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

AUTOMOBILE DEALERS AND DISTRIBUTORS ADVISED ON

COVERAGE OF FAIR LABOR STANDARDS ACT

The Wage and Hour Division, U. S. Department of Labor, today released a letter prepared in the Office of General Counsel, George A. McNulty, dealing with the coverage of employees of automobile dealers and distributors under the Fair Labor Standards Act. The letter dealt with the question of interstate commerce and with the exemptions provided in Section 13 of the Act, including the retail and service establishment exemption. Mr. McNulty's letter follows:

> You inquire about the coverage of the Fair Labor Standards Act of 1938 in the case of automobile dealers and distributors engaged in the distribution of automobiles, parts and accessories. Since the facts in each case are different, I should like to discuss generally the problem of coverage in the hope that the discussion will help you to determine the coverage of the Act in the particular cases in which you are interested.
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> The Act applies to employees engaged in interstate commerce or in the production of goods for interstate commerce. Unless employees are so engaged, neither the wage nor the hour provisions are applicable. Interpretative Bulletins Nos. 1 and 5 discuss the general coverage of the wage and hour provisions of the Act. Paragraphs 14 through 16 of Bulletin No. 5 relate to the status of employees of wholesalers under the Act, and these paragraphs apply to wholesaling operations

(both in parts and in automobiles) carried on by automobile dealers. You will note that it is our opinion that wholesalers who receive goods from outside the state should consider their employees as subject to the Act, even though their sales are made entirely within the state. Of course, employees of wholesalers making sales across state lines are subject to the Act.

Notwithstanding the general coverage of the wage and hour provisions of the Act, referred to above, certain specific exemptions from the wage and hour provisions are contained in Section 13(a). Section 13(a)(2) is of particular interest to automobile dealers and distributors. This section exempts from both the wage and hour provisions of the Act "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Interpretative Bulletin No. 6 discusses this exemption, and this bulletin should be consulted in determining the applicability of the exemption in particular cases. The Bulletin states that garages and service stations are ordinarily considered to be "service establishments" within the meaning of the exemption. But, as indicated in the next paragraph, a service station servicing the dealer's wholesale business is not within the exemption.

An enterprise engaged in selling automobiles to individuals exclusively is considered to be a "retail establishment" within the meaning of the exemption. In many cases, however, a dealer or distributor operates an enterprise which does not in every particular conform to the requirements of a retail or service establishment. Thus, some dealers not only sell automobiles and supply parts to private individuals, but also supply cars or parts to sub-dealers. Occasionally fleet sales, at a discount from the regular retail price, are made. In other cases, sales of trucks, tractors and trailers are made to industrial or business concerns. Some companies engage in rebuilding and other manufacturing operations. These activities do not fall within

the exemption, but if such activities comprise a very minor or insignificant portion of the business and the remainder of the business satisfies the terms of the exemption, the exemption is not thereby defeated. The business, as a whole, would not lose its character as a retail or service establishment. What constitutes a very minor or insignificant portion of the business depends, of course, upon the facts in each case. The dollar volume of such business, the percentage of such business in relation to the total business of the company, etc., are important factors.

If the nonexempt activities are not very minor or insignificant, then the business, taken as a whole, may not be considered as a retail establishment within the meaning of the exemption. The business would then be one which performs retail operations plus operations which are not retail, and as such it could not be considered as a retail establishment, even though part of its activities consisted of the making of retail sales to individuals. The fact that the exemption does not apply to the business as a whole does not mean, of course, that the entire business is automatically excluded from the exemption. If the retail or service branch of the business is segregated adequately from the nonexempt portion of the business so that the retail or service portion may properly be considered as a separate establishment, then such branch of the business might be exempt under Section 13(a)(2), even though the remainder of the business is not exempt. For example a wholesale distributor of automobiles might operate a retail used-car business and a garage in another part of the city. In such cases, the employees working exclusively in the retail used-car business and garage might be exempt under Section 13(a)(2) whereas the main wholesaling and distributing portion of the business would not be entitled to the exemption.

No definite formula will determine in every case as to what constitutes adequate segregation. The answer to this question depends upon the facts in the particular case. In this connection, however, it should be noted that some physical separation is necessary if

the portion of the business is to be considered a separate "establishment." Other factors will be the keeping of separate records and accounts, the use of separate employees, etc. In this connection, however, it should be noted that if an employee is employed in a "retail or service establishment" within the meaning of the exemption and also in a branch of the business which is not exempt under Section 13(a)(2), such employee would not be entitled to the exemption during any workweek in which he performs any work in the nonexempt branch.

Section 13(a)(1) of the Act exempts certain classes of employees as defined by the Administrator. Pursuant to Section 13(a)(1), the Administrator has promulgated Regulations, Part 541, which contain the definitions of the terms specified in Section 13(a)(1). Any employee who satisfies all the terms and conditions set forth in any of these definitions, is exempt from both the wage and hour provisions of the Act. You will be particularly interested in Sections 541.3 and 541.4 of the Regulations which define an employee employed in a "local retailing capacity" and "outside salesmen." It is not the policy of this Division, however, to apply the definitions contained in Regulations, Part 541, to particular employees. We do not have a knowledge of all the facts and an ex parte statement of facts is an unsatisfactory basis upon which to express any opinion.

The Act requires that employees subject to its provisions receive at least 30 cents an hour and time and one-half their regular rate of pay for all hours worked in excess of 42 in any workweek (On October 24, 1940, the number of hours becomes 40). The Employer's Digest of the law, Interpretative Bulletins Nos. 4 and 13, and Regulations, Part 516, explain the application of these requirements.

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