U. S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Washington, D. C. 20210

NOV 1 1971

21 BJ 304.41
21 AC 451.22

This is in further reference to your letter of September 7, 1971, regarding the application of section 13(a)(2) of the Fair Labor Standards Act to the operations of [redacted] a wholly-owned subsidiary of [redacted]. This company is engaged in the business of providing temporary help in the home and health care field through offices owned and operated by franchisees or through offices owned and operated directly by [redacted].

You were advised by letter dated June 22, 1971 that temporary help agencies, such as [redacted], are not considered retail or service establishments within the meaning of section 13(a)(2) of the Act, but ask that your request that your business be considered within the retail concept be given reconsideration.

Section 13(a)(2) of the Act provides an exemption from its minimum wage and overtime pay requirements for "any employee employed by any retail or service establishment .... if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section 3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

The entire legislative history of this section of the Act and numerous court cases based on this exemption indicate that the exemption is intended to apply to establishments which are engaged in the traditional selling of goods or services to the public at the end of the stream of distribution. Typical of the establishments Congress considered for exemption are grocery stores, restaurants, hotels, clothing stores, barber shops, beauty shops, drug stores, etc. Employment agencies and firms similarly providing temporary employees, while they may perform "services" within some meanings of the term, do not

perform "services" of the kind sold to consumers by those service establishments which come within the meaning of the retail or service establishment exemption. The legislative debates on this exemption named telephone, gas and electric, and credit companies along with a number of others as businesses outside the exemption. This "demonstrates that not everything the consumer purchases can be a retail sale of goods or services." Idaho Sheet Metal Works v. Wirtz, 383 U.S. 190; rehearing denied, 383 U.S. 963.

It is well settled by the Courts that exemptions from the Fair Labor Standards Act are to be narrowly construed requiring the party claiming the exemption to demonstrate clearly that he is well within the precise wording and intent envisioned by Congress. It is our opinion that a firm supplying temporary employees is not so exempt. The Junker case so holds and this has been the position of the Department from practically the inception of the Act as the court noted in that case. There would appear to be no more warrant to distinguish between the selling of temporary help services to householders and to manufacturing establishments than there would be between the sales of loan services to individuals by personal loan companies and those of banks to commercial customers. Mitchell v. Kentucky Finance Co., 359 U.S. 290.

Sincerely,

Horace E. Menasco
Administrator

by Bert T. Robertson
Administrator
Wage and Hour Division