U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2020-18

November 30, 2020

Dear **Name***:

This letter responds to your request for an opinion concerning whether workers employed by your insect farming operation are exempt from the overtime pay provisions of the Fair Labor Standards Act (FLSA) under the statutory exemption for agricultural employees. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

Your facility operates an insect farm that produces "superworms" for animal feed, as well as crickets and discoid roaches for human consumption. You also state that your farm is a member of the North American Coalition for Insect Agriculture. You state that you employ three categories of workers: (1) workers who feed, water, harvest, clean, and breed the insects; (2) managers who oversee insect rearing and otherwise work directly with the insects; and (3) facility workers who repair buildings, receive farm materials, deploy pest control measures in the barns, fix lights, and perform other maintenance tasks as needed. All of your employees work on site at the farm and are paid an hourly wage. Based on the facts that you have presented, we assume that the workers do not perform any tasks other than those listed above.

GENERAL LEGAL PRINCIPLES

The FLSA requires employers to pay their covered, non-exempt employees overtime compensation at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked in excess of forty hours in a workweek. *See* 29 U.S.C. § 207(a). However, the statutorily mandated overtime pay requirement does not apply to any employee employed in "agriculture." 29 U.S.C. § 213(b)(12). To determine the scope of an exemption, WHD gives the statutory text a "fair (rather than a narrow) interpretation" because the FLSA's exemptions are "as much a part of the FLSA's purpose as the [minimum wage and] overtime-pay requirement[s]." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks and citation omitted). The FLSA defines agriculture as:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such

> farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f).

As the Supreme Court has recognized, this FLSA exemption "embrace[s] the whole field of agriculture." *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 260 (1955); *see also Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 612 (1944) (stating that the exemption is "far-reaching"); *Reich v. Tiller Helicopter Servs., Inc.*, 8 F.3d 1018, 1024–26 (5th Cir. 1993) (explaining that Congress intended the exemption to have "broad reach"). Yet "no matter how broad" its scope, the exemption must "apply only to agriculture." *Maneja*, 349 U.S. at 260.

Agriculture is divided into two distinct categories: primary and secondary agriculture. *See Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762–63 (1949); *see also* 29 C.F.R. § 780.105(a). The first category, primary agriculture, includes "farming in all its branches," including "among other things . . . the raising of livestock, bees, fur-bearing animals, or poultry." *Id.* § 780.105(b). An employee who is employed in these activities is considered to be engaged in agriculture, regardless whether he or she is employed by a farmer or on a farm. *Id*. The second category, secondary agriculture, includes activities that are performed "as an incident to or in conjunction with such farming," and that are performed either by the farmer or on the farm. *Id.* § 780.105(c) (internal quotation omitted); *Farmers Reservoir & Irrigation*, 337 U.S. at 763.[1]

OPINION

Based on the information that you provided in your letter, the Department finds that the farm workers and farm managers employed at your insect farming operation are engaged in primary agricultural activities, and that the facility workers are engaged in secondary agricultural activities. Therefore, all of your employees are exempt from the overtime premium requirements of the FLSA during the workweeks in which they exclusively perform such activities.

The FLSA's definition of agriculture includes "among other things . . . the raising of livestock, bees, fur-bearing animals, or poultry." 29 U.S.C. § 203(f). The Sixth Circuit recently held that the growing and raising of worms fell within the FLSA's definition of agriculture, even though "raising worms is not expressly exempt within the meaning of any of the statutory examples." *Barks v. Silver Bait, LLC*, 802 F.3d 856, 863 (6th Cir. 2015).[2] The court explained that Congress

[1] The FLSA's agricultural exemption applies to individual employees on a workweek basis and does not apply to employees in workweeks in which they perform both exempt work and covered, non-exempt work. *See* 29 C.F.R. §§ 780.10–.11; WHD Opinion Letter FLSA2019-5, 2019 WL 1516460, at *2 n.2 (Apr. 2, 2019).

[2] The court observed that the specific activity of "raising livestock, bees, fur-bearing animals, or poultry" included in the FLSA's definition of agriculture "features members of the animal kingdom, a classification shared by worms. But worms are neither furred nor fowl, and bees are in a different phylum. Worms are also a poor fit for livestock, a term used to describe traditional farm animals." *Barks*, 802 F.3d at 863. At the same time, the court also pointed out that the definition of agriculture includes "the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities," and noted that worms cultivated on a farm "are more like the included cultivated commodities than excluded wild ones." *Id*. at 862–63. Ultimately, however, the Sixth Circuit determined that although raising worms is not a "specifically enumerated" farming activity under the statutory and regulatory

expressly gave agriculture a broad definition and recognized that agriculture "'includes all activities, *whether listed in the definition or not*, which constitute farming or a branch thereof under the facts and circumstances.'" *Id*. (quoting 29 C.F.R. § 780.107) (emphasis added).

You explain that your insect farming operations raise superworms, crickets, and discoid roaches. You further state that you utilize a large indoor farming space where approximately one million of these insects are produced per week. While worms are not a traditional farm animal, the Sixth Circuit explained that "there is nothing in the statute to suggest that the exemption should be circumscribed by tradition." *Barks*, 802 F.3d at 863–64. Noting that the worm farm at issue in that case "houses the worms, feeds them, monitors their growth, and eventually harvests them," the court found that "there is little to distinguish [the worm farm] from a traditional farm other than the unfamiliarity of worm farming." *Id.* at 865. The court thus concluded that the "raising of worms is a form of farming within the FLSA's agricultural exemption." *Id.* Similarly, here, the insects that your operations raise are not traditional livestock, but that does not prevent your employees from qualifying for the agricultural exemption because "the meaning of farming is not frozen in time." *Id*. at 863. Therefore, the farming of superworms, crickets, and discoid roaches falls within the FLSA's definition of agriculture.

Because the agricultural exemption covers the farming of non-traditional livestock such as insects, it logically follows that any workers who are performing primary or secondary agricultural activities in connection with insect farming are exempt under 29 U.S.C. § 213(b)(12). You assert that your "farm workers" raise the insects, including feeding, watering, harvesting, cleaning, and breeding them. These activities are indistinguishable from the housing, feeding, monitoring, and harvesting of worms that the Sixth Circuit found to be farming in *Barks,* 802 F.3d at 865. These activities fall squarely within primary agriculture under 29 U.S.C. § 203(f) and 29 C.F.R. § 780.105(b), which includes "the raising of livestock." Likewise, your "farm managers" who oversee insect rearing and are directly involved in growing the insects are also engaged in primary agriculture. Since the Department's regulations consider any employee performing these activities to be "engaged in agriculture," both farm workers and farm managers are exempt from the overtime pay provisions of the FLSA's agricultural exemption. *Id*.

Meanwhile, your "facility workers" repair buildings, receive farm materials, deploy pest control measures in the barns, fix lights, and perform other maintenance tasks as needed. None of these activities are primary agriculture activities under 29 C.F.R. § 780.105(b). However, they meet the definition of secondary agriculture, which "includes any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with 'such' farming operations." *Id*. § 780.105(c) (internal citations omitted).

Examples of secondary agricultural activities include the repairing and servicing of equipment necessary to farm operations, flying a crop-dusting plane, and engaging in some kinds of clerical work if the activities are performed by a farmer or on a farm and conducted incidentally to or in conjunction with such farming operations. *See Maneja*, 349 U.S. at 260–64; *Sariol v. Florida*

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definitions of agriculture, it nonetheless qualifies as a type of farming included within the scope of the agricultural exemption. *Id*. at 865; *see also* 29 C.F.R. §§ 780.107, .109 (explaining that an unlisted activity may qualify as agriculture if the circumstances reflect that the activity is in fact "farming").

Crystals Corp., 490 F.3d 1277, 1279 (11th Cir. 2007). As described, the on-site maintenance, pest control measures, and receipt of farm materials performed by your facility workers are subordinate activities that are "incident to or in conjunction" with the insect farming. *See, e.g.*, 29 C.F.R. § 780.158(a) (explaining that activities such as "maintenance and protective work" performed on a farm or by a farmer qualify as secondary agriculture if they are necessary and subordinate tasks incidental to the farming operations). Therefore, the facility workers are engaged in secondary agriculture and are also exempt from the overtime pay provisions of the FLSA.

CONCLUSION

For the foregoing reasons, all of the employees you have mentioned as working for your insect farm are exempt from the overtime pay provisions of the FLSA.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id*.

We trust that this letter is responsive to your inquiry.

Sincerely,

Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**