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U. S. DEPARTMENT OF LABOR
Wage and Hour Division
Washington

QUESTIONS AND ANSWERS (NO. 10)

(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.)

A Texas Taxicab Company sought information about its status under the Fair Labor Standards Act. The General Counsel's office wrote as follows:

"You state that prior to October 24, 1938, 95% to 98% of the business of your company was purely local and that the only manner in which the balance of your business touched upon or affected interstate commerce was by reason of the handling and transferring of interstate passengers and baggage between local stations of three rail carriers, under contract with the carriers. Your letter indicates that the company withdrew from this business with the railroads, but is desirous of resuming the service if not obliged to observe the maximum hours requirements of the Act.

"The Act applies to each employee engaged in commerce or in the production of goods for commerce as those terms are defined in Section 3, and it thus becomes an individual matter as to the nature of the

employment of the particular employee. An employer may be subject to the Act in respect to some of his employees, and not as to others. For example, it is our opinion that every employee engaged by your company in performing the above mentioned service for the railroads would be considered by the courts as engaged in commerce as that term is broadly defined in the Act, and therefore entitled to the benefits of the Act; however, other employees of the company not so engaged, and not engaged in other commerce or in the production of goods for commerce, but merely in furnishing what appears to be purely local service, would not be entitled to the benefits of the Act.

"Next, it is our opinion that the employees engaged in performing the service for the railroads would not come within the term 'outside salesman' as used in Section 13(a)(1) of the Act, and as defined in Section 541.4 of the enclosed copy of Regulations, Part 541.

"Enclosed you will find a copy of Interpretative Bulletin No. 6, dealing with the service establishment exemption. The Administrator has no authority to rule conclusively on the status of your particular business in connection with the exemption in Section 13(a)(2), and is not prepared at this time to elaborate on the general comments contained in this bulletin.

"We call your attention to Section 13(b)(1) of the enclosed copy of the Act which might be applicable to exempt such employees from the maximum hours provision, and therefore, be the solution of your problem. We note that Section 203 (b)(2) of the Motor Carrier Act excludes taxicabs from all provisions of that Act, except the provisions of Section 204

relative to qualifications and maximum hours of service, and, accordingly, we suggest that you communicate with the Interstate Commerce Commission to ascertain whether it would deem the employees in question to be subject to its power to establish hours of service pursuant to Section 204 of the Motor Carrier Act."

An official of the Bindery Workers Union in Chicago asked about the relationship of State laws to the Fair Labor Standards Act. The General Counsel's office replied as follows:

"Mr. Andrews has asked me to reply to your letter making inquiry as to maximum hours applicable to bindery women, under the Fair Labor Standards Act and the law of Illinois. You mention that under the law of Illinois, bindery women are not allowed to work over eight hours, but that the Bindery Women's Union has had an eight-hour day since 1921, with the privilege of working overtime up to ten hours at time and one-half, and double time for Saturday afternoons. You inquire whether these women are to be deprived of the privilege of working any overtime if they have an opportunity to do so, and if not, how many hours they may be employed.

"Whether your Union has the privilege under State Laws, of working overtime up to ten hours is a question of State law with which you are more familiar than we.

"If the maximum workweek established by state law is greater than that established under Section 7 of the Fair Labor Standards Act, then as to employees covered by the latter Act, the maximum workweek

established thereunder supersedes that established by state law to this extent: women employed for a workweek longer than that specified in Section 7 of the Act are entitled to receive compensation for employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which they are employed. However, no provision of the Fair Labor Standards Act excuses noncompliance by an employer with a state law which places an absolute limitation upon the number of hours an employee may work during a workweek; that is, if the state law provides that no employer shall employ a female for more than forty-eight hours in any workweek, then regardless of the willingness of the employer to pay overtime compensation, the Fair Labor Standards Act would not excuse noncompliance by the employer with the limitation imposed by such state law.

"Nor would any provision of the Act excuse noncompliance by an employer with provisions of State law or valid union agreements which establish lower maximum workweeks or rates of overtime compensation higher than those fixed by the Fair Labor Standards Act; for example, you mention double time for Saturday afternoons."

Scores of letters have been received from all parts of the country regarding the status of independent telephone exchanges. A typical letter from the General Counsel's office follows:

"Section 13(a)(2) of the Act provides that the wage and hour provisions shall not apply with respect to any employee engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce. In our recently published Inter-

pretatuve Bulletin No. 6 it was stated that telephone companies are not considered to be service establishments within the meaning of this exemption. For your information I am enclosing a copy of Interpretative Bulletin No. 6.

"This bulletin does not discuss the question of whether any or all employees of telephone exchanges are engaged in commerce or the production of goods for commerce within the meaning of Sections 6 and 7 of the Act. However, there are enclosed copies of Interpretative Bulletins Nos. 1 and 5 which deal with the coverage of these sections. I should like to advise you that this office is giving further consideration to the applicability of Sections 6 and 7 in the case of independent telephone exchanges.

"From the numerous letters we have received it appears that a common practice among small telephone exchanges is to contract the operating services for a definite amount per month. Frequently the contracting agent is furnished with living quarters, heat and light, and is required to give the switchboard whatever attention is needed. With respect to such employees your attention is directed to Section 3(m) of the Act, Interpretative Bulletin No. 3 and Regulations, Part 531, copies of which are enclosed. You will note that Section 3(m) of the Act defines the term 'wage' to include the reasonable cost of furnishing an employee with board, lodging or other facilities if such board, lodging or other facilities are customarily furnished by the employer to his employees.

"This office is presently studying the question of what constitutes

'hours worked' under various circumstances. In connection with this study careful consideration will be given to the problems presented by small independent telephone exchanges. We have had several informal conferences with representatives of the United States Independent Telephone Association in connection with this and other problems and expect to receive their suggested solution to the question of 'hours worked' in the near future."

The secretary of a Metal Trades Association located in the State of Washington asked numerous questions covering the various phases of the Fair Labor Standards Act. The General Counsel's office made the following reply:

"We note that our letter of December 30 replied to the first three questions presented in your letter of November 4, leaving unanswered only the fourth which relates to what constitutes 'hours worked' of an employee engaged in traveling and installation work at his destination, and who couples those activities with some selling en route. The subject of 'hours worked' is undergoing a thouough study and will be treated in detail in a bulletin which we hope will be issued soon. When it is issued you will be sent a copy. Until such date we regret that we are unable to give you any further information.

"In response to your questionnaire entitled 'Questions to Mr. Andrews . . .':

"1. The statement attributed to the Administrator to the effect that a salary for a monthly paid employee presupposes compensation for overtime work is not, in our opinion, in accord with a proper inter-

pretation of Section 7 (a) of the Act.

"2. This question relating to hours worked of the travelling employee will be treated by a separate bulletin on this subject referred to above.

"3. That portion of your question relating to hours worked will be treated in the bulletin referred to above. Assuming, however, that an employee is subject to the provisions of the Act for certain hours worked during a workweek and is exempt therefrom for other hours worked during the same workweek, it is our opinion that no segregation of either hours or the rate of pay during that particular workweek may be permitted under the Act. This opinion is based on the words contained in Section 7 (a) of the Act 'no employer shall. . . employ any of his employees who is engaged in commerce or in the production of goods for commerce. . .(1) for a workweek longer than 44 hours. . .unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.' It appears to us clear from those words and from the general intent of the Act (Section 2) that any employee engaged in any 'production of goods for commerce' must be compensated in accordance with the standards laid down in Section 7 (a) with respect to all of his employment during the workweek in which he was engaged in the production of goods for commerce. If the conclusion were otherwise it would be easy to defeat the objectives of the Fair Labor Standards Act by employing employees for 44 hours in the production of goods for commerce and employing them in intrastate commerce during the same workweek for additional hours without limit.

"Your fourth question reads as follows:

"'Suppose an employee is normally engaged in work or a position covered by the Act, but who is next in line for promotion to a supervising or administrative or outside sales position that is exempt from the Act, and due to absence of his exempt superior is required to temporarily fill his position, is such an employee under such circumstances dully employed within the Act, and thus while temporarily engaged in normally exempt duties exempt from the provisions of the Act?'

"It does not appear that such an employee falls within our definition of 'executive' and 'administrative' contained in Section 541.1 of our regulations, copy of which is enclosed.

"Your fifth question reads as follows:

"'Is a watchman, working at an operating plant but employed and paid by an insurance concern or watching service company, and who does no checking or handling of products or materials, covered by the Act?

"We are not, at present, able to render an opinion on this question of coverage of the Act. This and related questions are under serious consideration.

"6. You inquire whether a watchman employed by and working at an operating plant but who does no checking or handling of materials or products is covered by the Act. You are referred to our letter of December 30 and to our Interpretative Bulletin No. 1, page 4, copy of which was sent you, in which we state our opinion to be that a watchman is engaged in the processes or occupations 'necessary to the production' of goods and is,

therefore, covered by the Act. This statement may be qualified by our answer to your question number 5 above."