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April 24, 2009

Ms. Patricia Davidson  
District Director  
U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division  
Post Office Box 907  
Albuquerque, New Mexico 87103

Via Facsimile  
(505) 248-6108  
and U.S. Mail

Re: Calculation of overtime under 29 U.S.C. §§ 213(h) and (i) for cotton-ginning operations for the permitted 14 weeks during which partial overtime exemption available to employers as well as under other Fair Labor Standards Act (FLSA or "the Act") provisions that provide for partial overtime exemptions for hours worked in a workday and in a workweek

Dear Ms. Davidson:

Thank you for taking my telephone call on Thursday, April 16, to discuss the methodology for calculating overtime under 29 U.S.C. §§ 213(h) and (i), referenced as Sections 13(h) and (i) of the Act, in cotton ginning operations for up to fourteen workweeks in which employees have worked both more than 48 hours in the workweek and more than 10 hours in one or more workdays.

When the Congress adopted Sections 13 (i) and (j), it did so with express approval of the way what it referenced as Sections 7(h) and 7(m) were being "applied"—which is without pyramiding or stacking of daily and weekly overtime even when employees' work hours exceeded both maximum daily and weekly hours.

The same "regular rate" and overtime calculation methodology that is used now has been used since this Industry first became subject to partial overtime exemptions containing both daily and weekly overtime hours provisions. In connection with consideration of the 1977 FLSA Amendments under which Sections 13(i) and (j) were created respectively for cotton ginning and sugar cane and sugar beet establishments, the House of Representatives, which crafted the bill that was passed by the Senate, said that its aim was to continue a limited exemption for those activities,

expressly referencing the "same" practice "as now applies" under what is referenced as Sections 7(h) and 7(m):

The committee recommends that a limited 14-week overtime exemption be available for those activities. However, the committee recommends that employers be required to pay at least 1 ½ times the regular rate of pay for hours over 10 per day and 48 per week for a period of not more than 14 weeks during the year.

The recommendation of this committee is that sugar cane and sugar beet establishments as well as cotton gins shall be subject to the same limited overtime exemption as now applies to employees of tobacco handling and processing incidental to auction sales (7)(m)) and to cotton and sugar service employees (7(h)).

H.R. Rep. No. 95-521, at 33, *reprinted in* 1978 U.S.C.C.A.N. 3234. On July 22, 1977, when H.R. Rep. No. 95-521 was released, Congress, the Division, and ginners understood that overtime pay for "cotton and sugar service employees" and the specified tobacco handling and processing workers was not "stacked" or "pyramided." These industries' employees had not been receiving both daily and weekly overtime pay. The Department of Labor had questioned whether special industry overtime exemptions should be abolished, and some were abolished. Nevertheless, the committee considering the matter expressly said Sections 13 (h) and (i) should be applied as what it referenced as Sections 7(h) and 7(m) were then being applied in 1977.

The present methodology for calculating overtime in partial overtime exemption workweeks was in effect in 1977 and has been in effect since the Industry first became subject to both daily and weekly overtime requirements; neither it nor other industries covered by similar partial exemptions have ever been required to "stack" or "pyramid" overtime for both daily hours over the "maximum" and weekly hours over the "maximum."

Indeed, as is the case under what are now Sections 13(h) and (i), Sections 7(b)(3), 7(j), 7(m), and 13(j) have been consistently interpreted throughout the periods of their respective existence by the Department of Labor, Wage-Hour Division, to avoid requiring employers to stack or pyramid overtime payments. This is not surprising, and a contrary position would not be lawful for a number of reasons discussed below. See, e.g., 29 C.F.R. Part 526.1-.12, *particularly* .10(a)(1) and .10(b)(7) – (cotton ginning), .10(b)(30) – (sugar beets and sugar cane), .10(b)(32) – (tobacco), and .12(a)(1) and .12(b)(6) – (sugar cane); 29 C.F.R. §§ 778.0-.110, .200-.202, .601-.602(a)-(d); 29 C.F.R. §§ 780.0-.12, .800-.819 (1977). See also, 33 Fed. Reg. 1012-1013 (January 26, 1968) (adopting interpretations thereafter published until withdrawn by Notice in 1981 at 29 C.F.R. §778.602). Section 778.602(c) provided explanatory text and demonstrated the application of the requirements in a chart to show

how to pay overtime to gin employees who worked in excess of both the then applicable daily maximum hours and the then applicable weekly applicable hours. Other provisions of Section 778.602 provided the same clear explanations and examples for the application of the daily and weekly overtime requirements in other industries. When Sections 778.602 (c) and (d) were withdrawn by Notice published in 46 Fed. Reg. 7308 (January 23, 1981), there was no economic impact study performed or any suggestion that the method of calculation of the payment for overtime when both daily and weekly overtime had been worked under the then applicable Sections 13 (h), (i) and (j) provisions had been changed. As significant for understanding Congressional will on the subject of how to calculate overtime due when gin and other affected industries' employees worked in excess of both daily and weekly maximum hours, these examples in 29 C.F.R. § 778.602(c) and (d) and those in Part 526 are *the* examples Congress had for reference when the 1974 and 1977 FLSA amendments were considered and enacted. While the legislative history shows there were intended changes to the maximum hours, there was no discussion or suggestion of any intent to change the calculation methodology.

Sections 7(e)(5) and 7(h) do not permit requiring employers to stack or pyramid daily and weekly overtime payments.

In the first place, the Act does not permit requiring such stacking or pyramiding of overtime under the circumstances applicable to cotton gins. Under the statutory provision at 29 U.S.C. § 207(e)(5), extra pay provided by a premium rate for hours worked over eight in a day does not change the employee's "regular rate" for computing the employee's overtime or premium under Section 7. Under 29 U.S.C. § 207(h), such pay for hours over eight (8) in a day is creditable toward the employee's wages required to meet his Section 6 minimum wages and his Section 7 overtime wages.

Thus, even if there were not the regulatory history of enforcement before and after the effective dates of the 1974 and 1977 amendments to the Act, a separate reason the Act could not be reinterpreted differently now, the Act itself would not permit the Division to require calculating overtime for 50 hours of work as though 52 hours of work had been worked in the following example: Assume that employees worked one 12 hour day and a total of 50 hours for the workweek, having worked 10 or fewer hours on all other workdays. Under this example, as the Wage-Hour Division has recognized in perhaps countless — hundreds certainly, thousands probably — inspections from California to Virginia, in one of the 14 weeks in which the partial exemptions of 13(h) and (i) were otherwise applicable, the employer has been deemed to have owed the employee for two (2) hours above 48 hours at the overtime rate, not for four (4) hours. The employer was given a "credit" as required by Section 7(h) for the two (2) hours of daily overtime payment for the twelve (12) hour day.

Similarly, as you are undoubtedly aware, during the necessarily short seasons gins operate, employees typically work 6, and often 7, twelve (12) hour workdays. There is simply no history of the Division asserting overtime claims both for the 36 hours between 48 and 84 in an 84-hour workweek and for additional overtime premium rate wages for the total of 14 hours worked over 10 in the seven (7) workdays of an 84-hour workweek. To have done so would effectively have written both the exemptions and Section 7(h) out of the law.

There is, however, a substantial history of Wage-Hour Division examination of overtime compliance in this Industry and calculation of owed overtime premiums under the supervision of the Division without this issue, were it otherwise permitted under Sections 7(e)(5) and 7(h), being "recognized or brought to the employer's attention." In the past, some ginners did not understand the proper calculation and effect of end-of-the-season bonuses allocated over the entire season as affecting the "regular rate" and thus affecting the overtime premium rate for overtime hours worked. Therefore, every ginner inspected and their networks of colleagues in the Industry have therefore had substantial, justified, and objective reasons to believe that the continuance of the pay practices apparently now being examined are fully in compliance with applicable law.

We submit, therefore, that the absence of enforcement of the theory we have now heard is being considered comes from the Division's recognition, as initially presented, that 29 U.S.C. §§ 207(e)(5) and 207(h) do not permit the interpretation that we now understand is under consideration. That said, the Division's consistent interpretation and enforcement of these statutory provisions for nearly 35 years in the case of Section 13(h) lend strong weight to the conclusion that such a change could not now be made even were Sections 13(h) and (i) statutory sections as to which the Division were delegating rulemaking authority. The correctness of the conclusion that the statute does not permit the interpretation now being suggested is even stronger, given that when these statutory provisions were relocated and designated as sections specifically for the cotton ginning Industry, the legislative history such as that quoted above, shows that Congress intended to make no change in how the regular rate and overtime premium affecting the cotton ginning Industry would be interpreted and applied. The provisions cited at page 2, above, from the Code of Federal Regulations in effect in 1977 show that overtime was being calculated in 1977 just as it has been ever since: payment for the greater of daily or weekly overtime, not both.

Current published C.F.R. interpretations show that the Division recognizes that daily and weekly overtime for cotton ginning may not be "stacked" or "pyramided," just as expressly provided in Part 526.

Other factors also show that any deviation from the historic application of these statutory partial exemptions is not permitted. For example, the current 29 C.F.R. § 780.800 (July 1,

2008), specifies that “[t]he limited overtime exemptions provided for cotton ginning and for sugar processing under §§ 7(c) and 7(d) (see Part 526 of this chapter) are not discussed in this subpart.”

Thus, while the seasonal industry regulations that were previously codified in 29 C.F.R. Part 526 have now been “removed” from the published Code, the vitality and applicability of the regulatory directions prescribed in Part 526 with respect to the application of the “limited overtime exemptions” remain, as shown by the text at Section 780.800 as well as at 29 C.F.R. § 780.4 and 780.7 and by the process by which Part 526 provisions were adopted as regulations and then were withdrawn from the published C.F.R.

Accordingly, while the statutory maximum workweek in which the partial exemption may be applied for employees engaged in ginning and ginning services is now 48 hours and changes were made in the number of weeks the partial exemption would apply, these were the only changes required by the statutory law changes or permitted by the adoption of the Part 526 overtime pay calculation methodology by Section 780.800. Turning to the text of the sections of Part 526, as they were last codified, that deal with the actual calculation of daily and weekly overtime for cotton ginning and sugar processing, the latter now covered under 29 U.S.C. § 13(j), the instructions are as follows:

During each of the workweeks thus selected, any employee may be employed by an employer in such establishment without payment of the overtime compensation prescribed by Section 7(a) of the Act, if such employee is not employed in any non-exempt work outside the scope of the industry and is paid overtime compensation *at a rate not less than one and one-half times the regular rate at which he is employed for all hours worked in such workweek in excess of 10 in any workday or in excess of 50 in the workweek, whichever is greater.*

29 C.F.R. § 526.10(a)(1), .10(b)(7) (cotton), and .10(b)(30) (sugar beets and sugar cane) (1990) (emphasis supplied). See also 29 C.F.R. Part 526 (1977) for the same provisions in the 1977 Code. Other provisions of 29 C.F.R. Part 526 dealing with the calculation of total weekly overtime for other crops and industries when both daily and weekly overtime hours above the specified maximum amounts had been worked also gave the same instruction: pay only ***the greater of*** daily **or** weekly overtime, ***not both***. See 29 C.F.R. § 526.11(a)(1) (1990) (payment at one and one-half times the regular rate “for all hours worked . . . in excess of 10 in any workday or in excess of 48 in the workweek, whichever is greater.”); 29 C.F.R. § 526.12(a)(1) (1990) (payment for all hours worked in excess of 10 in any workday or 50 in not more than 10 of the workweeks or in excess of 10 in any workday or in excess of 48 hours in no more than 10 of the workweeks, “**whichever number of hours attributed to daily or weekly overtime work is greater.**”).

October 19, 1995, Opinion Letter by then-Administrator Maria Echaveste affirmed lawfulness of existing practice and Part 526 overtime calculation methodology even though she did not reference statutory anti-pyramiding provisions of Sections 7(e)(5) and 7(h).

Notably, by letter dated October 19, 1995, just days before the Part 526 regulations were withdrawn on October 26, 1995, by mere Federal Register Notice on the basis that amendments to the Fair Labor Standards Act in 1974 and 1977 had made publication of the regulations unnecessary, then-Administrator Maria Echaveste sent a formal Opinion Letter to the Southern Cotton Ginners Association, the Honorable Bill Frist, the Honorable Fred Thompson, the Honorable John Tanner, and the Honorable Ed Bryant on the subject of overtime calculation for the cotton ginning Industry under Sections 13(h) and (i). A copy of the letter to Senator Frist with the Opinion Letter Ms. Echaveste sent to him and to the Association is attached as Exhibit 1.

Ms. Echaveste gave no hint to the Industry or to the Senators and Congressmen to whom she sent copies of the letter that the Division contemplated any change in its view that daily and weekly overtime would be paid for hours above 10 and above 48 in workweeks in which more than 40 were worked, based on whether the worker would be paid more on the daily overtime basis or on the weekly overtime basis, not on both daily and weekly overtime added together, stacked or pyramided. While she did not specifically reference the statutory limitations of Sections 7(e)(5) and 7(h) on the basis of which statutorily required daily overtime is calculated and credited toward workweek overtime, had there been any reason or statutory exception that would allow the Division to begin requiring a stacking or pyramiding, that is, payment of both daily overtime and weekly overtime, it is unimaginable that Administrator Echaveste would not have addressed such a startling, stark, and substantial change in her letters to the Industry and to the Senators and Congressmen.

She told Senator Frist that the response "should make clear how FLSA sections 13(h) and 13(i) apply to cotton gins." (See Exhibit 1, p. 1.) Notably, Ms. Echaveste did not rely on any Division interpretation or even regulation but on the FLSA itself in explaining her reasoning.

The Notice withdrawing Part 526 also gave no hint that any change in overtime calculation methodology would result from removing Part 526 from the C.F.R.

Even if the October 19 Opinion Letter had not been written by Ms. Echaveste, the content of the October 26 Federal Register Notice by which Part 526 was "removed," not rescinded or revoked but "left" in the Code and incorporated by express references in the Part 780 interpretations shows no "significant" change was intended in the way overtime would be computed. Upon publication of the Notice of withdrawal of what had been adopted as rules, the then-Administrator asserted that the withdrawal "is not a 'significant regulatory action' within the meaning of Executive Order 12866" and that the regulations "do not affect the current operations of any program." 60 Fed. Reg. 54804 (October 26, 1995). The Administrator further assured the regulated public that the

removal of those provisions would not “adversely affect in a material way the economy [or] a sector of the economy[,] productivity[,] competition, jobs, the environment, public health or safety or State, local, or tribal governments or communities” or create other problems. *Id.* Significantly, the Administrator stated that the removal of these provisions would not “raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866.” For these and other reasons, she said, “no regulatory impact analysis has been prepared.” *Id.* at 54804.

Finally, the Notice asserted that no notice of proposed rule making was required under 5 U.S.C. § 553(b). The Notice asserted that the action would “not have a significant impact on a substantial number of small entities” (*Id.* at 54805), a conclusion that would not have been accurate if the removal of the Part 526 text on the calculation of overtime were meant to change the way overtime would be calculated for ginnners and others benefiting from these partial overtime exemptions.

Given the lag time between Agency completion of a document and its publication in the Federal Register, Ms. Echaveste, under whose direction the October 26 Notice was prepared (*Id.* at 54805), would have been preparing the October 19 formal Opinion Letter to the Industry and to several Senators and Congressmen at the same time the Notice was being prepared under her direction. That both documents were prepared at essentially the same time further supports the conclusion that no change in the way overtime was to be calculated was intended or is now possible.

FOH provisions do not permit pyramiding or stacking overtime.

Other evidence that the Division recognizes the legal prohibition against requiring employers to pyramid or stack overtime is found in the current Field Operations Handbook at Chapter 32e00, issued March 24, 1967, which addresses the application of current statutory Sections 7(e)(5) and 7(h):

Premium payments for excessive hours. Extra compensation provided by a premium rate paid for certain hours worked by an employee in any day or workweek because such hours are hours worked in excess of 8 in a day or the applicable statutory maximum workweek, or in excess of the employee’s normal regular working hours, need not be included in the computation of the employee’s rate of pay and may be credited toward OT compensation due under the FLSA or PCA.

As provided at FOH Chapter 32e01(a), the requirements of FLSA Section 7(e)(5) are met for Section 7(h) purposes if the payment of a premium rate is required because of a statute, such as is applicable under 29 U.S.C. §§ 213(h) and (i), or if any of several other criteria are met:

(1) Statutory standard – a standard working day of 8 hours or standard workweek of the applicable statutory maximum workweek. OT payments for standards in excess of 8 hours a day or the applicable statutory maximum workweek will also be recognized; for example, OT payments after 9 actual working hours in a day are recognized as OT payments under Sec 7(e)(5) even though 9 hours are not the employee's normal or regular working hours.

(2) Regular working hours standard – a standard which coincides with the employee's regular hours or days of work during the period covered by the investigation.

(3) Normal working hours standard – a standard which coincides with the employee's normal hours or days of work as established by agreement or practice . . . .

FOH Chapter 32e01(a)(1), (2), and (3).

Moreover, the FOH provides the following express direction:

Offset of premium payments for excessive hours. Where premium rates are paid for hours in excess of a valid hour standard, the amount of the premium payment may be offset against statutory OT compensation due, regardless of whether such extra compensation is provided by a premium rate of 1 1/3, 1 1/2, double, or some other multiple of the non-OT rate of pay.

FOH Chapter 32e03.

Other provisions of the FOH likewise support the Industry's position that its ginners may not be required to pay both daily and weekly overtime.

In the event that someone might now contend that the use of the word "or" rather than the word "and" is meaningful in the text of 29 U.S.C. §§ 213(h) and (i) as they have stood for more than 30 years, nearly 35 in the case of 213(h), FOH Chapter 20j describes "General Considerations" in the application of the Sections 7(m), 13(h), 13(i), and 13(j) exemptions. Chapter 20 was adopted July 6, 1990, long after the 1974 and 1977 FLSA amendments here in issue.

In the general discussion of the application of these partial exemptions that have both daily and workweek maximum exempt hours provisions, the Division uses the word "or" repeatedly in describing the partial overtime exemption for hours "worked in excess of 10 hours in a day or 48 hours

in a week . . . .” See, e.g., FOH Chapter 20j00(a)(1). The FOH text at Chapter 20(t) that explains application of the tobacco industry 29 U.S.C. § 207(m) 14-week overtime exemption for hours in excess of 10 in any workday “and” hours in excess of 48 hours in any workweek, likewise uses the word “or” as a synonym for the word “and.” FOH Chapter 20t00(a)(2)(A) and (B).

FOH provisions at Chapter 20u, 20v and 20w provide additional information on the application of these and other partial overtime exemptions and by their discussion of the predecessor statutory sections, describe the intended changes from the now repealed Section 7(c) and (d) statutory provisions. Nowhere is there any hint that “and” means that both daily and weekly overtime must be paid. In fact, by the use of both terms in Chapter 20 and elsewhere, it is clear that in context, the Division understands “and” to mean “one or the other,” not both.

Use of “and” and “or” to mean “either” in the FOH is not surprising. Administrator Echaveste used “and” and “or” interchangeably in her October 19, 1995, Opinion Letter to the Industry and to several Senators and Congressmen.

Case law shows the use of “and” is a meaningless change.

Moreover, as Judge John Brown explained in another cotton case, *Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893 (5<sup>th</sup> Cir. 1958), “and” and “or” often have the same meaning. In *Peacock*, the meaning of 29 U.S.C. §207(c), was in issue. The Judge found that to read the word “and” as requiring a business to be engaged in both “ginning” and “compressing” of cotton effectively read the exemption out of the law. As he explained:

But the word “and” is not a word with a single meaning, for chameleonlike, it takes its color from its surroundings. Nor has the law looked upon it as such. It is ancient learning, recorded authoritatively for us nearly one hundred years ago; echoing that which had accumulated in the previous years and forecasting that which was to come, that, “[I]n the construction of statutes, it is the duty of the Court to ascertain the clear intention of the legislature. In order to do this, Courts are often compelled to construe “or” as meaning “and,” and again “and” as meaning “or.” *United States v. Fisk*, 1866, 3 Wall. 445, 448, 70 U.S. 445, 448 . . . and see Heydon’s case (1584), 3 Co. 7a.

*Id.*, 252 F.2d at 393. Given the context and actions by the Congress in revising the cotton ginning partial overtime exemptions, changing the total hours per week for which the partial exemption is applicable to employees engaged in ginning, etc., and other exemptions then addressed, close study of the Congressional statutory amendments and legislative history gives no clue, hint, or suggestion

that the methodology for calculating overtime under these partial exemptions was intended to be changed in any respect — quite the opposite as shown by the Committee Report quoted on page 2.

The Supreme Court teaches that changes of such magnitude as to require stacking or pyramiding of both daily and weekly overtime is not a change that would have been hidden or cryptically addressed. See, *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) (“Congress does not alter the fundamentals of a regulatory scheme in vague or ancillary provisions – it does not, one might say, hide elephants in mouseholes.”); *FDA v. Brown & Williamson Tobacco Corp.*, 527 U.S. 120 (2000). As is the case of tobacco in the *Brown & Williamson* case, the place of the cotton, sugar and tobacco industries in the U.S. economy was such at the time of the statutory rearrangements to create Sections 7(m) and 13(h), (i), and (j), that it defies reason to suggest that Congress would have intended to change the then long-established methodology by which overtime would be calculated without saying so expressly. The economic consequences today of requiring gins to pyramid or stack both daily and weekly overtime would be enormous for the barely 700 remaining U.S. cotton gins. If the gins were unable to operate because of such dramatically increased costs, the U.S. cotton production industry would also be out of business, costing not only jobs of workers in cotton production and ginning but also many other jobs that are dependent on continued production of cotton in the U.S.

We respectfully submit that while the statutory law would not permit such a change to be required by the Division, even if the statutory law were otherwise, the Division has not made such a change in interpretation and would not be able to do so without justifying such a change from that on which it has acted since 1974, including its overt actions and positions taken in 1995 and without considering fully and discussing the economic impacts of such a change. Additionally, any change now would not be entitled to the deference for which “a consistent administrative interpretation” is entitled under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), as recognized and discussed by the Court in *Wirtz v. Western Compress Co.*, 330 F.2d 19, 23-24 (9<sup>th</sup> Cir. 1964). In *Western Compress*, the Secretary of Labor’s new interpretation of 29 U.S.C. § 207(c), twenty-six years after its enactment, was held not entitled to deference. Here the methodology by which overtime has been calculated has been in effect and has been used consistently by ginners and approved by the Division for nearly thirty-five years.

The text of 29 U.S.C. §207(j), the application of that provision, and the Division’s interpretation of its requirements further show that ginners may not be required to pay both daily and weekly overtime.

Section 7(j) of the Act is a provision that allows computation of overtime based on hours worked in excess of 8 hours in any workday *and* in excess of 80 hours in any 14 day period for employers engaged in the operation of a hospital or other establishment for the residential care of the sick, the aged, or the mentally ill or defective if there is an agreement to that effect in place between

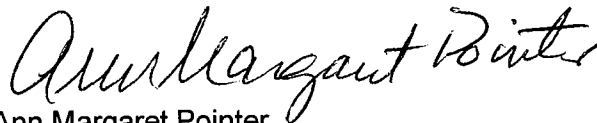
Ms. Patricia Davidson  
April 24, 2009  
Page 11

the employee and his employer. Interpretations for the application of Section 7(j) were adopted as 29 C.F.R. § 778.202 by a Notice in the Federal Register, 33 Fed. Reg., 986, 993 (January 26, 1968), and amended by publication at 46 Fed. Reg. 7311 (January 23, 1981) in ways not pertinent here. Then, as now, Section 778.202(a) expressly states that in applying Section 7(j), under the provisions of Section 7(h) and 7(e)(5) of the Act, any payments at the premium rate for daily overtime hours within such period may be "credited toward the overtime compensation" due. The current codification contains the same language, 29 C.F.R. § 778.202(a) (July 1, 2008), making it clear that the use of "and" rather than "or" in Sections 13(h) and (i) was of no legal consequence in 1977 and is of no consequence today.

Conclusion.

We therefore ask for confirmation that the Division is in agreement with the conclusion we have set forth here that employers may pay overtime for hours worked both in excess of 10 in a day and in excess of 48 in a workweek based on whether the calculated amount is greater for daily overtime or for weekly overtime and that they may pay only the greater amount. In sum, they are not required by the FLSA to pay based on both daily overtime hours and weekly overtime hours. Thank you for your prompt attention to this matter. We look forward to your response.

Very truly yours,



Ann Margaret Pointer  
For FISHER & PHILLIPS LLP

AMP:sjw  
Enclosure

**U.S. Department of Labor**

Employment Standards Administration  
Wage and Hour Division  
Washington, D.C. 20210



OCT 19 1995

NOV 20 1995

The Honorable Bill Frist  
United States Senate  
28 White Bridge Road, Suite 211  
Nashville, Tennessee 37205

Dear Senator Frist:

Thank you for your letter on behalf of Mr. Lee Todd of the Southern Cotton Ginners Association. The enclosed copy of our response to Mr. Todd's concerns should make clear how FLSA sections 13(h) and 13(i) apply to the employees of cotton gins. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

  
Maria Echaveste  
Administrator

Enclosure



Mr. Lee Todd  
Southern Cotton Ginners Association  
847 Cotton Gin Place  
Memphis, Tennessee 38106

Dear Mr. Todd:

This responds to concerns you have raised regarding the application of subsection 13(h) of the Fair Labor Standards Act of 1938, as amended (FLSA), to the employees of cotton ginning establishments (see enclosed). Specifically, you wish to know to which employees subsection 13(h) may be applied.

Subsection 13(h) of the FLSA provides a partial exemption from the overtime requirements of section 7 of the Act for employees employed "exclusively to provide services necessary and incidental to":

- (A) the ginning of cotton in an establishment primarily engaged in the ginning of cotton;
- (B) the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;
- (C) the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or
- (D) the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets.

The exemption can be applied for a period or periods not to exceed fourteen (14) workweeks (in the aggregate) in any calendar year to any employee engaged in one (or more) of the above capacities. In addition, in order for the exemption to apply, the employee must be compensated 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 ten (10) in any workday and forty-eight (48) hours in any workweek during the period in which the exemption is applied.

The statutory wording "exclusively to provide services necessary and incidental to" is not analogous to "engaged in" (which is used in subsection 13(i) of the Act). The phrase "necessary and incidental" could include such services as security guard, driver, clerical/secretarial/administrative or sales functions, or janitorial work, provided the service performed is exclusively in connection with one or more of the activities identified in (A) through (D) on the preceding page.

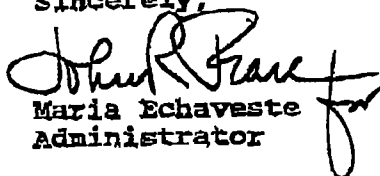
Also with respect to the application of subsection 13(h) of the Act, the statute specifically provides that "[a]ny employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 7." This statutory wording means that any employer that uses the partial overtime exemption provided in subsection 13(h), may not invoke any other exemption provided in either section 13 or section 7 of the Act (including 13(i)) for those employees to whom 13(h) is applied. In addition, the "banking" and carrying over of unused exemption workweeks to subsequent calendar years is not permitted under subsection 13(h).

Subsection 13(i) provides a partial exemption from the overtime requirements of section 7 of the Act for any employee "engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities . . ." Compared to the subsection 13(h) exemption, subsection 13(i) is considerably narrower in its applicability.

Limited in its application to a period not to exceed fourteen (14) workweeks (in the aggregate) in any period of fifty-two (52) consecutive weeks, the exemption applies only to those employees actually "engaged in the ginning of cotton." The plain language of the statute excludes all employees not actually engaged in the ginning of cotton, therefore, employees engaged in services that are "necessary and incidental" within the meaning of the term under subsection 13(h), such as security guards, administrative, or sales employees, would not meet the criteria for exemption under 13(i). In addition, subsection 13(i) may only be used if the employees to whom the exemption is applied receive compensation at a rate of not less than one and one-half times the regular rate of pay for all hours worked in excess of ten (10) in a workday or forty-eight in any workweek during a period in which the exemption is invoked by the employer. And as is the case under subsection 13(h), the "banking" and carrying over of unused exemption workweeks to subsequent periods of fifty-two consecutive weeks is not permitted under subsection 13(i).

I trust that the above is responsive to your concerns regarding the application of subsections 13(b) and 13(i) under the FLSA. Should you have any further questions or concerns, please do not hesitate to contact the Branch of Farm Labor and Immigration Programs at (202) 219-7605.

Sincerely,

  
Maria Echaveste  
Administrator

Enclosure