## FLSA-1077

September 24, 1980

Thank you for your letter regarding the application of the Fair Labor Standards Act to seasonal agricultural employees. You ask about the minimum wage exemptions provided by subsections 13(a)(6)(C) & (D) of the FLSA, copy enclosed, since your main concern is with seasonal agricultural employees paid on a piecework basis. Regarding these exemptions, you ask what length of time is used to define a "week" of farm work, and what percentage of seasonal farmworkers performing agricultural work and compensated on a piecework basis would be exempt under these subsections.

A week, as explained in Section 780.316 of 29 CFR Part 780, copy enclosed, in considered to be a fixed and regularly recurring period of 168 hours consisting of seven consecutive 24-hour periods. The phase "employed in agriculture less than 13 weeks" means that an employee has spent less than 13 weeks in agricultural work, regardless of the number of hours worked during each one of the 13 weekly units. This position recognizes and accommodates to situations where an employee works very long as well as very short hours during the week. This would accord with the legislative history of the exemption which clearly indicates that it was meant to apply only to temporary workers whose hours of work would undoubtably vary in length, and would, thereby effectuate the legislative intent. Further, not only is that agricultural work for the current employer in the preceding calendar year counted, but also that agricultural work for all employers in the previous calendar year. The 13-week test applies to each individual worker. It does not apply on a family basis. Finally, if an employer claims this exemption, it is the employer's responsibility to obtain a statement from the employee showing the number of weeks he or she was employed in agriculture during the preceding calendar year.

The available data indicates that approximately 40% of those agricultural employees employed on covered farms and compensated on a piece rate basis are eligible for these minimum wage exemptions.

You also ask if farmers are required to keep a record of the hours worked, as well as the production levels attained by the agricultural piece workers.

Section 516.33(a)(2) & (3) of 29 CFR Part 516, copy enclosed, specify that a record of both types of data must be maintained by farmers.

In addition, you ask if there are any limitations on deductions that employers may claim for accommodation or other benefits when compensating agricultural piece workers.

Section 3(m) of the Act provides that the "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary of labor to an employer of furnishing such employee with board, lodging, or other facilities if such board, lodging, or other facilities are customarily furnished by such employer to his employees; Provided, that the cost of board, lodging, or other facilities shall not be included as part of the wage paid to

any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee …."

The enclosed copy of 29 CFR Part 531 contains a discussion regarding the "reasonable cost" or "fair value" of board, lodging, or other facilities having general application, and describes the procedure whereby determinations having general or particular application may be made. As explained in section 531.30 of Part 531, the reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid to an employee only when "furnished" to the employee. Not only must the employee receive the benefits of the facility for which he or she is charged, but it is essential that acceptance of the facility be voluntary and uncoerced.

With regard to the effectiveness of the FLSA minimum wage provisions in encouraging voluntary compliance by employers, our comments must be limited since no formal statistical surveys have been made. It is the policy of the Wage and Hour Division to foster and encourage voluntary compliance programs on the part of the employers. In keeping with this policy, employers have been urged to maintain contact with Division personnel to obtain official information and advice needed to effect compliance.

Since the Employment Training Administration is responsible for establishing the adverse effect rate and the 80% test, we have referred your letter to Mr. ***, Chief, Division of Labor.

Sincerely,

Herbert J. Cohen
Assistant Administrator

Enclosures