APR 22 1981

This is in reply to your letter of March 27, 1981, concerning the application of the Fair Labor Standards Act (FLSA) to your client who is engaged in the cable television construction business. You indicate that your client has numerous out-of-town supervisors and you wish to know whether such supervisors are exempt from the requirements of the Act. Secondly, you wish to know whether your client's "independent contractor" agreement provides a valid arrangement so that persons signing such agreement are independent contractors rather than employees of your client.

You indicate that a supervisor's primary duties consist of assigning, distributing and inspecting work done by the "independent contractors" with whom he deals. The supervisor is paid a guaranteed salary in excess of $250 per week, and rarely, if ever, works over 40 hours per week. However, the same supervisor is signatory to the independent contractor agreement, and begins his role as an "independent contractor" when his supervisory duties are completed. Presumably, such change in status is within the same workweek.

First, we would like to comment on the status of the persons your client considers "independent contractors." 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 as a matter of economic reality 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 by "economic reality" rather than "technical concepts,"

it is not determined by the common law standards relating to master and servant. Rutherford Food Corp. v. McComb, 331 U.S. 722; Goldberg v. Whitaker House Cooperatives, Inc., 336 U.S. 528; Walling v. Portland Terminal Co., 330 U.S. 148; Walling v. American Needlecrafts, Inc., 139 F. 2d 60.

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 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 factors which the Supreme Court considered significant were: (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 and 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 of foresight exercised by the one who performs the services; See Rutherford Food Corp. v. McComb, 331 U.S. 722; and see also United States v. Silk, 331 U.S. 704; Harrison v. Gray Van Lines, Inc., 331 U.S. 704; Bartels v. Birmingham, 332 U.S. 126; NLRB v. Hearst Publications, 332 U.S. III.

It has long been the position of the Wage and Hour Division that it is unrealistic to assume that an employment and independent contractor relationship may exist concurrently between the same parties in the same workweek.

While you do not provide detailed information concerning the individuals your client regards "independent contractors", we should note that the typical construction worker who may own his or her own hand tools and vehicle does not become a bona fide independent contractor by signing a contractual agreement. All the facts surrounding the relationship, as described above, have to be considered. It is our opinion that these "independent contractors" would appear to be employees of your client.

With regard to the exempt status of your client's supervisors, section 13(a)(1) of the FLSA provides a complete minimum wage and overtime exemption for bona fide executive, administrative, professional and outside sales employees, as those terms are defined and delimited in 29 CFR Part 541. In order for a supervisory employee to be exempt as a bona fide executive, all the tests contained in section 541.1 must be met.

An executive employee, who is paid on a salary basis in excess of $250 per week must regularly direct the work of two or more other full-time employees and have management as his or her primary duty in order to qualify for exemption.

From the limited information contained in your letter, we cannot unequivocally determine the exempt status of your client's supervisors. A determination of whether the employees have management as their primary duty must be made on the facts in each individual case. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent of the employee's time. Time spent by the employee in construction activities, either during the hours of his or her regular supervisory position or outside those hours, would be nonexempt work and would have to be included in determining whether the employee has met the primary duty test. (See section 541.103 of the regulations for a more detailed discussion of "primary duty".)

If after reading the enclosed material you have further questions about the exempt status of the supervisors, you may find it more convenient to contact our [redacted]. The staff in that office is in a better position to obtain all the necessary facts, and would be pleased to be of all possible assistance.

Sincerely,

Herbert J. Cohen
Assistant Administrator
Wage and Hour Division

Henry T. White, Jr.
Deputy Administrator

Enclosure