of the Fair Labor Standards Act to window trimmers employed by your client.

It appears that your client displays products of national manufacturers in retail establishments and receives a fee from both the retail storekeeper and the manufacturer for trimming windows and setting up displays in such retail stores. You state that the window trimmers live in the State in which the stores are located except for one trimmer whose territory covers both Massachusetts and Rhode Island. New York and New Jersey trimmers come into your client's New York office once a week to receive their pay and to pick up displays and supplies (which are furnished by the manufacturer), and other employees pick up their pay checks, displays and supply material from a store in their State to which they are mailed from New York. You do not state how the retail stores are solicited nor do you indicate under what arrangement your client's men receive permission to dress the windows of the retail stores.

As you know, the Fair Labor Standards Act applies to employees engaged in interstate commerce or in the production of goods for interstate commerce, including occupations or processes necessary to such production. Employees so engaged must be paid at rates not less than 40 cents an hour for all hours worked in each workweek and at rates not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek, unless specifically exempted from one or both of these requirements by some provision of the Act.

Where display materials are transmitted across State lines and are installed by window trimmers pursuant to prior orders or understandings between your client and the retail establishments or national manufacturers, the installation of such displays would be deemed covered under the principles expressed in Walling v. Jacksonville Paper Co., 317 U.S. 564. This would be true even though the display materials may remain in the possession of your client for some time before the store is ready to have the displays set up. Moreover, if the contracts under which these displays are installed are interstate contracts for advertising (i.e., contracts involving or necessarily contemplating the movement of displays and supplies across State lines), the installation of such display materials would likewise be covered under the Act. Coverage would also extend to such employees as may engage in the ordering, receiving, handling and unpacking of materials coming from outside the State; to employees who, in any workweek, are engaged in transporting display materials across State lines; and to employees whose movements across State lines are regular and recurring, and are made in the performance of their duties pursuant to the employer's instructions.

(04137)

Section 13(a)(2) of the Act, however, provides an exemption from both its minimum wage and overtime requirements for any employee engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. This exemption would, in my opinion, be applicable to those window trimmers employed by your client in any week in which they are engaged exclusively in retail establishments which meet the requirements of section 13(a)(2). The exemption would be inapplicable, however, to window trimmers who, in any workweek, set up displays in establishments which do not meet the requirements of section 13(a)(2).

I trust that the information set forth above will enable you to determine which of your client's employees are entitled to the minimum wage and overtime benefits contained in the Act. If, however, you have any further questions in this matter, I suggest that you communicate with the regional office of these Divisions located at 341 Ninth Avenue, New York, New York, which office is charged with the enforcement of the Fair Labor Standards Act in the New York area.

Very truly yours,

Thacher Winslow
Deputy Administrator

(04137)

25 BC 204.2
26 CD 302.23
26 CD 302.1
26 CD 402.82
26 CD 601
26 AB
26 BB
26 CD 402.1
26 CD 702
26 CD 402.523
27 DA 101

Washington 25, D. C.

Robert C. Finley, Esquire
431 White Henry Stuart Building
Seattle, Washington

SOL:JFS:HD

Dear Mr. Finley:

February 8, 1946

Your letter of December 4, 1945, addressed to Mr. Karl Rodman of our Portland office, has been referred to this office for reply. You state that the union contract with the Shingle Weavers Union sets a regular 36-hour workweek and provides for payment of time and one-half for hours worked in excess thereof. During the war employees frequently were called upon to work an extra one-half shift of 3 hours and were credited with working 39 hours, the last 3 hours being paid at time and one-half. Under the contract for 1945 it is provided that make-ready time shall be computed on the basis of 15 minutes per three operating hours and paid for at the rate of $1.55 per hour. This provision was made retroactive to December 8, 1944 and back wages have been paid in accordance therewith; however, the question has now arisen whether employees hired on the basis of a combination hourly rate and piece rate and who were paid 3 cents per hour in lieu of vacations are also due back wages prior to December 8, 1944 under the requirements of the Fair Labor Standards Act. Apparently, prior to the 1945 contract make-ready time was not recorded or taken into account in determining employees' wages.

In the example contained in your letter, a sawyer, during the first 36 hours, produced 90 squares of grade 1 shingles at a piece rate of 31 cents and 90 squares of grades 2, 3, or 4 shingles at a piece rate of 25 cents, for a total of $50.40. During an extra one-half shift of 3 hours he produced 8 squares of grade 1 shingles and 8 squares of grade 2 shingles at the same piece rates, for a total of $4.48. In addition, he received 27-1/2 cents per hour, plus 3 cents per hour in lieu of vacation, or $11.90 for 39 hours, or a sum total of $66.78 for 39 hours. By figuring on the basis of one-half the hourly rates and one-half the piece rates, you have computed an additional $2.70 due as overtime under the employment contract for the last 3 hours in excess of 36. However, in addition to the 39 recorded hours, you state that the employee performed make-ready work, which time you compute as amounting to 15 minutes per 3 operating hours or 3-1/4 hours, making a total of 42-1/4 hours worked during the week. Consequently, it is your contention that the regular rate of pay for overtime purposes under the Fair Labor Standards Act should be computed by dividing total weekly earnings by total hours worked per week, exclusive of make-ready time.

As you know, employees entitled to the benefits of the act must

(04137)

be paid overtime at a rate not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 per week. Make-ready time constitutes hours worked under the act, Walling v. Frank, 62 F. Supp. 261 (W.D. Ky.); Edmondson v. Yellow Truck & Coach Co. 8 WHR 187 (E.D. Mich., 1945). The regular rate of pay for a piece worker is computed by dividing his total weekly piecework earnings (including supplemental hourly rate earnings) by the number of weekly hours for which such amount was earned. Of Walling v. Youngerman-Reynolds Hardwood Co. 324 U.S. 827. As was stated in Skidmore v. Swift & Co., 323 U.S. 134, where time outside the recorded hours constituted hours worked under the act, "His compensation may cover both waiting and task, or only performance of the task itself * * * We do not minimize the difficulty of such an inquiry where the arrangements of the parties have not contemplated the problem posed by the statute. But it does not differ in nature or in the standards to guide judgment from that which frequently confronts courts where they must find retrospectively the effect of contracts as to matters which the parties failed to anticipate or explicitly provide for."

Whether the weekly piecework earnings (including supplemental hourly rate earnings) were intended to cover both the weekly recorded hours and make-ready time, or only the recorded hours, must be determined from all the facts and circumstances of the case. However, where the employer did not consider make-ready time as constituting hours worked under the act, it would seem that the effect of the employment contract was that the hours of employment per week which the employer intended to exact from the employees in exchange for their piecework earnings (including supplemental hourly rate earnings) were only the recorded hours and the employees intended their piecework earnings (including supplemental hourly rate earnings) to pay them in full only for the recorded hours. Under such circumstances the regular rate of pay would be computed by dividing the total weekly piecework earnings (including supplemental hourly rate earnings) by the number of weekly recorded hours, exclusive of made-ready time.

As you also know, it is the position of the Divisions that extra amounts paid as bona fide overtime compensation for hours worked under 40 per week, pursuant to an employment contract, may be credited by the employer as overtime compensation paid to meet the requirements of the act for hours worked in excess of 40 per week. Of course, what the employee may be due under his contract of employment is a matter over which the Divisions have no jurisdiction.

Also, I wish to comment on the "3 cents per hour in lieu of vacation time" which is paid in addition to the piece rate and hourly earnings. It is the position of the Divisions that where an employee foregoes his vacation and during his vacation time receives both his vacation pay and actual earnings, the vacation pay need not be included in computing the regular rate of pay, provided, (1) there is a bona fide agreement that the employee will receive a vacation with pay, and, (2) the sum paid as vacation pay is the approximate equivalent of the employee's

(04137)

normal earnings for a similar period of time. However, where an employee is paid "3 cents per hour in lieu of vacation time," the amount he will receive as vacation pay will depend solely upon the number of hours he works throughout the year, and will have no relationship whatsoever to the amount he would have received if he had taken his vacation with pay. Under such circumstances the 3 cents actually amounts to an increase in the hourly rate and must be included in computing the regular rate of pay.

Very truly yours,

L. METCALFE WALLING
Administrator

(04137)