

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

40-HOUR WEEK -- 30-CENT MINIMUM DO NOT APPLY
WHERE SALES ARE 75% RETAIL

Administrator Broadens Term "Retail Sale"
To Include Some Commercial Transactions

In accordance with the directions of the United States Appellate Courts that exemptions from humanitarian legislation should be strictly construed, the Wage and Hour Division of the U. S. Department of Labor will not regard any establishment exempt as a retail one unless at least 75% of its sales are retail. Where wholesale, commercial and industrial sales, non-retail in character, total more than 25%, the 40-hour week and the 30-cents-an-hour minimum wage will apply.

At the same time, the Division will broaden its concept of a "retail sale." As a result, some sales to industrial or commercial purchasers may be included as retail in determining the status of an establishment under the Wage and Hour Law. These sales must be of articles commonly sold both to business and private purchasers and must be in a quantity or at a price similar to sales to private purchasers.

This policy was announced today by General Philip B. Fleming, Administrator of the Division, in making public a revision of the Division's Interpretative Bulletin No. 6. This is the interpretation on the scope and applicability of the section in the Wage and Hour law which rules that the floor for wages and the ceiling for hours shall not apply "to any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

The Bulletin continues the Division's position that service establishments must be similar to retail establishments to be exempt.

This policy will go into effect July 1. The Bulletin states, "For purposes of enforcement, the computation of the dollar volume of retail and non-retail selling will be based upon the semi-annual record of sales of the establishment. The analysis of sales from January 1 to June 30 and July 1 to December 31 will be used to determine whether during each six month period a substantial portion of the selling of the establishment was non-retail."

Some 6,242,000 wage earners are employed in the distribution and selling of goods and services, according to most recent figures compiled by the Bureau of Labor Statistics (March, 1941). Those engaged in retail or service establishments and those engaged in a "local retail capacity" in any type of establishment are exempt from the Wage and Hour law. The 30-cent minimum wage and 40-hour week apply to the others if they are engaged in interstate commerce or in the production of goods for interstate commerce.

The N.R.A. Wholesale Code called for a 40-hour week except for outside service men who were to work 48 hours before a time and one-third penalty rate began. Maximum hours for retail employees under N.R.A. were 40, 44, or 48, depending on the number of hours the store was open to the public. Due to the retail exemption in the Federal Wage and Hour law, the wage and hour regulation of retail store employees has been left to state action.

"From the first," General Fleming said, "the Division has taken the position that a 'substantial' amount of non-retail selling would nullify the retail exemption for any establishment. Shortly after I became Administrator we interpreted 'substantial' in this respect as more than 50 percent. Subsequently the United States Court of Appeals for the Eighth Circuit (St. Louis) handed down an opinion that the Wage and Hour law, as an humanitarian law, is entitled to a liberal construction and that exemptions from it are subject to strict construction. The First Circuit Court (Boston) said the same thing. Many wholesalers complained about the competitive wholesale service that retailers not under the 40-hour week were able to

provide. So we are now regarding 'substantial' non-retail selling as more than 25 percent. We will not regard establishments with more than 25 percent non-retail sales as exempt from the 40-hour week and the 30-cent minimum wage.

"At the same time we are acknowledging the retail character of many sales to industrial and commercial firms which always have been considered retail in the trades. I believe this will do much to make our enforcement policy more acceptable to firms engaged in distributing goods."

The typical department store will continue to be exempt. Although many conduct wholesaling operations these sales seldom approach 25 percent of total sales volume. The revised bulletin reaffirms the Administrator's interpretation of "establishment" -- "each physically separated place of business must be considered a separate establishment." The Wage and Hour law, therefore, does not apply to chain store retail and service establishments even though the chain spreads into several states. The law does apply, however, the bulletin adds, "to warehouses, central executive offices, manufacturing or processing plants, or other non-retail selling units which distribute to or serve stores."

The bulletin states, "Unless an establishment is clearly a retail or service establishment for the purposes of ... (the exemption), an assumption that the exemption applies involves considerable risk of violation."

The new interpretation of retail sales and the requirement that they total at least 75 percent of the volume are of especial importance in determining the status of establishments selling coal, lumber, glass, paint, tools, electrical equipment, automobiles, tires, stationery and office supplies, food stores and photographers' shops.

It is pointed out that the statute "confers no authority upon the Administrator to extend or restrict the scope of ... (the exemption) or to impose legally binding interpretations as to its meaning." However, the United States Supreme Court last year in the *I.C.C. v The American Trucking Association* case cited one of the Division's Interpretative Bulletins and said, "Such interpretations are entitled to great weight."

"At times it has been assumed," the bulletin says, "that an establishment is retail unless it is shown to be a wholesale, manufacturing, or other well-recognized type of establishment. In our judgment, this assumption is incorrect." For the exemption to apply the establishment must have retail characteristics.

The bulletin lists characteristics of retail establishments. Retail establishments are characterized by their numerous small sales. They are patronized regularly by the general consuming public. They sell goods for direct consumption and not for resale or redistribution in any form.

"A retail establishment," the bulletin says, "sells goods to private individuals for personal or family consumption. Typically, it sells 'consumer' goods such as food or clothing to private persons to satisfy their personal wants. In some cases, however, establishments sell 'consumer' goods to business or industrial purchasers, government agencies, institutions, and similar purchasers, as well as to private individuals for private consumption. For example, both commercial enterprises and private individuals purchase coal and fuel oil for heating purposes. The sale of coal or fuel oil to heat a private home is a retail sale. The sale of such goods to heat a store or business office will also be a retail sale if the goods are sold at the normal price charged to private consumers, or if the sale does not involve a quantity of goods materially larger than the normal quantity purchased by private consumers."

In discussing company cafeterias or stores, the bulletin recognizes that the exemption applies in cases where, among other conditions, "the goods or services are sold for cash to the employees and the store is normally open to the general consuming public."

However, the bulletin states the exemption does not apply in many cases, "since the facilities furnished serve merely to facilitate the continued operation of the principal business of the company. In these cases the employer does not operate an adjunct which is unrelated to the principal business but the furnishing of facilities is an integral part of the principal operations. The employer does not satisfy the wants of the employees as part of the general consuming public. Deductions for these facilities are normally made from the cash wages received by the employee. The facilities are not made available to the general public. In these cases, there will not be a separate retail or service establishment within the exemption. Thus, for example, isolated lumber and mining camps operate cookhouses and bunkhouses for employees. These cookhouses and bunkhouses do not serve the general public but are an integral part of the lumber or mining operations. Frequently, deductions are made from the wages of employees for the facilities furnished. The cookhouses and bunkhouses are not adjuncts which are unrelated to the business of lumber or mining. They are as much a part of the principal business as the tool sheds. Failure to provide the facilities would make continued operations difficult. Further, the furnishing of such facilities is not carried on in the same manner as the operations of commonly-recognized retail or service establishments. In our opinion, therefore, cookhouses and bunkhouses may not be considered as separate retail or service establishments for purposes of the exemption."

Under a heading, "Service Establishments," the revised bulletin continues the position of the Division that the term "may be considered to include generally that large miscellaneous assortment of business enterprises which are similar to retail establishments in character, but which may not be accurately classified as such."

The revised bulletin lists a larger number of "typical examples of service establishments." It lists "restaurants, cafeterias, roadside diners, hotels, tourist houses, trailer camps, home laundries, barber shops, beauty parlors, public baths, scalp treatment establishments, masseur establishments, funeral homes, embalming establishments, crematories, establishments engaged in cleaning, dyeing, pressing, altering and repairing hats, clothing and household goods for private individuals, valet shops, shoe repair shops, shoe shine parlors, dress suit rental establishments, public garages, automobile laundries, 'drive it yourself' establishments, battery shops, parking lots, musical instrument repair shops, piano tuning establishments, radio repair shops, watch, clock and jewelry repair establishments, household refrigerator service and repair shops. These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise.

"From the foregoing it is clear that service establishments generally repair consumer goods owned by the general consuming public. Public garages repair automobiles and tailor shops mend or repair clothing, etc. In some cases, however, an establishment repairs the type of goods which the general consuming public ordinarily does not own -- building elevators, production machinery, commercial refrigerators, etc. Such establishments may not be considered as service establishments for purposes of ... (the exemption) for the same reasons that establishments engaged in selling goods which have only an industrial or business market are not retail establishments."

The bulletin contains an added section in which the principles stated are applied to the business of coal distributors, distributors of lumber and building materials, feed establishments, distributors of automobile parts and accessories, dealers in stationery and office supplies, and photographers.

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