

**FLSA-1001**

February 19, 1982

This is in reply to your letter requesting an opinion as to the application of section 13(b)(1) of the Fair Labor Standards Act to certain employees of one of your clients.

You state that your client is a wholesale business involved in the sale and distribution of paper products. The products include such items as printing paper, photocopy paper, napkins, toilet paper, shopping bags, packing paper, janitorial paper, etc. In its distribution activities your client makes use of a number of delivery trucks and employs drivers, drivers helpers, loaders, receiving personnel, and warehousemen.

Eighty-five and ninety-five percent of all goods sold by your client are purchased and delivered from across State lines. Many of the shipments received are placed in general inventory at your clients warehouse from which sales and deliveries are made. However, on a regular and recurring basis supplies are special ordered from the State in order to fill specific orders of specific customers within the State. These interstate special orders are received by your client and not commingled with general inventory. Interstate special orders are received and distributed on almost a daily basis. The interstate special orders received and delivered vary between two and five percent of total goods handled during the course of a year.

The interstate special orders are generally delivered directly to the customers between one day and one week of receipt of the warehouse. Your client's driver, driver's helpers and loaders participate in making interstate special order deliveries on almost a daily basis. Not as often, but at least one or more times in each workweek, the receiving personnel and warehousemen also participate in loading interstate special orders on your client's delivery trucks. It is part of the duties of the receiving personnel and warehousemen to participate in loading activities as needed, such as during busy periods, rush shipments, or absences of loaders and helpers.

Section 13(b)(1) of the Act provides an exemption from its overtime pay requirements, but, not from its minimum wage requirements, for any employee subject to the jurisdiction of the Secretary of Transportation under section 204 of the Motor Carrier Act 1935. This has been interpreted as applying to any driver, driver's helper, loader, or mechanic employed by a carrier, and whose duties affect the safety of operation of a motor vehicle engaged in transportation on the public highways in interstate or foreign commerce.

We have recently been advised by the Department of Transportation that its jurisdiction under section 204 of the Motor Carrier Act also extends to any carrier's drivers, driver's helpers, loaders, and mechanics who have not actually been working on a interstate shipment if the following conditions are met. First, the carrier must be able to present concrete evidence of its involvement in interstate activity, such as an actual trip in interstate commerce, or proof, in the case of a "for hire" carrier, that interstate transportation business has been solicited. Secondly, the carrier must then be able to present that the drivers, driver's helpers, loaders, or mechanics could have, in the regular course of his or her employment, been reasonably expected to have been involved in the carrier's interstate activities. Satisfactory evidence could consist of statements from the named employees and their employer, or employment agreements.

Evidence of interstate activity would be accepted as proof that the employee is subject to section 204 of the Motor Carrier Act for the four-month period being on the date of proof. Such drivers, driver's helpers loaders, and mechanics may, therefore be exempt under section 13(b)(1) of the Fair Labor Standards Act.

Transportation confined to points within a single State from a storage terminal of commodities which have had a prior movement by rail, pipeline, motor, or water from an origin in a different State

is in interstate or foreign commerce within the meaning of the Motor Carrier Act, if the shipper of the commodities into the State has a fixed or persisting transportation intent beyond the terminal storage point at the time of shipment. (See section 782.7(b)(2) of the Interpretative Bulletin).

Assuming that there is a "fixed and persisting intent" beyond the warehouse on the part of the shipper of the commodities that are ordered from outside that States to fill orders for specific customers with the State, the employees you have in mind, including the warehouse and receiving personnel who engage in loading activities on a weekly basis, would come within the overtime pay exemption contained in section 13(b)(1) of the Fair Labor Standards Act, as outline in Interpretative Bulletin. Part 782.

We hope this satisfactorily responds to your inquiry. However, if you have any further questions on this matter please do not hesitate to let us know.

Sincerely,

William M. Otter  
Administrator

Enclosure