FLSA-126

October 27, 1980

Thank you for your letter concerning the employment status under the Fair Labor Standards Act of persons who tend cucumber plants for the purpose of harvesting pickling cucumbers.

Based on the information provided in your letter and during our March 12th meeting, our understanding of the factual situation is as follows: A farmer cultivates land, plants cucumber plants, fertilizes and sprays the plants throughout the growing season, and obtains a buyer for the fruit. The farmer provides the machinery, seeds, insecticides and fertilizer. After the plants are growing the farmer will solicit individuals (usually families) to tend and harvest the cucumber plants. Each family signs an agreement with the farmer specifying that they are a "share farmer." The "share farmer" agrees to do all the work necessary to pick and place the cucumbers clean and free from all rubbish and debris in containers furnished by the farmer. The methods and manner of harvesting used by the "share farmer" shall be determined by the buyer in the best interests of all parties.

The farmer agrees to furnish the necessary trucking and transportation in order to market the cucumbers, and the "share farmer" will not be required to assist in the loading of the trucks. The "share farmer" will not share in any of the proceeds derived by the farmer from moving the bins around or the trucking and transportation to market to the cucumbers. Occasionally, however, a "share farmer" may have a truck used in moving his or her family to the farm, which may be used to haul the cucumbers to market. "Share farmers" by this agreement our responsible for compliance with all Federal and State labor laws. Both the farmer and "share farmer" will share 50-50 in the profits derived from the sale of the cucumbers. The agreement also specifies the price per grade for the cucumbers.

After reviewing the tests of employment relationship contained in the "Employment Relationship under the FLSA" pamphlet, you believe the above relationship does not result in an employment relationship under the Act.

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 Act. It is the total activity or situation which is controlling. Among the factors which the Supreme Court has considered significant are: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of individual investment in facilities and equipment; (4) the opportunities for profit or loss; (5) the degree of independent business organization and operation; (6) the nature and degree of control by the principal; and (7) the degree of independent initiative, judgment, or foresight exercised by the one who performs the services.

Under the Act, an employee, as distinguished from a person who is engaged in a business of his or her own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business he or she serves. The employer-employee relationship is tested by "economic reality" rather than "technical concepts"; it is not determined by the common law standards relating to master and servant.

Based on the facts as outlined above, the services provided by these persons would appear to be a type of service that is an integral part of the farming operations. In a similar situation, where crew chiefs assembled crews to pick bricks from rubble or demolished buildings, clean, stack and load bricks found to be salvageable, and were paid a fixed amount per 1000 bricks, the court ruled that they "have no meaningful investment, have no opportunity to suffer substantial loss or to make substantial profit, and clearly do not run enterprises that actually depend for success upon initiative, judgment, or foresight of the typical independent contractor." Wirtz v. National Wrecking Co., 17 WH Cases 449 (E.D. 111. 1968).

The second factor the Supreme Court considered significant was the permanency of the relationship. You state that the migrant labor that harvest pickles have been with the same farmer on a sharecrop basis for at least several years. This does not indicate that the relationship would be any different than the usual relationship of employer and employee. The control exercised by the farmer over the "share farmers" by establishing the number of employees needed and making all arrangements but the performance of the job itself, is the same type of control that is exercised by an employer who hires general farm labor to hoe, tend and harvest any crop.

The third factor considered by the Supreme Court is the amount of individual investment in facilities and equipment. You state the "share farmer" would own hoes, gloves and occasionally a truck which may be used to transport the cucumbers to the receiving station. The Court in Goldberg v. Henderson, 15 W.H. Cases 475, 1962 (E.D. Ark. 1962), ruled that even though the "cutters had some equipment such as a gasoline handsaw and an old vehicle of small value" and "other hand tools, such as axes," they were not independent contractors, but employees.

As to the fourth factor, the opportunities for profit or loss must be those which flow from the operation of independent businessmen in open market competition with others. In Goldberg v. Henderson where employees were cutting, peeling and stacking timber, the Court ruled that "the cutters" had no opportunity for profit or loss and the only moneys they earned came from their physical labor in the woods."

The fifth factor deals with the degree of independent organization and operation. As stated in Mednick v. Albert Enterprises, Inc., 505 F. 2d 297, 303 (C.A. 5, 1975), "[a]n employer cannot saddle a worker with the status of independent contractor, thereby relieving itself of its duties under the Fair Labor Standards Act, by granting some legal powers where the economic reality is that the worker is not and never has been independently in the business which the employer would have him operate."

The sixth test is the nature and degree of control by the principal. You state the principal has little control over the sharecropper as to work hours, supervision, pay, or who is in the field harvesting the cucumbers of the sharecropper. We disagree. By selecting individuals based on historical relationships, primarily accepting families to do the work, obtaining a buyer and negotiating a price to be paid for a cucumber grace, the farmer has exerted a large degree of control over the "share farmer".

The last factor is the degree of independent initiative judgment, or foresight exercised by the one who performed the services. You state the contractor does make judgments as to the quantity of pickles harvested how and when to care for and harvest the crop. Inasmuch as the farmer will participate in the proceeds from the sale of the cucumbers on a 50-50 basis, it is reasonable to assume that the farmer would issue instructions regarding the tending of the plants and the cucumber size selection for harvest (the smaller cucumbers bringing the income return) if it were evident to him or her that his or her land and crop investment were not being efficiently utilized.

Accordingly, it is our opinion that such "share farmers" are employees under the Fair Labor Standards Act.

You have made reference to internal revenue and unemployment compensation cases which suggest a contrary view. In Sachs v. United States, 422 F.Supp. 1092 (W.D. Ohio 1976), the court dealt with an Internal Revenue Code section which defined "employee" under usual common law rules, a much more restrictive definition than is the case under the FLSA. Furthermore, the Internal Revenue statute specifically excepted share farmers from the employment relationship.

Matter of Carmen Patane, a decision rendered on Sept. 13, 1979 by the California Unemployment Insurance Appeals Board, reached a result in agreement with our position in the present case. There the Appeals Board concluded that the "share farmers" in question were employees, by reason of the fact that the employer had the right to control the manner and means of accomplishing the work performed.

Henry T. White
Deputy Administrator