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

PD

AUG 26 1976

This is in reply to your letter of May 28, 1976, concerning the application of the overtime provisions of the Fair Labor Standards Act to employees of restaurants and other food service establishments.

It is our position that applicability of the special overtime provision in section 13(b)(8) turns not on the primary function of the employer in selling prepared foods for immediate consumption, but on whether the establishment is a restaurant. Food service establishments that do not provide the characteristic employee services and the physical equipment and furnishings that patrons require for consumption of meals on the premises are not "restaurants" for the purpose of section 13(b)(8).

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You refer to our opinion letter of May 1, 1975, and state that some of our compliance officers are not correctly applying the standards enunciated in that letter. In particular, you state that one compliance officer refused to classify as a restaurant an establishment that has seating facilities for fewer than 15 patrons, and other offices assert that the exemption is not available if over 50% of the sales are made to customers who do not elect to eat on the premises.

Whether or not a food service establishment is a restaurant for purposes of section 13(b)(8) depends on all the facts in the particular situation. No single test is determinative. Since the facts in the cases about which you write are not available, we cannot address our reply to the specific allegations.

The reference to "seating facilities for at least 15 patrons" in our opinion is, as you state, a Census description. Our letter did not state it as an absolute rule, but a guide to indicate that in the common understanding a restaurant is predominantly a "sit-down" eating place. Similarly, we have not set any numerical rule for testing "consumption on the premises".

In the usual case it is not necessary to count the seats or the carry-out orders. For example, a fast food operation having the requisite dollar volume for coverage under the Act that has as few as 15 or so seats could hardly be said to provide the characteristic employee services and the physical equipment and furnishings that patrons require for consumption of meals on the premises. It is probable, also, that under such circumstances the establishment would have considerable carry-out business. On the other hand, a full-service restaurant may be so located in a business area that more than 50% of its volume comes from take-out orders. Such an establishment could nevertheless be regarded as a restaurant.

With respect to the "on the premises" test, a garden restaurant or a sidewalk cafe could, of course, qualify as a restaurant if it provides the customary employee and dining room services. "On the premises" does not necessarily mean a physical structure. However, it is our opinion that a drive-in that has no seating facilities but where patrons are served and eat in their cars is not a restaurant within the meaning of the exemption.

Sincerely,

/s/ Ronald J. James

Ronald J. James
Administrator
Wage and Hour Division