

JAN -5 1995

This is in reply to your letter requesting an opinion on the application of the overtime pay exemption contained in section 13(b)(1) of the Fair Labor Standards Act (FLSA) to truck drivers employed by one of your clients,

You state that [redacted] operates a distribution center in California under a contractual relationship with [redacted]. The drivers are compensated pursuant to a labor agreement with the union based on activity and mileage. The pay plan does not include overtime premium pay for hours worked in excess of 40 in a workweek. [redacted] has received an opinion from the U.S. Department of Transportation's Federal Highway Administration (FHA) stating that the drivers are engaged in interstate commerce and are subject to the jurisdiction of the FHA.

The distribution center is a large complex of adjoining warehouses. Products of a wide variety of types and brands from various locations arrive and are stored at the warehouse. Every evening [redacted] retail stores in its northern division place orders to the northern division office. In turn, each day [redacted] transmits those orders to [redacted] employees fill the orders from the distribution center and load [redacted] trucks. The truck drivers deliver the orders to the various [redacted] stores in the northern division. These deliveries are made to stores in California, Oregon, Nevada and to the Port of Oakland where the goods are shipped to Hawaii. All routes are assigned interchangeably and may be assigned to any of the drivers.

Section 13(b)(1) of the FLSA provides an exemption from the Act's overtime pay requirements for any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act (MCA) of 1935. This has been interpreted as applying to any driver, driver's helper, loader, or mechanic employed by a carrier whose activities directly affect the safety of operation of motor vehicles engaged in the transportation on the public highways of

passengers or property in interstate or foreign commerce within the meaning of the MCA. The terms and conditions of this exemption are further explained in Regulations, 29 CFR Part 782 (copy enclosed).

It is clear that the drivers you have in mind are engaged in interstate commerce and subject to the overtime exemption contained in section 13(b)(1) when they deliver goods outside the State of California and to the Port of Oakland. With regard to your client's drivers who may not make an interstate trip, it should be noted that the Department of Transportation has held that drivers, driver's helpers, loaders, or mechanics would be subject to the Secretary of Transportation's jurisdiction under section 204 of the MCA for a 4-month period beginning with the date they could have been called upon to, or actually did, engage in activities directly affecting the safety of operation of motor vehicles on the public highways in interstate commerce. Since you state that the routes are assigned interchangeably and may be assigned to any of the drivers, it would appear that during any 4-month period, the overtime pay exemption contained in section 13(b)(1) of the FLSA would apply to all your client's truck drivers. If at the end of any 4-month period the employees are no longer engaged in interstate commerce, or in the regular course of their employment are no longer subject to making one of the interstate trips, jurisdiction under MCA would cease and the employees would no longer be exempt from overtime pay under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought because of an investigation by the Wage and Hour Division, or because of litigation with respect to, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure