FLSA-146

October 1, 1975

This is in reply to your letter of September 5, 1975, asking whether craftspeople who produce goods in their homes for marketing cooperatives of which they are members would be treated under the Fair Labor Standards Act as employees of such cooperatives or as independent contractors.

A determination as to the existence of an employment relationship is dependent upon all the facts in each individual situation. The Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the Fair Labor Standards Act. The Court has held that it is the total activity or situation which controls. Among the elements which the Supreme Court considered significant are six factors listed on pages 2 and 3 for the enclosed pamphlet, Employment Relationship.

In the application of the Fair Labor Standards Act an employee, as distinguished from a person who is engaged in a business of his own, is one who follows the usual path of an employee and is dependent on the business which he serves. The employer employee relationship under the Act is tested according to the Court by "economic reality" rather than "technical concepts", it is not determined by the common law standards relating to master and servant.

There is extensive case law dealing with the economic relationship between a worker and a marketing medium which almost without exception holds that the home workers are the employees of the distributor of the raw materials. We call your attention to the recent case of Mednick v. Albert Enterprises, Inc., et al. (5th Cir., 1975) 22 Wage and Hour Cases 166, 508 F. 2d 297 in which the court, in dealing with the economic realities test, delved deeply into the question and held that the determination of whether an individual is protected by the Fair Labor Standards Act may be bottomed in great part on a finding of whether that individual is "dependent upon finding employment in the business of others . . .[one of] those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut off their earnings".

Other cases dealing with the relationship between a worker and a marketing medium in which the worker was held to be an employee include McComb v. Homeworkers Handicraft Cooperative, 176 F.2d 633 (C.A. 4, cert. denied) 338 U.S. 900; Walling v. American Needlecrafts, 139 F.2d 60 (C.A. 6) and Goldberg v. Whitaker House Cooperative, 366 U.S. 28.

There are conditions under which the dependence of the craftspeople upon their marketing cooperative would characterize them as employees of the cooperative rather than as independent contractors. For example, where the marketing cooperative designs or standardizes the products, furnishes practically all the raw materials except insignificant findings, sets a predetermined piece rate for each item produced and

determines production goals and deadlines, the craftspeople are dependent in every way upon the business which they serve. The opportunity for profit and loss by the craftspeople would appear minimal under such a plan. The services rendered by the craftspeople in such a relationship are an integral part of the marketing cooperative's business and are under the full control of the marketing cooperative so that no initiative, judgment, or foresight in open market competition is required for the success of the craft producers. In such case, the craftspeople follow the usual path of an employee and must be paid in compliance with the Act's minimum wage and overtime pay requirements.

The above principles are well established and constitute no change in interpretation or policy with respect to craft cooperatives.

With respect to section 11(d) of the Fair Labor Standards Act, the section states that "all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect". It should be noted that in adopting the 1974 amendments to the Act, the Congress did not consider making any change in section 11(d). Accordingly, we find no authority to modify the restrictions on homework in certain industries which are prescribed by regulation in 29 CFR Part 530.

Sincerely,

Warren D. Landis
Acting Administrator