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U.S. DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION  
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Paul Sifton, Deputy Administrator, Wage and Hour Division, U.S. Department of Labor, today released the following interpretative bulletin prepared in the Office of the General Counsel:

WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR  
OFFICE OF THE GENERAL COUNSEL

INTERPRETATIVE BULLETIN

No. 5

FURTHER STATEMENT AS TO THE COVERAGE OF  
THE FAIR LABOR STANDARDS ACT OF 1938

(1) This Bulletin is intended to supplement Interpretative Bulletin No. 1 by indicating the answer to some of the questions left open therein. The caution must again be stated that interpretations announced by the Administrator, except in certain specific instances where the statute directs the Administrator to make various regulations and definitions, serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties unless he is directed otherwise by the authoritative ruling of the courts or unless he shall subsequently decide that his prior interpretation is incorrect.

(2) The wage and hour provisions of the Act are applicable to employees "engaged in (interstate) commerce or in the production of goods for (interstate) commerce." Employees are engaged in the production of goods for commerce where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. If, however, the employer does not intend or hope or have reason to believe that the goods in production will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the Act. The facts at the time that the goods are being produced determine whether an employee is engaged in the production of goods for commerce and not any subsequent act of his employer or of some third party. Of course, the fact that the goods do move in interstate commerce is strong evidence that the employer intended, hoped, or had reason to believe that the goods would move in interstate commerce.

(3) As indicated above, whether the employees are engaged "in the production of goods for (interstate) commerce" depends upon circumstances as they exist at the time the goods are being produced, not upon some subsequent event that may or may not be in the control of the producer. Thus, if a shirt manufacturer produces shirts to fill the order of a local retail store in the expectation that the shirts will be sold for consumption within the State of production, the manufacturer will not become retroactively subject to the Act in respect to those goods, because the retailer subsequently goes bankrupt and its whole stock of merchandise, including the shirts, is bought up by an out-of-State merchant and removed to another State. On the other hand, if the shirt manufacturer produced the shirts to fill an out-of-State order, the rights of the employees under Sections 6 and 7 of the Act are not affected by the subsequent fact that a fire destroys the finished shirts before they are shipped out of the State.

(4) Employees engaged in the production of goods that move out of the State of production are engaged "in the production of goods for commerce" even though the employer does not himself ship the goods across State lines. It is immaterial that the producer passes title to the purchaser within the State of production. 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 the production of goods for interstate commerce. The same is true if the producer sells his products within the State of production to a wholesaler or retailer who, in turn, sells them in interstate commerce.

(5) There are other situations in which employees of an employer who does not ship his goods directly in interstate commerce may yet be engaged in the production of goods for commerce. This will be true where a producer sells goods to a further processor thereof within the State who, in turn, sells goods in interstate commerce, the first producer's goods being a part or ingredient of the second producer's goods. In this connection attention is called to Section 3(i) which defines the term "goods" to include "any part or ingredient" of goods. Thus, if a manufacturer of buttons sells his product within the State to a manufacturer of shirts, the shirts being shipped in interstate commerce, the employees of the button manufacturer are engaged in the production of goods for commerce. And, if a lumber manufacturer sells his lumber locally to a furniture manufacturer who sells furniture in interstate commerce, the employees of the lumber manufacturer would likewise come within the scope of the Act.

(6) Even where the goods which one producer sells to another producer are not technically parts or ingredients of the goods which the second producer sells in interstate commerce, the employees of the first producer, may be within the scope of the Act. Thus, where the manufacturer of containers sells the containers within the State to another manufacturer or to a shipper who packs goods into the containers and sells them in interstate commerce, the employees of the container manufacturer would be engaged in the production of goods for commerce. A contrary interpretation has been suggested based upon the definition of the term "goods" in Section 3(i) which provides that the term "goods" "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." From this definition it has been suggested that the manufacturer or shipper who uses the containers to ship his own goods out of the State is the ultimate consumer of the containers and that, consequently, the employees of the container manufacturer are not engaged in the production of goods for commerce as the term "goods" is used in the Act. It is our opinion that the manufacturer or shipper above is not the ultimate consumer of the containers. At times the purchaser who consumes the contents of the containers is the ultimate consumer of the containers. For example the ultimate consumer of a shoe box is not the manufacturer of the shoes but the man who buys and wears the shoes. At other times the ultimate consumer is the dealer who destroys the containers. Thus, if goods are shipped in boxes and the wholesaler or retailer in the State of destination removes the goods and destroys the boxes, such wholesaler or retailer would be the ultimate consumer of the boxes. Since it is our opinion that the ultimate consumer of the containers is not the manufacturer or shipper above, it becomes unnecessary to determine whether employees are engaged in the production of goods for commerce where the goods are delivered within the State into the actual physical possession of the ultimate consumer who transports them out of the State.

(7) A case somewhat similar to those that have been considered above should be noted. A garment manufacturer sends his goods to an independent contractor within the State to have the materials cut and returned to him for further processing. After the materials have been cut by the employees of the independent contractor they are returned to the garment manufacturer and subsequently move in interstate commerce. It seems clear that the employees of the independent contractor are engaged in the production of goods for commerce. There is nothing in the definition of the word "produced" in Section 3(j) that would lend any credence to the argument

that the division of the production functions between the employees of the garment manufacturer and the employees of the independent contractor who do the work of cutting the garments in any way militates against the employees of the independent contractor being engaged in the production of goods for commerce. On the contrary, Section 3(j) expressly provides that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing . . . such goods, or in any process or occupation necessary to the production thereof."

(8) Attention is again called to Section 3(i) which defines goods to include "articles or subjects of commerce of any character." It seems clear that the term "goods" includes publications, pamphlets or any other written materials. Accordingly, employees engaged in the collection and dissemination of information which is transmitted to other States in the form of publications, pamphlets or any other written materials are engaged in the production of goods for commerce even though the actual work of printing may be done by an independent printing establishment. Typically this would apply to employees of organizations such as trade associations and research and compilation services. It should be noted, too, that such employees may well be "engaged in commerce" inasmuch as the continued use of the mails and the channels and instrumentalities of interstate commerce may well bring the employer's business within the category of a business in interstate commerce or may bring the employee's work within the category of work in interstate commerce.

(9) Where an employee is engaged in the production of any goods for interstate commerce, the Act makes no distinction as to the percentage of his employer's goods or of the goods upon which he works that move in interstate commerce. The entire legislative history of the Act leads to the conclusion that Congress intended to exclude from the channels of interstate commerce all goods produced under labor conditions detrimental to the health, efficiency and general well-being of workers. The President's message advocating the passage of wage and hour legislation stated that "goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade." Congress expressly found in Section 2(a)(1) that the production of goods under labor conditions detrimental to health, efficiency and general well-being of workers "causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States." The reference in Section 15(a)(1) to "any goods" is convincing proof of this intent of Congress to make no distinction as to the percentage of goods which move in interstate commerce. That section makes it unlawful for

any person "(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7."

(10) There are manufacturers or processors who produce goods for consumption wholly within the State of manufacture or processing, but receive their raw materials from outside the State. Typical of this group is a baker who receives his flour from outside the State and sells his bread for consumption within the State. Employees engaged in the production of goods for local consumption would seem to be excluded from the scope of the Act even though the raw materials upon which they work are brought in from outside the State. Interpretative Bulletin No. 1 stated that "the Act does not cover plants where the employees work on raw materials derived from within the State and where none of the product of the plant moves in interstate commerce." This statement left open for further consideration the status of employees manufacturing or processing raw materials derived from outside the State where the product is sold for local consumption. Such employees are certainly not "engaged in the production of goods for (interstate) commerce" as the term "commerce" is defined in Section 3(b) of the Act. And it seems they cannot be considered as "engaged in (interstate) commerce", because they are working on or processing goods that have come to rest within the State and have ceased to be articles of interstate commerce. Other employees in the same plant, however, such as employees purchasing the raw materials from other States or receiving them from other States, may be "engaged in commerce" and therefore entitled to the benefits of the Act. As stated in Bulletin No. 1, the coverage of the Act is "an individual matter as to the nature of the employment of the particular employee."

(11) A case analogous to that set out in the last paragraph is the case of the production of goods to be consumed locally by a producer of goods for commerce where the first producer's goods are not a part or ingredient of something the second producer is producing for commerce. Where a small mine sells all its coal within the State to a local manufacturer engaged in the production of goods for commerce, the manufacturer using the coal to heat his plant or drive his machinery, the employees of the mine are not engaged in the production of goods for commerce. Similarly, employees engaged in the manufacture of machines, all of which are sold within the State to a local manufacturer engaged in the production of goods for commerce, are not within the scope of the Act.

(12) The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across State lines. There may be particular employees of such contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the Act.

(13) Employees of contractors engaged in maintaining, repairing or reconstructing railroads, ships, highways, bridges, pipe lines, or other essential instrumentalities of interstate or foreign commerce would seem to be engaged in interstate commerce and subject to the Act. And employees of contractors who are employed in repairing or altering buildings used to produce goods for commerce might be held by the courts to be engaged in a "process or occupation necessary to the production" of such goods within Section 3(j) of the Act and, therefore, within the coverage of the Act.

(14) The status of wholesalers has been a subject of frequent inquiry. Interpretative Bulletin No. 1 states that "employees who are an essential part of the stream of interstate commerce are included in the phrase 'engaged in commerce'; for example,--employees of a warehouse whose storage facilities are used in the interstate distribution of goods." Similarly, employees engaged in making sales at wholesale across State lines or in work incidental thereto are "engaged in commerce."

(15) Many wholesalers make all their sales within the State in which their place of business is located, but purchase the goods which they wholesale from outside the State. There are varying situations within this group of wholesalers

selling locally. At times, shipment will be made direct to the customer of the wholesaler from the out-of-State manufacturer. Again, shipment may be made to the wholesaler after the goods have already been resold to or ordered by the customer. Employees engaged in connection with such sales are an essential part of the stream of interstate commerce and are included in the phrase "engaged in commerce."

(16) Again, there will be employees whose sole work is connected with goods sold from stock at the wholesaler's place of business. It is possible that a court may draw a distinction between employees engaged in connection with the sale of goods in the original package and employees engaged in connection with the sale of goods after the package has been broken. More likely, however, the courts will hold that employees employed in connection with the wholesale sale of goods brought in from outside the State are engaged in the stream of commerce and entitled to the benefits of the Act, whether or not the goods are sold in the original package. It is our opinion that wholesalers purchasing their goods from outside the State should comply with the provisions of the Act.