

MINUTES

**MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON LABOR & EMPLOYMENT RELATIONS

Call to Order: By Sen. Bill Wilson, Vice-Chair, on January 14, 1993, at 1:05 P.M.

ROLL CALL

Members Present:

Sen. Tom Towe, Chair (D)
Sen. Bill Wilson, Vice Chair (D)
Sen. Gary Aklestad (R)
Sen. Chet Blaylock (D)
Sen. Jim Burnett (R)
Sen. Tom Keating (R)
Sen. J.D. Lynch (D)

Members Excused:

Members Absent: None

Staff Present: Eddy McClure, Legislative Council
Patricia Brooke, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 116, SB 62, SB 91
Executive Action: None

HEARING ON SB 116

Opening Statement by Sponsor:

Sen. Harp, Senate District 4, introduced SB 116 and stated that he was introducing the bill on behalf of the Montana Food Distributors Association. The bill allows for the exclusion of overtime pay and addresses only outside salesmen, not route people. Currently under the federal Fair Labor Standards Act Montana Food Distributors do not have to pay overtime and under Montana law we already make some exemptions. The intent of this bill is to coincide with the federal law.

Proponents' Testimony:

Bill Stevens, Montana Food Distributors Association testified in favor of the bill. He stated that the bill addresses only outside sales in the food industry. Many people already think that the exclusion provision exists and it has created some

problems between the employers and employees. He emphasized that it does not affect the people who deliver the product, i.e. the route people. (Exhibit #1)

Mike Stump, Montana Food Distributors Association, stated that the federal and Montana laws differ in who is exempt from wage laws regarding outside sales employees. The determination is made on a job by job basis which has resulted in inadvertent violations. This bill would add a new exemption for minimum wage and overtime requirements of state law and is asking for a specific exemption for the food industry. Stump stated that he has seen many claims under these laws in the Wage and Hour Section of the Montana Department of Labor.

Opponents' Testimony: None

Questions From Committee Members and Responses:

Sen. J.D. Lynch asked for an example of who the bill affects. Sen. Harp answered that there are some food distributors who handle outside sales that would be affected by the bill and referred the question to Bill Stevens. Mr. Stevens stated again that it affects food salesmen, not route men.

Sen. Lynch clarified that this does not affect the route men.

Sen. Blaylock asked if there are problems for which this bill is necessary. Bill Stevens answered that there have been many cases of wrongful discharge and that loopholes exist in the present law and that this bill is needed.

Closing by Sponsor:

Sen. Harp closed

HEARING ON 62

Opening Statement by Sponsor:

SEN. TOM HAGER, SD 48, stated that this is a simple bill that asking for a contractor to provide health care, retirement benefits, life insurance, disability, and sickness insurance to a worker or employee covered by the state prevailing wage law in lieu of paying fringe benefits as wages. It gives the employer the right to pay those fringe benefits in cash, pay them to a trust that has some of these benefits in it, or any combination of the two. The bill only applies to employers working under the state prevailing wage law, about 15% of the employees.

Proponents' Testimony:

Brad Talccett, President Montana Contractors Health Care and Retirement Trust, explained the history of this trust fund that provides health and retirement benefits for the employees. He stated that 31 firms are enrolled in this trust and 1,040 employees. There are about 3,000 Montanans who are covered under this plan who would likely not have health insurance if the trust

did not exist.

Robert Berland, Western Materials and trustee for the Montana Contractors Health Care and Retirement Trust, stated that the benefits plan of the contractors trust is a health and welfare plan and the retirement is vested beginning with the first hour of work. The funds are invested as a personal IRA and belong to the employees. The medical insurance includes medical, dental, and vision.

Bob Meinhardt, SWANK Enterprises, Whitefish, is a member of the contractors trust fund and urged support of SB 62.

Francis Talbot, United Materials, Great Falls, stated that she had done a verbal survey of the employees and that they were all completely satisfied with their health plan and urged support of SB 62.

Robert Warren, Western Materials, spoke in support of his company's benefit plan.

Jerry Jockinsen, Western Materials, spoke in support of SB 62.

Tim Talseth, Dick Anderson Construction, Inc., spoke in support of SB 62.

Jerry Chambers, Dick Anderson Construction, Inc., spoke in support of SB 62.

Angie Phillips, Western Materials, stated that she would not be able to work without the health benefits her plan offers and urged support of SB 62.

Craig Campbell, Pioneer Ready Mix, spoke in support of SB 62.

Rick Rice, Pioneer Ready Mix spoke in support of SB 62.

Paul Heikkiki, United Materials, spoke in support of SB 62.

Lon Jones, Western Materials, spoke in support of SB 62.

Dick Anderson, Dick Anderson Construction, Inc, spoke in support of SB 62.

Mike Hoppel, Pioneer Ready Mix, spoke in support of SB 62.

Steve Eichorn, Pioneer Ready Mix, spoke in support of SB 62.

Sonny Lockrem, Montana Contractors Pension and Retirement Trust, gave a brief history of this legislation. Lockrem stated that SB 62 was not introduced in the 1991 session but was included in a prevailing wage law package that was vetoed by Governor Stephens. He noted that 60% of the membership of the Montana Contractors Association is non-union. Lockrem stated that if SB 62 does not pass, he is fairly confident that the trust will continue to operate under the pre-emption granted under the federal court.

The Montana Department of Labor has no regulatory authority over the fringe benefits that are pre-determined in Davis Bacon. Lockrem read a letter from Congressman Pat Williams that urges an amendment of the Montana Prevailing Wage Law. Lockrem feels that the Department of Labor must have some statute that regulates the payment of fringe benefits.

Opponents' Testimony:

Eugene Fenderson, MT. District Council of Laborers, stated that he is in opposition to this bill for many reasons. He stated that a number of people in Montana started selling insurance plans to contractors, and many not as good as the Montana Contractors Association trust fund. Some of the plans took 500 hours to get vested and nobody on the project ever got that many hours. Fenderson reminded the committee that this law goes beyond Montana Contractors Association.

Don Judge, President, Montana State AFL-CIO, stated that this law goes far beyond the Montana Contractors Association system. He noted that violators of the prevailing wage laws are extremely hard to track down. He stated that this bill does not provide or mandate that employees participate in the administration of the system. He requested that the Montana Contractors Association sit down with the AFL-CIO and work out the differences. (Exhibit #2).

Chuck Cashell, Operating Engineers, Local 400, urged opposition to SB 62.

Questions From Committee Members and Responses: Sen. Lynch asked Sonny Lockrem if both groups, the Montana Contractors Association, and the unions can sit down and reach an agreement. Sonny Lockrem stated that the problems are out there and will be there whether SB 62 passes or not. Lockrem talked about differences and similarities between the administration of this plan and that of union plans. Lockrem stated that in absence of passing SB 62 the Department of Labor has absolutely nothing in the statute regarding how fringe benefits are to be paid. Senator Lynch asked Sonny Lockrem if he is willing to sit down and visit and with the unions. Sonny Lockrem responded that he will visit with them but said again that when you get into the area of fringe benefits it goes beyond a state statute of general nature and is preempted.

Sen. Blaylock asked Chuck Hunter if this bill does not pass would the Department of Labor have anything to work with. Chuck Hunter talked about the provision that was struck down and the existing prevailing wage law. There is not a specific law that dictates how the benefits are going to be paid.

Sen. Towe asked Sonny Lockrem why we need the law if it is in operation already. Sonny Lockrem replied that the Montana Contractors Association is operating under a federal pre-emption. He discussed section 405 of the Montana code that mandates that fringe benefits have to be paid in cash under Montana law,

therefore, they can not be put into the trust.

Sen. Towe asked Chuck Hunter how to address the controls or limits of pension plans. Chuck Hunter stated that the Montana Contractors Association's plan is a very good one, but some plans that were approved by ERISA are not because the ERISA standards are broad and allow for abuse. He stated that he would be interested in working with the groups to find some answers.

Sen. Towe asked Mr. Fenderson if he had a comment regarding how to solve the problem. Mr. Fenderson said that the unions would like to sit down with the contractors association. He noted that the state needs to try to provide protection to the workers who are often mobile and generally do not have the same plan from employer to employer.

Sen. Towe and Sonny Lockrem discussed what minimum standards are needed.

Sen. Towe asked Don Judge if he had a comment regarding how to solve the problem. Don Judge stated that ERISA does not pre-empt regulatory authority and does not protect employees. He suggested that employers be required to file benefit plans in order to receive public contracts and that penalties be increased for violations.

Sen. Towe asked Sonny Lockrem if he is willing to sit down with various parties to work on an amendment or a separate bill. Sonny Lockrem answered that "he's always been available."

Sen. Aklestad urged that the bill not be clouded with too much to make it unworkable.

Sen. Blaylock urged that the parties get together and aim to protect workers in Montana to ensure that they have health insurance.

Sen. Towe asked that a meeting be held between parties and committee staff and try to stay within the topic of the bill but keep the option open to submit a new bill.

Sen. Blaylock requested that Chuck Hunter be included in the discussions.

Closing by Sponsor: Sen. Hager closed.

HEARING ON 91

Opening Statement by Sponsor:

Sen. Chris Christiaens, SD 18, opened by saying that this bill will extend workers compensation disability and rehabilitation compensation benefits to certain inmates employed while residents of pre-release centers. He addressed the amendments to the bill

(Exhibit #3). Sen. Christiaens explained the system in which the inmates go to work and premiums are paid but if they are injured they receive only medical benefits but no other benefits. This bill will give the inmates temporary total disability during the period of time they are in the pre-release center. The fiscal note says that the costs are inestimable and Sen. Christiaens can not think of more than five people during his time as director of a pre-release center that would have been receiving these benefits.

Proponents' Testimony:

Jim Pomroy, Deputy Administrator at the Department of Corrections and Human Services, stated that the department is proposing a substantial expansion of the community programs. He stated that an entitlement to regular benefits should be a part of the normalization process. He discussed the employment of inmates and responsibilities they have and encouraged the committee to pass SB 91.

Opponents' Testimony: None

Questions From Committee Members and Responses:

Sen. Blaylock asked Jim Pomroy how many more people there are at Deer Lodge than what it was designed for. Jim Pomroy stated that there are currently 170 more inmates than what the prison was designed for and said that by 1997 there are expected to be 2200 inmates and the prison is designed for roughly 1200 inmates.

Sen. Keating asked Sen. Christiaens if the pre-release centers are covered by workers comp when the inmates are working. Sen. Christiaens replied that the inmates are covered for medical benefits but not disability and rehabilitation.

Sen. Keating asked that if the pre-release centers are on contract with the state are the inmates technically employees of the state. Sen. Christiaens said that it is a complicated issue. The pre-release inmates contract with the state. When the inmates go to the center they sign a contract and work for minimum wage and assume their medical costs.

Sen. Keating asked if this bill passes would it extend coverage or benefits and would the pre-release employers pay premiums or the state. Sen. Christiaens answered that the employer pays. Sen. Keating than asked if we were sticking the employer with additional costs. Sen. Christiaens explained that the employer already pays the premiums but there is no temporary total disability coverage for the inmates. Sen. Towe clarified that the employer pays full premiums but is not permitted to pay full benefits.

Sen. Towe asked what the purpose of the amendment is. Sen. Christiaens responded that the amendment takes out the community service portion of the bill because they are unable to come up with funding for community service worker's premium but he is

willing to work with the committee. He stated that regarding community service nobody wishes to be the employer. It has been an agency responsibility to pay the premiums and the pre-release centers cannot afford to pay the premiums.

Sen. Towe stated that paying for workers comp costs less than the liability insurance coverage. Sen. Christiaens replied that the money is simply not available but he would like to see them covered somehow.

Sen. Keating stated that workers comp is based on hourly wages and asked what wage is attributed to community service. Sen. Christiaens replied that it is the minimum wage.

Sen. Aklestad asked when the coverage of an inmate stops. Sen. Christiaens replied that the coverage stops when the inmate leaves the place of employment.

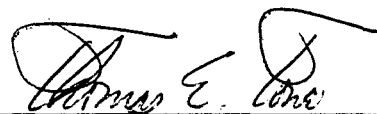
Closing by Sponsor: Sen. Christiaens closed.

Introductions: Commissioner Laurie Ekanger, Department of Labor, introduced the staff of the Department of Labor and explained the responsibility areas of each.

Announcements: Sen. Towe announced that executive action will be taken on Tuesday, January 19th on the bills before the committee.

ADJOURNMENT

Adjournment: 2:50



SEN. TOM TOWE, Chair



PATRICIA BROOKE, Secretary

TET/PMB

ROLL CALL

SENATE COMMITTEE LABOR

DATE 1/14/93

NAME	PRESENT	ABSENT	EXCUSED
Senator Aklestad	X		
Senator Keating	X		
Senator Blaylock	X		
Senator Lynch	X		
Senator Burnett	X		
Senator Wilson	X		
Senator Towe	X		

FC8

Attach to each day's minutes



MONTANA FOOD DISTRIBUTORS ASSOCIATION

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SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 1

DATE 1/14/93

BILL NO. 8116

Senate Bill #116

Introduced by Senator Harp

Sponsored by Montana Food Distributor Association

BACKGROUND INFORMATION:

Montana businesses are subject to either the Montana Wage and Hour law (Title 39-3-100 dt. seq. MCA) or to the requirements of the federal Fair Labor Standards Act or both. Although the two laws have many similar provisions, they differ with regard to who is exempt from the minimum wage and overtime provisions of each law.

One such area of disagreement exists with regard to outside sales employees. The federal FLSA exempts all outside sales employees (see attached). State law on the other hand does not provide for such a blanket exemption. The determination of which law a particular employer must follow requires understanding of the complex differences between federal and state coverage and must be made on a job by job basis. This results in confusion and inadvertant violations.

This bill would add a new exculsion from the minimum wage and overtime requirements of state law for outside sales employees who are employed by firms in the food distribution industry. Several types of employers such as radio and television stations and office machine dealers have been exempted from the state law.

The intent of this bill is to apply the exemption only to those sales persons who work for food brokers, food wholesalers or food associations selling products and services to retail stores. It would not affect in-store sales persons or employees at the retail level. Employees of organizations like COSTCO and other "wholesale" organizations would not be exempted because they are not "outside sales". Nor is it the intent of this bill to exempt route drivers such as those delivering beer and pop to retail establishments. As a matter of fact those employees covered under this bill rarely carry product with them other than samples of new products being introduced into the food distribution system.

For enforcement purposes, the terms used in this bill should be interpreted the same as the federal FLSA. Using the federal definitions is consistent with the method used in interpreting the other federal exemptions that are also recognized in Montana law. See subsection (j) of 39-3-406(1).

FISCAL IMPACT:

Passage of this bill should result in a reduction of cost to the Department of Labor and Industry due to diminished compliance responsibilities.

Section 39-3-406(1), MCA, is amended by the addition of a new subsection (m) which provides:

- (v) An outside salesman or marketing representative paid on a commission, contract, or salary basis who is primarily employed selling or marketing products or services within the food distribution industry for a food broker, wholesaler, or association.**

Statement of Intent:

This bill would amend the Montana minimum wage and overtime compensation law to provide an exemption from the minimum wage and overtime requirements for an outside salesman or marketing representative in the food distribution industry. The federal law (Fair Labor Standards Act) provides for such an exemption.

Definitions:

"Outside salesman" is an employee:

- 1. who customarily and regularly works away from his employers place of business while making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and**
- 2. whose hours spent engaged in work of any other nature do not exceed 20 percent of the hours worked in the workweek by the employer's nonexempt employees.**

well-being of workers against the unfair competition of wage and hour standards which do not provide such adequate standards of living; and

(3) sustain purchasing power and increase employment opportunities.

History: En. Sec. 1, Ch. 417, L. 1971; R.C.M. 1947, 41-2301.

39-3-402. Definitions. As used in this part, the following definitions apply:

(1) "Commissioner" means the commissioner of labor and industry.

(2) "Employ" means to suffer or permit to work.

(3) "Employee" means an individual employed by an employer.

(4) "Farm or ranch" means any endeavor primarily engaged in cultivating the soil or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, and poultry and fur-bearing animals and wildlife.

(5) "Farm worker" means a person employed to do any service performed on a farm or ranch.

(6) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed.

(7) "Wage" means compensation due to an employee by reason of his employment, payable in legal tender of the United States or check on banks convertible into cash on demand at full face value, subject to an allowance as may be permitted by regulations of the commissioner under 39-3-403. The term "wage" includes the reasonable cost to the employer of furnishing the employee with lodging or other facility if the lodging or other facility is customarily furnished by the employer to his employees; however, the inclusion may not exceed an amount equal to 40% of the total wage paid by the employer to the employee. The term "wage" does not include the cost to the employer of providing meals or a meal allowance to the employee or the value of any tips received by an employee as a gratuity for service.

History: En. Sec. 2, Ch. 417, L. 1971; R.C.M. 1947, 41-2302; amd. Sec. 1, Ch. 446, L. 1987; amd. Sec. 1, Ch. 216, L. 1991.

Compiler's Comments

1991 Amendment: In (7), in last sentence after "include", inserted "the cost to the employer of providing meals or a meal allowance

to the employee or"; and made minor changes in style. Amendment effective March 29, 1991.

39-3-403. Regulations. The commissioner shall make and revise administrative regulations to carry out the purposes of this part. Such regulations shall take effect upon publication by the commissioner. Any person who is aggrieved by an administrative regulation may obtain a hearing before the commissioner upon filing written protest with the commissioner, who shall thereupon set such matter for hearing in the county of residence of such protestant within 30 days after receipt of such protest. After such hearing, the commissioner shall promulgate such further administrative regulations as the evidence produced at said hearing shall justify.

History: En. S. Ch. 197, M. 1-230

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

"Commissioner" defined, 39-3-402.

EXHIBIT 1
DATE 1-14-93
SP 116

39-3-404. Minimum wage. (1) Except as otherwise provided in this part and except for farm workers as provided in subsection (2), every employer shall pay to each of his employees a wage of not less than the applicable minimum wage as determined by the commissioner in accordance with 39-3-409.

(2) In the case of a farm worker employed for a part of a calendar year which includes periods requiring working hours in excess of 8 hours per day and other seasonal periods requiring working hours substantially less than 8 hours per day, the employer may pay the worker at a fixed rate of compensation during the term of employment. The employer may elect to:

(a) keep a record of the total number of hours worked by the worker during the part of the year during which the worker was employed by him (the total wages paid by such employer to such employee for that part of the year during which said employee was employed by him shall not be less than the applicable minimum wage rate multiplied by the total number of hours so worked); or

(b) in lieu of the minimum wage set forth herein, pay the farm worker a wage as herein defined on a monthly basis. This monthly compensation shall constitute a minimum wage and shall not be less than \$635 a month beginning January 1, 1990.

History: En. Sec. 3, Ch. 417, L. 1971; amd. Sec. 1, Ch. 363, L. 1973; amd. Sec. 1, Ch. 421, L. 1975; R.C.M. 1947, 41-2303(a), (c); amd. Sec. 1, Ch. 410, L. 1981; amd. Sec. 1, Ch. 360, L. 1985; amd. Sec. 1, Ch. 674, L. 1989.

Cross-References

Eight-hour maximum workday, Art. XII, sec. 2, Mont. Const.

Standard prevailing wages in public works, Title 18, ch. 2, part 4.

"Employee" defined, 39-3-402.

"Farm worker" defined, 39-3-402.

"Wage" defined, 39-3-402.

39-3-405. Overtime compensation. (1) No employer shall employ any of his employees for a workweek longer than 40 hours unless such employee receives compensation for his employment in excess of 40 hours in a workweek at a rate of not less than 1 1/2 times the hourly wage rate at which he is employed.

(2) No overtime provision shall apply for farm workers.

(3) Employers of students at an amusement or recreational area that operates on a seasonal basis who furnish said students with board, lodging, or other facilities shall not employ said students for a workweek longer than 48 hours, unless such students receive compensation for their employment in excess of 48 hours in a workweek at a rate of not less than 1 1/2 times the hourly wage rate at which they are employed.

History: En. Sec. 3, Ch. 417, L. 1971; amd. Sec. 1, Ch. 363, L. 1973; amd. Sec. 1, Ch. 421, L. 1975; R.C.M. 1947, 41-2303(b).

Cross-References

Department of Public Safety -- work pe...

"Employ" defined, 39-3-402.
"Employee" defined, 39-3-402.

"Wage" defined, 39-3-402.

39-3-406. Exclusions. (1) The provisions of 39-3-404 and 39-3-405 do not apply with respect to:

- (a) students participating in a distributive education program established under the auspices of an accredited educational agency;
- (b) persons employed in private homes whose duties consist of menial chores such as babysitting, mowing lawns, cleaning sidewalks;
- (c) persons employed directly by the head of a household to care for children dependent upon the head of the household;
- (d) immediate members of the family of an employer or persons dependent upon an employer for half or more of their support in the customary sense of being a dependent;
- (e) any persons not regular employees thereof who voluntarily offer their services to a nonprofit organization on a fully or partially reimbursed basis;
- (f) handicapped workers engaged in work which is incidental to training or evaluation programs or whose earning capacity is so severely impaired that they are unable to engage in competitive employment;
- (g) apprentices or learners, who may be exempted by the commissioner for a period not to exceed 30 days of their employment;
- (h) learners under the age of 18 who are employed as farm workers, provided that such exclusion shall not exceed a period of 180 days from their initial date of employment and further provided that during this exclusion period wages paid such learners may not be less than 50% of the minimum wage rate established in this part;
- (i) retired or semiretired persons performing part-time incidental work as a condition of their residence on a farm or ranch;
- (j) any individual employed in a bona fide executive, administrative, or professional capacity as these terms are defined and delimited by regulations of the commissioner;
- (k) any individual employed by the United States of America;
- (l) resident managers employed in lodging establishments or personal care facilities who, under the terms of their employment, live in the establishment or facility.

(2) The provisions of 39-3-405 do not apply to:

- (a) an employee with respect to whom the United States Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of 49 U.S.C. 304;
- (b) an employee of an employer subject to the provisions of part I of the Interstate Commerce Act;
- (c) an individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state;
- (d) an outside salesman paid on a commission or contract basis who is primarily employed in selling advertising for a newspaper;
- (e) a salesman, partsman, or mechanic paid on a commission or contract basis and primarily engaged in selling or servicing automobiles, trucks, mobile homes, recreational vehicles, or farm implements if he is employed by

a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers;

(f) a salesman primarily engaged in selling trailers, boats, or aircraft if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers;

(g) an outside salesman paid on a commission or contract basis who is primarily employed in selling office supplies, computers, or other office equipment for an office equipment dealer;

(h) a salesman paid on a commission or contract basis who is primarily engaged in selling advertising for a radio or television station employer;

(i) an employee employed as a driver or driver's helper making local deliveries who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the commissioner finds that such plan has the general purpose and effect of reducing hours worked by such employees to or below the maximum workweek applicable to them under 39-3-405;

(j) an employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways not owned or operated for profit and not operated on a sharecrop basis and which are used exclusively for supply and storing of water for agricultural purposes;

(k) an employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee is

(1) primarily employed during his workweek in agriculture by such farmer; and

(ii) paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by 39-3-404;

(l) an employee of an establishment commonly recognized as a country elevator, including an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed by the establishment;

(m) a driver employed by an employer engaged in the business of operating taxicabs;

(n) an employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children who are orphans or one of whose natural parents is deceased or who are enrolled in such institution and reside in residential facilities of the institution so long as the children are in residence at the institution and so long as such employee and his spouse reside in such facilities and receive, without cost, board and lodging from the institution and are together compensated, on a cash basis, at an annual rate of not less than \$10,000;

(o) an employee employed in planting or tending trees; cruising, surveying, or felling timber; or transporting logs or other forestry products to a mill, processing plant, railroad, or other transportation terminal if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

which are not an essential part of and necessarily incident to exempt professional work.⁴⁸

Observation: There are no percentage limits on nonexempt work for employees that meet the short test other than those implied in the primary duty rule (§ C-11,107).

Illustration: This test of whether routine work is exempt work is different for professionals than it is for executives and administrators. Routine work for the latter employee groups is exempt if it is directly and closely related to the performance of exempt executive or administrative duties (§§ C-11,124, 11,137), while routine work for professionals is not exempt unless it is an essential part of and necessarily incident to exempt professional work.⁴⁹

Who is an Outside Salesman

§ C-11,147. List of criteria.

An "outside salesman" is an employee:

- (1) who customarily and regularly works away from his employer's place of business while making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer;⁵⁰ and
- (2) whose hours spent engaged in work of any other nature do not exceed 20 percent of the hours worked in the workweek by the employer's nonexempt employees.⁵¹

Among the indicia of an employee's bona fide status as an outside salesman are:

- (1) significant compensation on a commission basis;⁵²
- (2) special sales training;⁵³
- (3) little or no direct or constant supervision in carrying out daily tasks;⁵⁴ and
- (4) a contractual designation of job title that reflects sales involvement.⁵⁵

Observation: Although a term indicating male gender (salesman) is used in this exemption, the exemption can apply to either male or female workers.

§ C-11,148. Work away from employer's place of business.

For an "outside salesman" to meet the requirement that he work away from his employer's place or places of businesses (§ C-11,147), he cannot engage in inside sales or other inside work unless it is in direct conjunction with and incidental to his outside sales and solicitations activities.⁵⁶ Any fixed site used as headquarters or for solicitation of sales by telephone is considered the employer's place of business, even though the employer in no formal sense owns the property; the employee's home or office used in this manner is also considered the employer's place of business. On the other hand, hotel rooms used by the employee as he travels to display samples and sell merchandise are not considered employer places of business.⁵⁷

§ C-11,149. Making sales or obtaining orders or contracts.

With respect to the requirement that an

- 48. 29 CFR §§ 541.3(d), 541.307, 541.309.
- 49. 29 CFR § 541.307(b).
- 50. 29 CFR §§ 541.5(a), 541.500.
Brennan v Modern Chevrolet Co. (1973, ND Tex) 363 F Supp 327, *affd* without op (CA5) 491 F2d 1271; Reynolds v Salt River Valley Water Users Assn. (1944, CA9) 143 F2d 863, 8 CCH LC § 62262, cert den 323 US 764, 89 L Ed 611, 65 S Ct 117.
- 51. 29 CFR §§ 541.5(b), 541.500.
Fifth Circuit—Wirtz v Dr Pepper Co. (1966, ND Tex) 33 CCH LC § 31797;
Sixth Circuit—Wirtz v Atlantic Life Ins. Co. (1963, CA6) 311 F2d 646, 46 CCH LC § 31369;
Eighth Circuit—Young v Calderera (1954, ED Ark) 26 CCH LC § 68607;
Ninth Circuit—Reynolds v Salt River Valley Water Users Assn. (1944, CA9) 143 F2d 863, 8 CCH LC § 62262, cert den 323 US 764, 89 L Ed 611, 65 S Ct 117.
Who is employed in "capacity of outside salesman"

- within meaning of § 13(a)(1) of Fair Labor Standards Act (29 USCS § 213(a)(1)), as amended, exempting such employees from minimum wage and overtime requirements of Act. 26 ALR Fed 941.
- 52. Hodgson v Krispy Kreme Doughnut Co. (1972, MD NC) 346 F Supp 1102.
- 53. Bradford v Gaylord Products, Inc. (1948, DC Ill) 77 F Supp 1002.
- 54. Hodgson v Krispy Kreme Doughnut Co. (1972, MD NC) 346 F Supp 1102.
- 55. Jewel Tea Co. v Williams (1941, CA10) 118 F2d 202, 3 CCH LC § 60322.
- 56. 29 CFR § 541.502(a).
Who is employed in "capacity of outside salesman" within meaning of § 13(a)(1) of Fair Labor Standards Act (29 USCS § 213(a)(1)), as amended, exempting such employees from minimum wage and overtime requirements of Act. 26 ALR Fed 941.
- 57. 29 CFR § 541.502(b).

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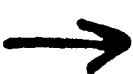


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employee be engaged in making sales or obtaining orders or contracts for services or for the use of facilities (¶ C-11,147), the word "sale" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition⁵⁸ of title to tangible property, or of tangible and valuable evidences of intangible property.⁵⁹

"Obtaining orders or contracts for the use of facilities" includes the sale of radio time, the solicitation of advertising for periodicals, and the solicitation of freight for transportation agencies.⁶⁰

Obtaining orders or contracts for services" applies only to services not performed by the employee himself.⁶¹ Therefore, persons who make repairs or provide other services are not outside salesmen even though they may sell the services which they themselves perform.⁶²

¶ C-11,150. Percentage limits on nonexempt work.

There is a limit on the amount of time that an "outside salesman" may devote to nonexempt activities (¶ C-11,147), which includes all nonoutside sales work and all other work not performed in conjunction with or incidental to outside sales (¶ C-11,151).⁶³ Since the limit is 20% and the base to be taken is 40 hours a week, the amount of nonexempt work allowed is eight hours a week, unless there are nonexempt employees of the same employer who perform the kind of nonexempt work performed by the outside salesman; in the latter case, the 20% limitation is computed on the basis of the hours worked in a week by those nonexempt employees.⁶⁴

Whether an employee is required by his employer to do nonexempt work is not material in determining whether the work is nonexempt.⁶⁵

¶ C-11,151. Work incident to outside sales work.

Work that is incidental to and performed in conjunction with outside sales includes deliveries and collections⁶⁶ and all other work that furthers the employee's own sales, such as writing sales reports, revising merchandise catalogs, planning itineraries and attending sales conferences.⁶⁷

Nonexempt work is work which is not sales work and is neither incidental to nor performed in conjunction with outside sales activities. Activities which are nonexempt include: inside sales and all work incidental thereto, outside nonsales work like meter-reading and clerical warehouse work, and the training of other salesmen, except when trainees accompany salesmen while they are making outside sales.⁶⁸

Illustration: A propane gas routeman could still be an outside salesman, even though a detailed examination revealed that more than 20% of his work time was nonsales related, since under all the facts and circumstances his primary duty was that of making outside sales. The labeling of his duties as exempt or nonexempt was inappropriate because, even when performing maintenance work on his customers' appliances or when delivering orders to customers solicited by other salesmen, the employee would still essentially be engaged either in selling his employer's product or in performing work incidental to his selling activities.⁶⁹

¶ C-11,152. Promotional work.

Any promotional work which is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work which is incidental to sales

58. 29 USCS § 203(k).

59. 29 CFR § 541.501(b).

Who is employed in "capacity of outside salesman" within meaning of § 13(a)(1) of Fair Labor Standards Act (29 USCS § 213(a)(1)), as amended, exempting such employees from minimum wage and overtime requirements of Act. 26 ALR Fed 941.

60. 29 CFR § 541.501(c).

61. 29 CFR § 541.501(d).

62. 29 CFR § 541.501(e).

63. 29 CFR § 541.506.

64. 29 CFR § 541.507.

65. Weeks v Postal Telegraph-Cable Co. (1941, Okla CP) 5 CCH LC 60857.

66. Jewel Tea Co. v Williams (1941, CA10) 118 F2d 202, 3 CCH LC § 60322.

67. 29 CFR § 541.503.

68. 29 CFR § 541.506.

69. Hodgson v Greene's Propane Gas Service, Inc. (1971, MD Ga) 64 CCH LC § 32455, aff'd (CA5) 71 CCH LC § 32907.

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pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which serve the medical profession.

§ 541.315 Special proviso for high salaried professional employees.

(a) Except as otherwise noted in paragraph (b) of this section, the definition of "professional" contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least \$250 per week exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption in § 541.3 (a) through (e) will be deemed to be met by an employee who receives the higher salary or fees and whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in the activity of imparting knowledge, which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Thus, the exemption will apply to highly paid employees employed either in one of the "learned" professions or in an "artistic" profession and doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.3 (a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa the second proviso of § 541.3(e) applies to those "professional" employees (other than employees of the Federal government) who are compensated on a salary or fee basis of not less than \$200 per week.

140 FR 7093, Feb. 10, 1978)

Postponed Regulation: Section 541.315 was revised at 46 FR 3015, Jan. 13, 1981. In accordance with the President's Memorandum of January 20, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of § 541.315 set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.315 Special proviso for high salaried professional employees.

(a) Except as otherwise noted in paragraph (b) of this section, the definition of "professional" contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least \$320 per week beginning February 13, 1981 and \$345 per week beginning February 13, 1983, exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption in § 541.3 (a) through (e) will be deemed to be met by an employee who receives the higher salary or fees and whose primary duty consists of the performance of

work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in the activity of imparting knowledge, which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Thus, the exemption will apply to highly paid employees employed either in one of the "learned" professions or in an "artistic" profession and doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.3 (a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa the second proviso of § 541.3(e) applies to those "professional" employees (other than employees of the Federal Government) who are compensated on a salary or fee basis of not less than \$260 per week beginning February 13, 1981 and \$285 per week beginning February 13, 1983.

EMPLOYEE EMPLOYED IN THE CAPACITY OF OUTSIDE SALESMAN

§ 541.500 Definition of "outside salesman."

Section 541.5 defines the term "outside salesman" as follows: The term "employee employed . . . in the capacity of outside salesman" in section 13(a)(1) of the act shall mean any employee:

(a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

(1) Making sales within the meaning of section 3(k) of the act; or

(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Whose hours of work of a nature other than that described in paragraph (a) (1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer; *Provided*, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

§ 541.501 Making sales or obtaining orders.

(a) Section 541.5 requires that the employee be engaged in: (1) Making sales within the meaning of section 3(k) of the act, or (2) obtaining orders or contracts for services or for the use of facilities.

(b) Generally speaking, the divisions have interpreted section 3(k) of the act to include the transfer of title to tangible property, and in certain cases,

of tangible and valuable evidences of intangible property. Thus sales of automobiles, coffee, shoes, cigars, stocks, bonds, and insurance are construed as sales within the meaning of section 3(k). (Sec. 3(k) of the act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.)

(c) It will be noted that the exempt work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." "Obtaining orders . . . for the use of facilities" includes the selling of time on the radio, the solicitation of advertising for newspapers and other periodicals and the solicitation of freight for railroads and other transportation agencies.

(d) The word "services" extends the exemption as outside salesmen to employees who sell or take orders for a service, which is performed for the customer by someone other than the person taking the order. For example, it includes the salesman of a typewriter repair service who does not himself do the repairing. It also includes otherwise exempt outside salesmen who obtain orders for the laundering of the customer's own linens as well as those who obtain orders for the rental of the laundry's linens.

(e) The inclusion of the word "services" is not intended to exempt persons who, in a very loose sense, are sometimes described as selling "services". For example, it does not include persons such as servicemen even though they may sell the service which they themselves perform. Selling the service in such cases would be incidental to the servicing rather than the reverse. Nor does it include outside buyers, who in a very loose sense are sometimes described as selling their employer's "service" to the person from whom they obtain their goods. It is obvious that the relationship here is the reverse of that of salesman-customer.

§ 541.502 Away from his employer's place of business.

(a) Section 541.5 requires that an outside salesman be customarily and regularly engaged "away from his employer's place or places of business". This requirement is based on the obvious connotation of the word "outside" in the term "outside salesman". It would obviously be beyond the scope of the Administrator's authority that "outside salesman" should be construed to include inside salesmen. Inside sales and other inside work (except such as is directly in conjunction with and incidental to outside

sales and solicitations, as explained in paragraph (b) of this section) is non-exempt.

(b) Characteristically the outside salesman is one who makes his sales at his customer's place of business. This is the reverse of sales made by mail or telephone (except where the telephone is used merely as an adjunct to personal calls). Thus any fixed site, whether home or office, used by a salesman as a headquarters or for telephonic solicitation of sales must be construed as one of his employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. It should not be inferred from the foregoing that an outside salesman loses his exemption by displaying his samples in hotel sample rooms as he travels from city to city; these sample rooms should not be considered as his employer's places of business.

§ 541.503 Incidental to and in conjunction with sales work.

Work performed "incidental to and in conjunction with the employee's own outside sales or solicitation" includes not only incidental deliveries and collections which are specifically mentioned in § 541.5(b), but also any other work performed by the employee in furthering his own sales efforts. Work performed incidental to and in conjunction with the employee's own outside sales or solicitations would include, among other things, the writing of his sales reports, the revision of his own catalog, the planning of his itinerary and attendance at sales conferences.

§ 541.501 Promotion work.

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt work, depending upon the circumstances under which it is performed. Promotion men are not exempt as "outside salesmen." (This discussion relates solely to the exemption under § 541.5, dealing with outside salesmen. Promotion men who receive the required salary and otherwise qualify may be exempt as administrative employees.) However, any promotional work which is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is clearly exempt work. On the other hand, promotional work which is incidental to sales made, or to be made, by someone else cannot be considered as exempt work. Many persons are engaged in certain combinations of sales and promotional work or in certain types of promotional work having some of the characteristics of sales work while lacking others. The types of work in-

volved include activities in borderline areas in which it is difficult to determine whether the work is sales or promotional. Where the work is promotional in nature it is sometimes difficult to determine whether it is incidental to the employee's own sales work.

(b) (1) Typically, the problems presented involve distribution through jobbers (who employ their own salesmen) or through central warehouses of chainstore organizations or cooperative retail buying associations. A manufacturer's representative in such cases visits the retailer, either alone or accompanied by the jobber's salesman. In some instances the manufacturer's representative may sell directly to the retailer; in others, he may urge the retailer to buy from the jobber.

(2) This manufacturer's representative may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such persons can be considered salesmen only if they are actually employed for the purpose of and are engaged in making sales or contracts. To the extent that they are engaged in promotional activities designed to stimulate sales which will be made by someone else the work must be considered nonexempt. With such variations in the methods of selling and promoting sales each case must be decided upon its facts. In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt. Incidental promotional activities may be tested by whether they are "performed incidental to and in conjunction with the employee's own outside sales or solicitations" or whether they are incidental to sales which will be made by someone else.

(c) (1) A few illustrations of typical situations will be of assistance in determining whether a particular type of work is exempt or nonexempt under § 541.5. One situation involves a manufacturer's representative who visits the retailer for the purpose of obtaining orders for his employer's product, but transmits any orders he obtains to the local jobber to be filled. In such a case the employee is performing sales work regardless of the fact that the order is filled by the jobber rather than directly by his own employer. The sale in this instance has been "consummated" in the sense that the

salesman has obtained a commitment from the customer.

(2) Another typical situation involves facts similar to those described in the preceding illustration with the difference that the jobber's salesman accompanies the representative of the company whose product is being sold. The order in this instance is taken by the jobber's salesman after the manufacturer's representative has done the preliminary work which may include arranging the stock, putting up a display or poster, and talking to the retailer for the purpose of getting him to place the order for the product with the jobber's salesman. In this instance the sale is consummated by the jobber's salesman. The work performed by the manufacturer's representative is not incidental to sales made by himself and is not exempt work. Moreover, even if in a particular instance the sale is consummated by the manufacturer's representative it is necessary to examine the nature of the work performed by the representative to determine whether his promotional activities are directed toward paving the way for his own present and future sales, or whether they are intended to stimulate the present and future sales of the jobber's salesman. If his work is related to his own sales it would be considered exempt work, while if it is directed toward stimulating sales by the jobber's representative it must be considered nonexempt work.

(3) Another type of situation involves representatives employed by utility companies engaged in furnishing gas or electricity to consumers. In a sense these representatives are employed for the purpose of "selling" to the consumer an increased volume of the product of the utility. This "selling" is accomplished indirectly by persuading the consumer to purchase appliances which will result in a greater use of gas or electricity. Different methods are used by various companies. In some instances the utility representative after persuading the consumer to install a particular appliance may actually take the order for the appliance which is delivered from stock by the employer, or he may forward the order to an appliance dealer who then delivers it. In such cases the sales activity would be exempt, since it is directed at the consummation of a specific sale by the utility representative, the employer actually making the delivery in the one case, while in the other the sale is consummated in the sense that the representative obtains an order or commitment from the customer. In another type of situation the utility representative persuades the consumer to buy the appliance and he may even accompany the consumer to an appliance store where the retailer shows the appliance and takes

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the order. In such instances the utility representative is not an outside salesman since he does not consummate the sale or direct his efforts toward making the sale himself. Similarly, the utility representative is not exempt as an outside salesman if he merely persuades the consumer to purchase an appliance and the consumer then goes to an appliance dealer and places his order.

(4) Still another type of situation involves the company representative who visits chainstores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, consults with the manager as to the requirements of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chainstore company which later ships the quantity requested. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Since the manufacturer's representative in this instance does not consummate the sale nor direct his efforts toward the consummation of a sale (the store manager often has no authority to buy) this work must be counted as nonexempt.

§ 541.505 Driver salesmen.

(a) Where drivers who deliver to an employer's customers the products distributed by the employer also perform functions concerned with the selling of such products, and questions arise as to whether such an employee is employed in the capacity of outside salesman, all the facts bearing on the content of the job as a whole must be scrutinized to determine whether such an employee is really employed for the purpose of making sales rather than for the service and delivery duties which he performs and, if so, whether he is customarily and regularly engaged in making sales and his performance of nonexempt work is sufficiently limited to come within the tolerance permitted by § 541.5. The employee may qualify as an employee employed in the capacity of outside salesman if, and only if, the facts clearly indicate that he is employed for the purpose of making sales and that he is customarily and regularly engaged in such activity within the meaning of the act and this part. As in the case of outside salesmen whose jobs do not involve delivery of products to customers, the employee's chief duty or primary function must be the making of sales or the taking of orders if he is to qualify under the definition in § 541.5. He must be a salesman by occupation. If he is, all work that he performs which is actual-

ly incidental to and in conjunction with his own sales effort is exempt work. All other work of such an employee is nonexempt work. A determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole. All of the duties performed by an employee must be considered. The time devoted to the various duties is an important, but not necessarily controlling, element.

(b) Employees who may perform a combination of selling or sales promotion activities with product deliveries are employed in a number of industries. Distributors of carbonated beverages, beer, bottled water, food and dairy products of various kinds, cigars and other nonfood products commonly utilize such employees, variously known as routemen, route drivers, route salesmen, dealer salesmen, distributor salesmen, or driver salesmen. Some such employees deliver at retail to customers' homes; others deliver on wholesale routes to such customers as retail stores, restaurants, hospitals, hotels, taverns, and other business establishments. Whether such an employee qualifies as an outside salesman under the regulations depends, as stated in paragraph (a) of this section, on the content of the job as a whole and not on its title or designation or the kind of business in which the employer is engaged. Hearings in 1964 concerning the application of § 541.5 to such employees demonstrated that there is great variation in the nature and extent of sales activity and its significance as an element of the job, as among drivers whose duties are performed with respect to different products or different industries and also among drivers engaged in the same industry in delivering products to different types of customers. In some cases the facts may make it plain that such an employee is employed for the purpose of making sales; in other cases the facts are equally clear that he is employed for another purpose. Thus, there is little question that a routeman who provides the only sales contact between the employer and the customers, who calls on customers and takes orders for products which he delivers from stock in his vehicle or procures and delivers to the customer on a later trip, and who receives compensation commensurate with the volume of products sold, is employed for the purpose of making sales. It is equally clear, on the other hand, that a routeman whose chief duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations, is not selling his employer's product or employed for the purpose of making

which, although important to the promotion of sales to customers using the machines, plainly cannot characterize the employee as a salesman by occupation. In other cases there may be more difficulty in determining whether the employee is employed for the purpose of making sales within the meaning of this part. The facts in such cases must be weighed in the light of the principles stated in paragraph (a) of this section, giving due consideration to the factors discussed in subsequent paragraphs of this section.

(c) One source of difficulty in determining the extent to which a route driver may actually be engaged in making sales arises from the fact that such a driver often calls on established customers day after day or week after week, delivering a quantity of his employer's products at each call. Plainly, such a driver is not making sales when he delivers orders to customers to whom he did not make the initial sale in amounts which are exactly or approximately prearranged by customer or contractual arrangement or in amounts specified by the customer and not significantly affected by solicitations of the customer by the delivering driver. Making such deliveries, as well as recurring deliveries the amounts of which are determined by the volume of sales by the customer since the previous delivery rather than by any sales effort of the driver, do not qualify the driver as an outside salesman nor are such deliveries and the work incident thereto directly to the making or soliciting of sales by the driver so as to be considered exempt work. On the other hand, route drivers are making sales when they actually obtain or solicit, at the stops on their routes, orders for their employer's products from persons who have authority to commit the customer for purchases. A driver who calls on new prospects for customers along his route and attempts to convince them of the desirability of accepting regular delivery of goods is likewise engaged in sales activity and is making sales to those from whom he obtains a commitment. Also, a driver salesman calling on established customers on his route, carrying an assortment of the articles which his employer sells, may be making sales by persuading regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery of the employer's products may have been made by someone else. Work which is performed incidental to and in conjunction with such sales activities will also be considered exempt work, provided such solicitation of the customer is frequent and regular. Incidental activities include loading the truck with the

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man, driving the truck, delivering the products sold, removing empty containers for return to the employer, and collecting payment for the goods delivered.

(d) Neither delivery of goods sold by others nor sales promotion work as such constitutes making sales within the meaning of § 541.5; delivery men and promotion men are not employed in the capacity of outside salesmen for purposes of section 13(a)(1) of the act although both delivery work and promotion work are exempt salesman as an incident to his own sales or efforts to sell. The distinction between the making of sales and the promotion of sales is explained in more detail in the discussion and illustrations contained in § 541.504. Under the principles there stated a route driver, just as any other employee, must have as his chief duty and primary function the making of sales in the sense of obtaining and soliciting commitments to buy from the persons upon whom he calls if he is to qualify under the regulations as an employee employed in the capacity of outside salesman. For this reason, a route driver primarily engaged in making deliveries to his employer's customers and performing activities intended to promote sales by customers, including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves or in coolers or cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases, is not employed in the capacity of an outside salesman by reason of such work. Such work is nonexempt work for purposes of this part unless it is performed as an incident to or in conjunction with sales actually made by the driver to such customers. If the driver who performs such functions actually takes orders or obtains commitments from such customers for the products which he delivers, and the performance of the promotion work is in furtherance of his own sales efforts, his activities for that purpose in the customer's establishment would be exempt work.

(e) As indicated in paragraph (a) of this section, whether a route driver can qualify as an outside salesman depends on the facts which establish the content of his job as a whole. Accordingly, in borderline cases a determination of whether the driver is actually employed for the purpose or, in non-borderline cases, is actually engaged in, and has as his chief duty and primary function the making of sales, may involve consideration of such factors as a comparison of his duties with those of other employees engaged as (1) truckdrivers and (2) salesmen; possession of a salesman's or solicitor's license when such license is required by law or ordinances; presence or absence

of customary or contractual prearrangements concerning amounts of products to be delivered; description of the employee's occupation in union contracts; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; proportion of earnings directly attributable to sales effort; and other factors that may have a bearing on the relationship to sales of the employee's work. However, where it is clear that an employee performs nonexempt work in excess of the amount permitted by § 541.5, he would be nonexempt in any event and consideration of such factors as the foregoing would not be pertinent.

(f) The following examples will further illustrate the factual situations in which, under the principles discussed previously in this section, routemen engaged in recurrent deliveries of goods may qualify or may fail to qualify for exemption as outside salesmen.

(1) A retail routeman who regularly calls on established retail customers to deliver goods of generally prearranged amounts and kinds may also exert considerable effort not only to keep such customers satisfied to continue their orders for such goods but also to make such customers aware of other products which he would like to sell to them and to offer to take orders for such products or for increased amounts of the products which he is already delivering to the customer. In addition, he may call at prospective retail customers' homes for the purpose of persuading such persons to order the goods which he sells. A routeman who customarily and regularly calls on customers for these purposes and takes orders from them for products which he delivers to them, in addition to those products for which delivery has been prearranged, who in practical effect his employer's exclusive sales contact with such customers, and whose earnings are in large part directly attributable to sales made to such customers, will be considered to be employed in the capacity of outside salesman and within the exemption provided by section 13(a)(1) of the Act if he does not perform nonexempt work in excess of the tolerance permitted by § 541.5.

(2) A routeman who calls on retail stores which are among his employer's established customers may also qualify for exemption as an outside salesman notwithstanding the goods he delivers to them are of kinds and in amounts which are generally prearranged. Other facts may show that making sales is his chief duty and primary function and that he is customarily and regularly engaged in performing this function. Thus, such a routeman whose regular calls on es-

tablished customers involve not only delivery of prearranged items but also active efforts to persuade such customers to continue or increase the orders for such goods and to solicit their orders for other kinds of products which he offers for sale, who also calls on retail stores which are prospective customers, talks to persons who are authorized to order goods for such stores, and solicits orders from them for the goods which he sells, and whose compensation is based primarily on the volume of sales attributable to his efforts, will be considered exempt as an outside salesman if he does not perform nonexempt work in excess of the tolerance permitted by § 541.5.

(3) If a routeman delivers goods to branch business establishments whose personnel have no authority to place orders or make commitments with respect to the kinds and amounts of such goods, and if the kinds and amounts of goods delivered are not determined pursuant to orders placed by the authorized personnel of the customer's enterprise as a result of sales solicitation by the routeman, it is clear that the routeman's calls on such branch establishments are not a part of the making of sales by him or incidental to sales made by him. If such work is his chief duty or primary function or if he spends a greater proportion of the workweek in such work than is allowed for nonexempt work under § 541.5, such a routeman cannot qualify for exemption as an "outside salesman".

(4) A routeman who delivers to supermarkets after the enterprise has been persuaded, by a salesman of the routeman's employer, to accept delivery of goods, and whose functions other than such deliveries are primarily to arrange merchandise, rotate stocks, place point-of-sale and other advertising materials, and engage in other activities which are intended to promote sales by the supermarkets of the goods he has delivered, is not employed primarily for the purpose of selling and is not customarily and regularly engaged in making sales. Rather, he is employed primarily to deliver goods and to perform activities in the supermarkets of a nature usually performed by store employees not employed as salesmen. Such a routeman is not employed in the capacity of outside salesman within the exemption provided by section 13(a)(1) of the Act.

(5) Some employees are engaged in a combination of activities involving delivery, the selling of services, and the performance of the services. For example, some drivers call on customers for the purpose of selling pesticides and, if a sale is consummated, applying the pesticides on the customer's property. Such employees, like those

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referred to in § 541.501(e), are not exempt as outside salesmen. They are primarily engaged in delivery or service functions, not in outside selling.

§ 541.506 Nonexempt work generally

Nonexempt work is that work which is not sales work and is not performed incidentally and in conjunction with the outside sales activities of the employee. It includes outside activities like meter-reading, which are not part of the sales process. Inside sales and all work incidental thereto are also nonexempt work. So is clerical warehouse work which is not related to the employee's own sales. Similarly, the training of other salesmen is not exempt as outside sales work, with one exception. In some concerns it is the custom for the salesman to be accompanied by the trainee while actually making sales. Under such circumstances it appears that normally the trainer-salesman and the trainee make the various sales jointly, and both normally receive a commission thereon. In such instances, since both are engaged in making sales, the work of both is considered exempt work. However, the work of a helper who merely assists the salesman in transporting goods or samples and who is not directly concerned with effectuating the sale is nonexempt work.

§ 541.507 20-percent limitation on nonexempt work.

Nonexempt work in the definition of "outside salesman" is limited to "20 percent of the hours worked in the workweek by nonexempt employees of the employer." The 20 percent is computed on the basis of the hours worked by nonexempt employees of the employer who perform the kind of nonexempt work performed by the outside salesman. If there are no employees of the employer performing such nonexempt work, the base to be taken is 40 hours a week, and the amount of nonexempt work allowed will be 8 hours a week.

§ 541.508 Trainees, outside salesmen.

The exemption is applicable to an employee employed in the capacity of outside salesman and does not include employees training to become outside salesmen who are not actually performing the duties of an outside salesman (see also § 541.506).

SPECIAL PROBLEMS

§ 541.600 Combination exemptions

(a) The divisions' position under the regulations in Subpart A of this part permits the "tacking" of exempt work under one section of the regulations in Subpart A to exempt work under another section of those regulations, so

that a person who, for example, performs a combination of executive and professional work may qualify for exemption. In combination exemptions, however, the employee must meet the stricter of the requirements on salary and nonexempt work. For instance, if the employee performs a combination of an executive's and an outside salesman's function (regardless of which occupies most of his time) he must meet the salary requirement for executives. Also, the total hours of non-exempt work under the definition of "executive" together with the hours of work which would not be exempt if he were clearly an outside salesman, must not exceed either 20 percent of his own time or 20 percent of the hours worked in the workweek by the nonexempt employees of the employer, whichever is the smaller amount.

(b) Under the principles in paragraph (a) of this section combinations of exemptions under the other sections of the regulations in Subpart A of this part are also permissible. In short, under the regulations in Subpart A, work which is "exempt" under one section of the regulations in Subpart A will not defeat the exemption under any other section.

§ 541.601 Special provision for motion picture producing industry.

Under § 541.5a, the requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least \$250 a week (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under §§ 541.1, 541.2, or 541.3 and who is employed at a base rate of at least \$250 a week is exempt if he is paid at least prorata (based on a week of not more than 6 days) for any week when he does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if he is employed at a daily rate under the following circumstances: (a) The employee is in a job category for which a weekly base rate is not provided and his daily base rate would yield at least \$250 if 6 days were worked; or (b) the employee is in a job category having a weekly base rate of at least \$250 and his daily base rate is at least one-sixth of such weekly base rate.

The higher minimum salary tests will be effective on April 1, 1975.

[40 FR 7094, Feb. 19, 1975]

Postponed Regulations: Section 541.601 was revised at 46 FR 3016, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6,

1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of § 541.601 set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.601 Special provision for motion picture producing industry.

Under § 541.5a, the requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least \$320 per week beginning February 13, 1981 and \$345 per week beginning February 13, 1983 (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under §§ 541.1, 541.2, or 541.3 and who is employed at a base rate of at least \$320 per week beginning February 13, 1981 and \$345 per week beginning February 13, 1983 is exempt if he is paid at least prorata (based on a week of not more than 6 days) for any week when he does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if he is employed at a daily rate under the following circumstances: (a) The employee is in a job category for which a weekly base rate is not provided and his daily base rate would yield at least \$320 per week beginning February 13, 1981 and \$345 per week beginning February 13, 1983 if 6 days were worked; or (b) the employee is in a job category having a weekly base rate of at least \$320 per week beginning February 13, 1983 and his daily base rate is at least one-sixth of such weekly base rate.

The higher minimum salary tests will be effective on February 13, 1981, and February 13, 1983, respectively.

§ 541.602 Special provision concerning executive and administrative employees in multi-store retailing operations.

(a) The tolerance of up to 40 percent of the employee's time which is allowed for nonexempt work performed by an executive or administrative employee of a retail or service establishment does not apply to employees of a multiunit retailing operation, such as a chainstore system or a retail establishment having one or more branch stores, who perform central functions for the organization in physically separated establishments such as warehouses, central office buildings or other central service units or by traveling from store to store. Nor does this special tolerance apply to employees who perform central office, warehousing, or service functions in a multi-unit retailing operation by reason of the fact that the space provided for such work is located in a portion or portions of the building in which the main retail or service establishment or another retail outlet of the organization is also situated. Such employees are subject to the 20-percent limitation on nonexempt work.

(b) With respect to executive or administrative employees stationed in

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 1/14/93
BILL NO. 62

NAME Don Judge

ADDRESS P.O. Box 1176 Helena, MT 59624

HOME PHONE _____ WORK PHONE 442-1708

REPRESENTING Montana State AFL-CIO

APPEARING ON WHICH PROPOSAL? SB 62

DO YOU: SUPPORT _____ OPPOSE X AMEND X

COMMENTS:

- Oppose legislation in current form.
- Recognize legal decision impacting current statute
- Legislation currently in Congress to provide ERISA exemptions to state Little Davis Bacon Acts
- impact on retirees

immediate
vesting

- no requirement to contain system to private sector work or to regulate such work
↳ eligibility, pension investment, regulation of benefits

- willing to look at amendments to improve enforcement of current statutes regarding enforcement of prevailing wage laws

- no requirement for joint employer-employee mgt
- no protection against "voiding the trust" for other purposes
- Public jobs pay not employee

WITNESS STATEMENT

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

Amendments to Senate Bill No. 91
First Reading Copy

EXHIBIT NO. 3DATE 1/14/93BILL NO. SB 91

Requested by Senator Christiaens
For the Senate Labor Committee

Prepared by Eddy McClure
January 13, 1993

1. Title, lines 7 and 8.

Following: "PROGRAMS" on line 7

Strike: remainder of line 7 through "PROGRAMS" on line 8

2. Title, line 9.

Following: "AMENDING"

Strike: "SECTIONS 39-71-118 AND"

Insert: "SECTION"

3. Page 1, lines 13 through page 5, line 25.

Strike: section 1

Renumber: subsequent section

4. Page 6, line 3.

Following: "(1)"

Strike: "A"

Insert: "Except as provided in subsection (2), a"

5. Page 6, line 12.

Following: "A"

Strike: "claimant"

Insert: "person"

6. Page 6, lines 13 and 14.

Following: "program" on line 13

Strike: remainder of line 13 through "program" on line 14

7. Page 6, lines 15 and 16.

Following: "eligible"

Strike: the remainder of line 15 through "39-71-118" on line 16

Insert: "for temporary total benefits as provided in 39-71-701
and medical benefits for a work-related injury. Other
disability or rehabilitation benefits are not payable while
the worker is participating in a prerelease center or
community corrections program. This subsection does not
apply to an employee performing community service described
in 39-71-118(1)(f)"

DATE Jan 14th 1993

SENATE COMMITTEE ON Labor

BILLS BEING HEARD TODAY: SB 62, SB 91, SB 116

Name	Representing	Bill No.	Check One	
			Support	Oppose
Frank Hoppel	MT. CTS	62	X	
Rick L. Rice			X	
Jerry Johnson	Western Materials ^{USLA}	62	X	
Angela Phillips	Western Materials	62	X	
Robert Berland	Western Materials	62	X	
Lon Jones	Western Materials	62	X	
Robert Warren	Western Materials	62	X	
Jerry Haven	Pioneer Ready Mix	62	X	
Walt Johnson	Pioneer Rdy Mix	62	X	
Jack Hoppel	Pioneer Ready Mix	62	X	
Rich Allison	Pioneer Ready Mix	62	X	
Craig Campbell	Pioneer Ready Mix	62	X	
Michael J. Hoppel	Pioneer Ready Mix	62	X	
Steve Richards	Pioneer Ready Mix	62	X	
James Tallet	United Materials	62	X	
S. Paul Patton	United Materials	62	X	

Ray Brummett *MACS* *91* *X*

VISITOR REGISTER

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DATE Jan. 14, 1993

SENATE COMMITTEE ON Labor

BILLS BEING HEARD TODAY: SB 62, SB 91, SB 116

Name	Representing	Bill No.	Check One	
			Support	Oppose
Paul Heikkila	United Materials	62	X	
Sam NYS	Self	SB 116	X	
Tim Talseth	Dick Anderson Const	62	X	
JERRY CHAMBERS	DICK ANDERSON CONST.	62	X	
Carl Schwitzer	Mont Contractors Assoc	SB 62	X	
Dick Anderson	Dick Anderson Const	62	X	
Dow Judge	MT STATE AFL-CIO	SB 62		X
Marty Kenison	Self	SB 116	X	
Robert Meinhardt	Swank	62	X	
Sonny Locken	MCC	62	X	
Eugene Fendley	Laborer Union	62		X
George (Moe) Strump	Montana Food Dist	116	X	
W.S. Stevens	MT. Food Dist	116	X	
Bob Raffert	Publ Labor	62		
Bob Anderson	DLT	62		
Bradley Bialcow	MT CONTRACTORS HEALTH (CARE AND RETIREMENT TRUST)	62	X	

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DATE 1/14/93

SENATE COMMITTEE ON Labor

BILLS BEING HEARD TODAY: SB 62, SB 91, SB 116

Name	Representing	Bill No.	Check One	
			Support	Oppose
Chuck Cashell	I.U.O.E #400	62		X
CARL Ericson	CARPENTERS	62		✓
Mich Hamble	DC HS	91	✓	
Jim Pomroy	DC HS	91	✓	
TOM G. Foley	AFSCME	62		X

VISITOR REGISTER

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