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U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, D. C.

EXEMPTION FOR WHOLESALE AND RETAIL ESTABLISHMENTS UNDER SECTION 13 (a)(2) OF FAIR LABOR STANDARDS ACT EXPLAINED

A definite "yardstick" for determining coverage of the Fair Labor Standards Act as it applies to retail and wholesale establishments, and another step in the practical adaptation of the Act to business practice and custom, was announced today by Colonel Philip B. Fleming, Administrator of the Wage and Hour Division.

An explanation of the exemptions for retail and wholesale establishments under Section 13 of the Act was made public by Colonel Fleming, in the form of a letter prepared in the office of George A. McNulty, General Counsel.

Section 13 (a)(2) of the Act provides for the removal from coverage of the wage and hour provisions "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." The Division has indicated previously that a retail sale is a sale to the ultimate consumer for direct consumption and not for the purpose of resale in any form. The merchandise is sold in small quantities and at prices higher than wholesale or jobber prices. In addition, it is indicated that a sale of goods, to be used for industrial or business purposes, as distinguished from private or family consumption, is not a retail sale. The application of the exemption is further clarified in Mr. McNulty's letter, as follows:

"In our opinion any establishment engaged exclusively in the distribution of merchandise may be considered a retail establishment if more than 50 percent of the dollar value of its total sales are retail sales. Establishments which sell at retail and wholesale may not be considered 'retail' if more than 50 percent (dollar value) of the sales are wholesale sales.

"It should be noted that in the language of the statute the exemption applies to employees of retail 'establishments.' What constitutes the establishment depend

upon the facts in each particular case. If a firm operates two or more separate establishments the sales of each establishment must be considered separately in determining whether such establishment may properly be considered a 'retail establishment.' The total sales of the enterprise as a whole will not determine the retail or non-retail character of separate establishments within the organization. Thus, for example, a company may operate two separate stores in different parts of the city. Each store would be considered as a separate establishment for purposes of the exemption. If one store made more than 50 percent of its total dollar volume of sales at wholesale such store would not be a 'retail' establishment for purposes of the exemption even though the combined dollar volume of the sales of both stores was 50 percent at retail. Conversely, if one sold more than 50 percent at retail it would not cease to be a retail establishment merely because the combined dollar volume of sales of both stores was more than 50 percent at wholesale.

"In some cases it may be difficult to determine whether the wholesale selling takes place in a separate establishment. In the ordinary case if the selling of the company all takes place under one roof such place of business will be considered to be a single establishment. However, if the wholesale branch of the business is distinct and separate from the retail branch, -- as where a room or rooms are set aside for wholesale selling -- such wholesale branch taken alone would ordinarily be considered as a wholesale establishment and the exemption would not apply to employees of this branch of the business.

"It should be noted further that an employee who performs both exempt and nonexempt work is entitled to the benefits of the act during any workweek in which he performs any nonexempt work."

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