

## FLSA-147

June 10, 1981

This is in reply to your letter of May 6, 1981, concerning the application of the Fair Labor Standards Act (FLSA) to your client who is a frozen foods wholesaler selling to various grocery store operations.

You indicate that your client is developing a new program with some grocery store operations whereby the stocking and display of the frozen foods, as well as maintenance and management of the frozen food section of the grocery operations, will be assumed by your client. Your client wishes to enter into a subcontracting arrangement with individuals or firms who would actually perform the service and management responsibilities assumed by your client in its arrangement with certain grocery operations. You wish to know whether such subcontractors would be considered independent contractors or potential employees of your client under the FLSA.

First, we would like to comment on the status of "individuals" with whom your client may enter into a subcontracting relationship whereby such individuals would be considered "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; 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.

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 or 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.

If the facts show that your client subcontracts with a bona fide independent business which performs services for other businesses as an established part of its own business

activities (e.g. does work for other wholesalers, or retail grocery enterprises), such business may indeed be an independent contractor. On the other hand, an individual frozen foods section manager whose only activity consists of performing functions cited in your letter at one grocery establishment serviced by your client, would be an employee of your client.

We would also like to point out that the possibility of a joint employment relationship exists. An individual deemed to be an employee of your client may also be deemed an employee of the grocery enterprise. Where an employee performs work during the same workweek for two employers who either arrange with each other to share the employee's services, or one employer acts in the interest of the other in relation to the employee, or the employers are not completely disassociated with respect to the employee's employment, a joint employment relationship is deemed to exist. Each employer in such a situation is responsible, individually and jointly with the other, for compliance with the applicable provisions of the Act.

The association between your client and the grocery enterprise would appear especially close with respect to a frozen food manager who would be responsible for inventory control, ordering, sanitation of the frozen foods section, inspection and reporting of maintenance requirements to the store, receiving, pricing, storage and rotation, stocking, related clerical duties, and the like.

Since you indicate that the circumstances may vary at some locations, we cannot provide a determination that would apply to all situations. Please let us know if you have further questions.

Sincerely,

Herbert J. Cohen  
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Wage and Hour Division

Henry T. White, Jr.  
Deputy Administrator