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

C. I. O. UNION QUESTIONS ON "EXECUTIVE," ETC., ANSWERED

Several questions submitted by unions affiliated with the Congress of Industrial Organizations through Joseph Curran, President of the Greater New York Industrial Union Council, were answered in a long letter made public today by Colonel Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor.

The status of draftsmen, newspaper employees and clerical workers is dealt with in the letter. Colonel Fleming also pointed out that the exemption granted to driver salesmen, who are now classified as "outside salesmen," had been granted at the specific request of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, A. F. of L., the union in that field. These employees constituted the largest single group exempted under the redefinitions of the terms, "executive," "administrative," "professional," and "outside salesman," which became effective last Thursday (October 24, 1940), the date on which the standard workweek, after which overtime must be paid, was reduced to 40 hours.

Colonel Fleming's letter to Mr. Curran follows:

October 24, 1940

Mr. Joseph Curran, President
Greater New York Industrial Union Council
1133 Broadway
New York, New York

Dear Mr. Curran:

This will acknowledge receipt of your letter of October 21, 1940, enclosing a copy of a resolution adopted at a regular meeting of the Greater New York Industrial Union Council expressing opposition to the new definitions of executive, administrative, and professional employees. It appears possible that this resolution was based on information derived solely from newspaper accounts which were confusing in many instances. As an aid to clarification, therefore, I shall attempt to give you a summary description of the new definitions with particular reference to their probable effect on members of unions affiliated with the Greater New York Industrial Union Council. Of course, the exemption or non-exemption of any individual employee under these definitions is a question for individual factual determination; yet certain general aspects can be pointed out which will be of interest.

It should be clearly understood at the outset that the exemption from the wage and hour provisions of the Fair Labor Standards Act of persons employed in a "bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman" under section 13(a)(1) is fixed by the Act itself and cannot be altered by the Administrator. If, for example, I were of the opinion that outside salesmen should have the protection of the Act, I nevertheless would not have the authority to deny exemption to genuine outside salesmen. Similarly, I do not have any authority to refuse exemption in the case of bona fide executive, administrative, and professional employees. I do, however, have the responsibility to define and delimit those terms. The recent revision of Part 541 of our regulations represents my considered judgment on appropriate definitions and delimitations. The revised regulations do not grant any exemption. They put into effect the exemptions granted by Congress but with adequate safeguards against abuse.

Mr. Joseph Curran -

The new definition of the word "executive" is based on the previous single definition of the two words "executive - administrative." In the earlier definition there was an exceedingly troublesome phrase "who performs no substantial amount of work of the same nature as that performed by non-exempt employees." This phrase was designed to keep within the coverage of the Act working foremen and working supervisors. With one minor exception, the phrase has been translated into numerical terms whereby "no substantial amount of work" is defined as meaning not more than 20 percent. As you will observe, this does not exempt working foremen and working supervisors.

The definition of "executive" contains various additional minor revisions, largely in the nature of clarification. The $30 minimum pay requirement for exemption under this heading was the subject of some criticism both from labor and industry. On the whole most of the criticism was directed at the requirement as being too high. However, it was my belief that there would be a basic error in describing as an "executive" any person who is paid less than $30 a week. Furthermore, heretofore the exemption was applicable to hourly paid employees if their hourly pay was sufficiently high to produce $30 a week. This proviso has been changed and no hourly paid employee can qualify for the exemption.

In the previous definitions there was no definition specifically applicable to the term "administrative." This created a serious problem because the definition of "executive - administrative" was applicable only to persons with managerial authority along the lines now found in the definition of "executive." Thus exemption was denied to a large group of well-paid employees, many of whom were exceedingly important in the functioning of business. Cases could be cited where purchasing agents and personnel directors and persons of that type receiving as much as $7,500 or $10,000 a year were not eligible for exemption under the old definitions. This just didn't make sense. At the other end of the scale are office personnel performing routine clerical tasks such as typists, comptometer operators, shipping clerks, etc. In my opinion these employees are as clearly in need of the benefits of the Act as the Purchasing Agent and the Personnel Director referred to above are not.

While it is easy to identify the extremes, it is not easy to draw a line which will separate the two groups of employees. It is difficult, for example, to find a common denominator for a well-paid executive assistant to a president of a large corporation, a well-paid lease buyer for an oil company, and a well-paid customer's broker, even though there is no dispute that all three should be exempt. In spite of this difficulty, the new definition does indicate and include in a general way these

three types of administrative employees. On the other hand, since the general descriptions standing alone would not be adequate to prevent abuse, the definition also contains certain specific requirements which must be met in each instance. These additional requirements are (1) the exercise of discretionary judgment, (2) the performance of non-manual tasks, (3) the performance of tasks directly related to management policies or general business operations (this requirement does not apply in the case of persons who directly assist executive and administrative employees), (4) the receipt of compensation on a salary or fee basis at a rate of not less than $200 per month.

Thus, the definition of "administrative" does not permit the exemption, for example, of employees who perform manual tasks such as tool and die makers, no matter what they earn, nor of those whose work is purely routine such as business machine operators, no matter what they earn, nor of any employee whose rate of pay is less than $200 per month (or $50 per week). It is my considered judgment that with these significant limitations, employees who meet the requirements of the administrative definition are properly exempt from the wage and hour provisions of the Act. In saying this, I am aware of course, that in a few industries, and in certain areas where comparatively high wages are common there will be some employees for whom exemption may be claimed whose exemption is debatable. Similarly, in certain instances in low wage industries and areas there will be some employees not exempt who do not need the protection of the Act. But in a general way and with due regard for the nation-wide application of the Act and these regulations I feel that the definition is sound and fair.

From the studies we have made it appears that not a great many actual or potential members of the unions affiliated with your organization will be exempt under the definition of the term "administrative." To take bookkeepers as an example: the ordinary bookkeeper performs routine work and thus cannot qualify for exemption. Furthermore, over 90 per cent of all bookkeepers are paid less than $200 a month and thus automatically barred from exemption. There are, however, a few persons whose work includes bookkeeping who will be exempt. Characteristically the bookkeeper who is paid as much as $200 also serves as an office manager or performs other functions sufficiently important to justify the payment of what is a comparatively high salary. In these rare instances the bookkeeper-office manager, etc., will meet all the requirements of the administrative definition.

Another example of the practical effect of the administrative definition can be found in the case of secretaries, stenographers and typists. According to reports available to us, less than 1 per cent of all persons in these occupations are paid as much as $200 a month.

Mr. Joseph Curran

In the instance where a secretary is paid $200 a month, she is usually really employed as a confidential assistant rather than primarily as a secretary. In any event, as you will observe, the total number of stenographers for whom any claim for exemption can be made is to small that it can have no effect on the general application of the Act to a group of clerical workers who need and deserve its benefits.

A third group of employers in whom your affiliated unions are undoubtedly interested are draftsmen. The information at our disposal indicates that draftsmen are normally paid on an hourly basis and in general are employed in groups and perform routine work. Thus, in the vast majority of instances, draftsmen will still retain the benefits of the Act even if they are paid $200 a month. An exception to this will be found in the case of persons whose drafting work is incident to duties that are really directly related to management policies or to general business operations. Such draftsmen normally work independently rather than as members of a group. Furthermore, in some instances, of course, there are engineers whose work includes drafting, but who are truly professional employees and who are employed in a "bona fide professional capacity." Such employees if they are paid not less than $200 a month, will be exempt under the term "professional" as they should be, in my opinion.

The new definition of the term "professional" is primarily based on the previous definition with certain minor modifications. There is the same clarification of the significance of the phrase "no substantial amount of work of the same nature as that performed by non-exempt employees" by translating this into numerical terms as 20 per cent and by an explanation that incidental operations performed by a genuine chemist, etc., such as the setting up of apparatus do not preclude the chemist from the exemption. The exemption has also been widened by an inclusion within the professional group of employees such as actors and musicians. It is my opinion that such employees, if they meet the other tests, should be exempt.

The major change in the definition, however, is the requirement (not applicable to lawyers and doctors) that the employee be paid not less than $200 per month. Heretofore there was no salary requirement included in the definition of "professional." In actual fact persons receiving far less than $200 per month were exempt under the old definition. Finally, I wish to point out that to obtain exemption the employees must meet six different tests. His work must be intellectual and varied in character; it must require the exercise of discretion; it must be of the type whose output cannot be standardized; not more than 20 per cent of the workweek can be devoted to non-exempt work; the employee must be paid not less than $200 per month; and finally, the work must fall within either one of the

recognized learned professions or one of the recognized artistic professions.

Undoubtedly some actual or potential members of unions affiliated with your organization engaged in the learned professions will be exempt under the new definition. All or almost all such employees were exempt under the old definition. A group of employees for whom the protection of the Act is now guaranteed are those members of the learned professions, such as chemists and engineers, who in some instances have been grossly exploited by their employers by the requirement of long hours at low wages. The new definition extends the protection of the Act to these low-paid employees.

The old definition of "professional" did not cover employees in the artistic professions. Actually there is good reason for describing as "professional" such persons as moving picture actors, to take a single example. Thus there will be some union members who will be exempt as professionals who have not heretofore been exempt. However, when it is remembered that all six tests must be met to obtain exemption, it will be realized that the definition does afford protection against abuse. On a newspaper, for example, typically the reporters assigned to regular beats and the copy desk men will not qualify for exemption even if they are paid $200 a month. And, of course, in the whole wide field of the artistic occupations, the great group of employees who are paid less than $200 a month cannot be classed as professional employees within the meaning of the regulations.

The definition of the term "outside salesman" has been changed in two major respects. First, included in the exemption under the new definition are advertising, radio time, and freight solicitors. The exclusion of such outside salesmen from the exemption in the past was due to a technicality in the definition of the word "sale" and was not based on any sound distinction between the type of work performed by these employees and by other outside salesmen.

The other group who were not exempt in the past and who in general will be exempt under the new definition are so-called driver and route salesmen. The exemption or non-exemption of these employees is a puzzling matter. However, the request for exemption was concurred in by all the affected employers and by the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, who supplied much factual data in support of their contention. On the basis of this representation it appeared to me that the definition could appropriately be broadened to grant exemption to employees of this type.

Mr. Joseph Curran --

I am sending you herewith a supply of copies of the Report of the Presiding Officer containing the recommendations which have been adopted as the new definitions. This is a comprehensive statement giving in full the reasons for making the various changes and explaining their significance. I am hopeful that a careful reading of this report, which can be used as the authoritative interpretation of the regulations, will serve to allay misapprehensions that may have arisen about the new definitions. Please feel free to call on me for any further information that I can supply.

Sincerely yours,

Administrator

Enclosures