

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

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DEPARTMENT OF LABOR
UNITED STATES OF AMERICA

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This is in further reply to your letter of January 25, 1973, concerning the application of the Fair Labor Standards Act to the [REDACTED]

Specifically, you are concerned with the exemption provided in section 13(a)(2) of the Act to your client's operations which include, as you state, "a small amount of landscaping consisting of sodding, planting, trimming, and installing sprinklers." You go on to say that in only one instance during the past two years has such work been performed in connection with new construction.

It is the Wage and Hour Division's position that a retail nursery with annual sales of less than \$250,000 may qualify for the exemption provided in the Act for a retail or service establishment under section 13(a)(2). The occasional planting for customers in their home yards goods which the establishment sells would generally be considered an exempt activity for purposes of this exemption.

On the other hand, work of the type you describe would be considered landscaping work and is non-retail and must be considered in the 25% tolerance for nonexempt work in section 13(a)(2).

Although landscaping work does not constitute construction, per se, it is considered construction when performed in connection with the repair, maintenance, improvement, enlargement, replacement, or extension of an instrumentality of commerce, or in connection with new construction or reconstruction, or where substantial amounts of earth are moved to reconstruct terrain, or to build terraces or retaining walls, and any employees engaged in such work are outside the scope of the section 13(a)(2) exemption and would be covered under section 3(s)(3) where the tests of that section are met.

The fact that certain landscape work may be considered as construction for the purpose of section 3(s)(3) does not preclude the application of section 7(c). In other words, landscape work which

is considered within the definition of the landscape contracting industry found by the Administrator to be seasonal in nature (see Regulations, Part 526.10(b)(17)), would be within the 7(c) exemption even though it is a construction activity.

In response to your specific inquiry, the sodding, planting, trimming, and installing of sprinklers mentioned in your letter would be non-retail and must be included in the 25% tolerance for nonexempt work set out in the 13(a)(2) exemption. Employees engaged in such work would be exempt if the establishment otherwise meets the tests for a retail or service establishment described in section 13(a)(2). In any week in which they engage in landscaping work related to new construction (or in other landscaping work described in paragraph five above), the exemption would not apply.

Sincerely,

Ben P. Robertson
Acting Administrator
Wage and Hour Division

Enclosures