For release in morning papers
Wednesday, November 16, 1938

(R-92)
(148)

U.S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington

QUESTIONS AND ANSWERS (NO. 5)

(IMPORTANT NOTE: Letters such as the accompanying were written in response to specific requests for information, and each answer has been made on the basis of the particular circumstances involved. They should not be construed as covering cases that might be regarded as similar.)

Numerous requests for information have been received by the Wage and Hour Division on the status of wholesale establishments. Among the cities from which such requests have been received are:

Houston, Texas; Brady, Texas; Nashville, Tenn.; New Orleans; Miami, Fla.; Jackson, Miss.; Washington; Montpelier, Vt.; Youngstown, Ohio; San Antonio, Texas; New York City; Philadelphia; Tampa, Fla.; Dallas, Texas; Atlanta, Ga.

A typical reply by the General Counsel's Office follows:

"You ask whether a wholesaler making all his sales within the State in which he is doing his wholesaling is subject to the provisions of the Act if he purchases the goods which he wholesales from outside the State.

"You will note that there are varying situations even within the group of wholesalers selling locally. Thus, at times, shipment may be made directly to the local purchaser from the out-of-State manufacturer. Again, shipment may be made to the wholesaler after the goods have already been resold. Any employee engaged in such work would seem to be 'in commerce.'

"There may be employees whose sole work is connected with goods which have tentatively come to rest at the wholesaler's place of business. Even here the courts may hold that employees engaged in wholesale sales of goods brought in from outside the State are 'in commerce.'

"It would seem wisest to adopt the policy as to such employees—when in doubt, comply."

A letter from Miss Rose Schneiderman, Secretary of the State of New York Department of Labor, received the following reply from the General Counsel's Office:

"The first inquiry is whether a telephone operator working in a hotel comes within the Fair Labor Standards Act because of the fact she takes calls from all over the country. I think that such an employee would be within the exemption in Section 13(a) (2) applicable to 'any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce

"Your second question relates to 'goods being made in New Jersey for a New York manufacturer.' This, of course, is a very meager statement of facts. It would appear, however, that the employees of the New Jersey factory are engaged in the production of goods for interstate commerce within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

"Your third question relates to employees engaged in manufacturing paper boxes where the raw materials have been derived from outside the State. If no part of the product of the paper-box factory moves in interstate commerce, the employees engaged in producing the goods are not within the meaning of the Fair Labor Standards Act. It should be noted, however, that certain of the employees, such as employees purchasing the raw materials from other States or receiving or unpacking the goods, might be held to be 'in commerce' and, therefore, entitled to the benefits of the Act.

"The next question asks whether 'retailers, unless they do 20 percent of their business from outside the State, are exempt from the Wage and Hour Law.' So far as I know, the figure '20 percent' has no significance. The exemption in Section 13(a) (2) applies to 'any employee engaged in any retail. . . establishment, the greater part of whose selling . . . is in intrastate commerce.' I take it that 'the greater part' means more than 50 percent.

"As to architects 'who make plans for buildings', I do not believe they are engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act.

"You realize that in all the above matters the Administrator has no power to make any conclusive ruling; they are matters of interpretation which are ultimately for the courts. An expression of opinion by the Administrator, or by his Counsel, to the effect that a particular employer is not subject to the Act, would not, if such opinion proved to be erroneous, protect the employer from suits by employees for double damages under Section 16(a)."

A query from North Carolina received the following reply from the General Counsel's Office:

"You state that the wood frames for the chairs are produced in factories with factory labor, but that the seats and backs are woven by hand out of cane splints, and that this latter work is done in the homes of the workers and delivered to the manufacturer on the manufacturer's trucks.

"You further state that the work is done on a contract basis; that the contract is with some member of the household, and that the manufacturer is not supplied with a list of the individuals in the household performing the labor.

"We have stated in Interpretative Bulletin No. 1 that 'since the Act contains no prescription as to the place where the employee must work, it is evident that employees otherwise coming within the terms of the Act are entitled to its benefits, ether they perform their work at home, in the factory or elsewhere.' Of course, this presupposes the existence of an employer-employee relationship. Whether a particular arrangement for work in the home creates a bona fide relationship of employer-independent contractor or is, in substance, an employer-employee relationship, is a question of general law depending on the facts in each particular case. The Administrator could not undertake to issue rulings on such questions, and certainly not upon an ex parte statement of facts. The manufacturer must be guided by the advice of his own attorneys.

"You make further inquiry, 'with respect to the manufacture of chairs for sale wholly within the State of production' out of raw materials imported from abroad. If no part of the chairs moves in interstate commerce, the employees engaged in manufacturing them are not engaged in production of goods for interstate commerce within the meaning of Section 6 and 7 of the Act. It should be noted, however, that certain the employees purchasing the raw materials from other States or receiving or unpacking the goods might be held to be 'in commerce' and, therefore, entitled to the benefits of the Act.

"In determining whether employees are engaged in production of goods for interstate commerce, it is not conclusive that the manufacturer passes title wholly within the State of manufacture. Thus, if the goods are purchased by an out-of-State purchaser, f.o.b. the factory, and are taken by the purchaser out of the State, the employees in the factory are engaged in production of goods for interstate commerce. The same is true if the manufacturer sold his product within the State of manufacture to a wholesaler who, in turn, sells to out-of-State purchasers.

"You make the further inquiry: 'Assuming that a manufacturer of double cane seat chairs manufactures other types of chairs which are produced entirely by factory labor; would this manufacturer be in violation of the Act if he continued this home work in connection with chairs sold entirely within the State of production, if the nufacturer at the same time sold other types of chairs in interstate commerce?' This question assumes a complete segregation of functions with the result that the employees working in the homes are not contributing to the production of goods for interstate commerce within the meaning of the Act. This answer, however, is subject to the qualifications stated in the previous paragraph of this letter."

A query from New York City covered employment of aliens. The General Counsel's Office wrote:

"You state that you have two nonresident alien students working through the various departments in your office to learn the business; that on account of their status you may not pay them a salary but that, for technical reasons, you are carrying them on your pay roll at $1 a month.

"You further state that 'such individuals do not replace any regular employees, being extras who do not perform any particular work.' I understand that the Department of Labor does not consider aliens in the situation you describe to be 'laborers' within the meaning of the contract labor laws. This conclusion is based upon the Department's interpretation of the term 'laborer' as implying the existence of an employer-employee relationship, which is believed not to exist in the situation described.

"I should think that by the same reasoning such alien visitors, under the facts set forth in your letter, are not your 'employees' within the meaning of the Fair Labor Standards Act."

A query from Butte, Mont., elicited the following letter from Administrator Elmer F. Andrews:

"The Administrator has no power under the Act to exempt the gold mining industry from the application of the law. Whether the gold mining industry under the existing economic situation with reference to gold is subject to the Fair Labor Standards Act is ultimately a question of interpretation for the courts, and the Administrator has no power to issue any binding ruling."

A letter from York, Pa., asked whether the stemming of tobacco is permitted "until the Department makes a decision."

The General Counsel's Office replied:

"Section 3(f) of the Act defines agriculture to include 'any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.' An exemption is provided in Section 13(a) (8) for agricultural employees. Hence, where tobacco stemming is done by a farmer or on a farm as an incident to or in conjunction with the growing of tobacco on such farm, employees engaged in such work would appear to be exempt from both the wage and hour provisions.

"Section 13(a) (10) provides an exemption from both the wage and hour provisions for employees within the area of production engaged in handling and preparing in their raw or natural state agricultural or horticultural commodities for market. As stemming changes the tobacco from its natural form, it does not appear that it is an operation which brings the employees within the wording of this exemption.

"Section 7(b) (3) and Section 7(c), however, may operate to exempt employees who are stemming tobacco from the 44-hour limitation for an aggregate period of 14 workweeks. But this question will have to be determined by you after examination of our regulations on seasonal industries and area of production."

A query from New York City received the following reply from Burton E. Oppenheim, Acting Chief of the Industry Committees Section:

"The Administrator has requested Industry Committee No. 1 to consider and recommend to him a possible change in the form of the definition for the textile industry to include:

"'Such further processing of woven or knitted fabrics enumerated in the order of September 13 as is substantially conducted in establishments which are also engaged in the weaving or knitting of fabrics, excepting knitted outerwear, such as dresses, suits, overcoats and sweaters, and as may be included with the least disturbance of competitive relationships.'

"I am advised by the Legal Division that the Administrator may accept or reject such amendment to the definition as may be suggested. At such time, the Administrator may confer further with interested parties affected by a change in the definition, or he may hold a public hearing at which interested parties will be given an opportunity to be heard on any proposed change. These actions on his part, however, are not required but are within his discretion. But the wage order recommended to the Administrator by Industry Committee No. 1 must include a definition for the industry to which it will apply, and this recommended wage order will, under the Act, be subject to a public hearing before the Administrator can decide whether to adopt or reject it.

"To maintain reasonably efficient administrative procedure, the Administrator will not hold further conferences on the subject of definition in the textile industry until the Textile Industry Committee makes its report to him in response to his letter requesting advice as to amendment to the definition. Industry Committee No. 1 has appointed the subcommittee before which you are to appear to report to it concerning this matter. The Administrator will not influence Industry Committee No. 1 as to its course of procedure in determining its recommendation to him."