



January 13, 2006

FLSA2006-3

Dear *Name**,

This is in response to your letters requesting an opinion on the application of section 13(b)(1), 29 U.S.C. § 213(b)(1) (copy enclosed), of the Fair Labor Standards Act (FLSA) to your client, a large beverage distributor located in *Name**. The distributor operates a large complex of adjoining warehouses from which it distributes beverages to customers within *Name**. Slightly less than half of the beverages sold by the distributor are from manufacturers and suppliers located outside the State of *Name**.

The distributor's suppliers ship the beverages by common carriers and virtually all the beverages arrive on wooden pallets. Some are kept on the pallets for delivery to the distributor's customers and approximately one quarter of the beverages must be restacked and repalletized by the distributor before delivery. For "those beverages that are kept on the pallets for delivery," the distributor's drivers must collect the pallets after delivery and return them to the distributor's warehouse. Returning pallets to the warehouse is a "significant part of each driver's daily duties." The distributor returns "some of those pallets" to the suppliers of the beverages and sells others on the open market in *Name**. The distributor ships about one percent of the pallets to out-of-state suppliers. With the exception of one or two of the 57 drivers, all of the distributor's drivers deliver a mix of beverages every day that come from both out-of-state suppliers and in-state suppliers.

You estimate that about one percent of the distributor's total beverages are received from the suppliers in kegs. The distributor returns all of the empty kegs to the suppliers, including to out-of-state suppliers, and you describe the collection of empty kegs as a "significant part" of each driver's daily duty. Some suppliers make their own arrangements for the return of the kegs from the distributor's warehouses and the distributor arranges for returning the others. As with the returned pallets, suppliers return your client's deposit money upon return of the empty kegs.

Section 13(b)(1) applies to "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49" (the "Motor Carrier Act" or "MCA"). The Department of Transportation ("DOT") has jurisdiction over the safety-affecting employees of motor carriers when the employees operate in interstate commerce, as defined in the MCA. There is no question that the distributor is a motor carrier and that the drivers are safety-affecting employees. See 29 C.F.R. §§ 782.1-3. The only issue is whether the distributor's drivers are operating in interstate commerce under the MCA, as interpreted by DOT. The Wage and Hour Division's enforcement position for section 13(b)(1) provides that an intrastate leg of an interstate trip is in interstate commerce if it "forms a part of a 'practical continuity of movement' across State lines from the point of origin to the point of destination." 29 C.F.R. § 782.7(b)(1); see *also* WH Opinion Letter January 11, 2005 (copies enclosed).

The transportation of pallets and kegs from the customers to the warehouse for shipment back to the out-of-state suppliers constitutes interstate commerce because it is part of a practical continuity of movement from one state to another. The intrastate leg of the shipment is merely a part of the continuous flow of products moving in interstate commerce, because the ultimate out-of-state "destination was envisaged at the time the transportation commenced." *Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 224 (2d Cir. 2002). The court in *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1025 (10th Cir. 1992) (copy enclosed), stated that "[t]he regular pick up of empty containers destined for out-of-state bottling facilities has been held to both place employees in interstate commerce and exempt them from the overtime provisions of the FLSA under the motor carrier exemption." As the court recognized, the key focus is not upon the amount of time employees spend handling the empty containers, so long as there is interstate commerce. As you



represent, the delivery of pallets and kegs to customers and returning them to the warehouse is a “significant part” of each driver’s daily duty. Those drivers who regularly transport pallets and kegs, some of which are destined for out-of-state suppliers, appear easily to fall within DOT’s jurisdiction, which applies for a four-month period beginning on the date a driver could have been called upon to, or actually did, engage in interstate commerce. DOT’s jurisdiction ceases only if, at the end of the four-month period, the driver is no longer engaged in interstate commerce or, in the regular course of his or her employment, is no longer subject to making such a trip. See WH Opinion Letters July 29, 2005 and August 17, 2004 (copies enclosed). Thus, these drivers qualify for the section 13(b)(1) exemption. Consequently, an analysis of the intrastate movement of the beverages to your customers is unnecessary to determine the application of the section 13(b)(1) exemption to these drivers. See *Bilyou*, 300 F.3d at 224. Your letter did not provide any information regarding the work of the one or two drivers who do not deliver a mix of out-of-state and in-state beverages (and pallets and kegs) on a daily basis, so we are unable to assess their status under DOT’s four-month rule.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.,
Deputy Administrator

Enclosures:
FLSA § 13(b)(1)
29 C.F.R. § 782.7
Thomas v Wichita Coca-Cola Bottling Co
WH Opinion Letters January 11, 2005, July 29, 2005, and August 17, 2004

* Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552 (b)(7).