U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 11, 2005 **FLSA2005-11**

Dear ***Name****,

This is in response to a letter of April 29, 2004 sent by your predecessor to Ms. Kristine Iverson, Assistant Secretary for Congressional and Intergovernmental Affairs, on behalf of your constituent, ***Name****. In his letter ***Name**** requests a clarification of the definition of "agriculture" under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., as that statute applies to his business, ***Name****. ***Name**** specifically seeks information concerning the applicability to his employees of the FLSA exemption from federal overtime pay requirements for persons employed in agriculture, in light of a recent FLSA investigation conducted of ***Name**** by the Wage and Hour Division, which determined that his employees were not exempt from overtime. This letter has been referred to this office for response, as the Wage and Hour Division is responsible for interpreting and enforcing the FLSA.

We appreciate this opportunity to clarify our views in this matter and provide a more detailed explanation of the applicable legal requirements. We understand that the findings in a recent FLSA investigation of ***Name**** may differ from information ***Name**** indicates he has received in prior telephone conversations. As I am sure you understand, application of the FLSA to any situation must be determined on the particular facts, and the investigation may have disclosed information that was not available during the other contacts.

During the course of the investigation of ***Name**** the firm was requested to pay back wages but did not agree to do so. In this regard, the Wage and Hour Division has the authority to supervise voluntary payment of back wages but cannot order such payment. Only the courts have that authority. The Department reviewed all the circumstances in this case and decided it was not suitable for court action by the Department of Labor. The Department will therefore take no further action in this matter. This decision does not affect an employee's private right under the FLSA to bring an independent suit seeking to recover back wages.

The FLSA is the federal law of most general application concerning wages, hours of work, and the employment of youth. The FLSA requires employers to pay each employee covered by the Act no less than the federal minimum wage (currently $5.15 per hour) and overtime premium pay (at time and one-half the employee's regular rate of pay) for all hours worked in excess of 40 in any workweek, unless a specific exemption applies. The Act also contains certain recordkeeping requirements. The proper classification of employees under the FLSA is critical to the proper administration of the Act. The Supreme Court has ruled that coverage under the FLSA applies broadly.[1] The Court has also held that "the employer bears the burden of proving that employees are exempt,"[2] and exemptions under the Act must "be narrowly construed" and must apply "plainly and unmistakably."[3] FLSA section 13(b) (12), 29 U.S.C. 213(b) (12), allows an employer to claim an overtime pay exemption for any employee employed in agriculture.

In order for the agricultural exemption from overtime to apply, the workers' employment must come within the meaning of the term "agriculture" as defined under section 3(f) of the FLSA, 29 U.S.C. 203(f). The definition of "agriculture," under the FLSA, has long been recognized as having two distinct branches: primary agriculture and secondary agriculture.[4] The primary definition includes farming in all its branches and specific farming operations enumerated in section 3(f) such as the cultivation and tillage of the soil; the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities; and the raising of livestock.[5]

[1] Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207 (1959)
[2] Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959)
[3] Philips v. Walling, 324 U.S. 490 (1945)
[4] Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755 (1949).
[5] 29 CFR 780.105

The facts, as represented to us in the information your constituent provided, indicate that ***Name****. ***Name**** owns and operates a rural brush eradication contracting company with approximately twenty-two employees, which performs services for landowners that include brush grubbing and clearing, loader raking, pasture aeration, roller chopping, and re-seeding. A letter, which ***Name**** attached from ***Name**** state representative ***Name**** to the Wage and Hour Division ***Name**** states that this work is performed "to make the land more productive for livestock and to also help generate springs which have gone dry due to heavy brush infestation." As part of the services provided, the company purchases the grubbed materials from the landowner and processes them into cedar mulch, cedar oils, and mesquite chips.

Of the activities ***Name**** has identified in his letter, soil aeration and re-seeding would appear to be the only activities described that might come within the scope of primary agriculture and then only if they were performed for the purpose of producing a specific agricultural or horticultural commodity.[6] However, from the information provided, it does not appear that those activities would come within the scope of primary agriculture because those operations are not performed for the purpose of obtaining an agricultural or horticultural commodity. Similarly, operations which are merely preliminary, preparatory, or incidental to the operations whereby commodities are actually produced do not come within the scope of "production, cultivation, and growing."[7]

Grubbing and the related activities of loader raking and roller chopping growth from the land, as well as the processing of grubbed materials into mulch and chips, is not primary agriculture since those operations are performed on materials which are the product of uncultivated natural growth and not commodities "planted and cultivated by man.[8] In addition, the mulching operation is the processing of materials rather than the production of any agricultural commodity.

Although the "raising" of livestock comes within the meaning of primary agriculture, the activities described above do not meet the regulatory definition for the raising of livestock. Raising of livestock is defined as the "breeding, fattening, feeding and general care of livestock."[9] Activities such as grubbing, while they can be related to the raising of livestock, are too attenuated from the care and feeding of the animals to meet the definition of "raising."

The secondary meaning of "agriculture" in section 3(f) includes "any practices … performed by a farmer or on a farm as an incident to or in conjunction with such [primary agriculture] farming operations …" [10]To the extent that the activities of grubbing, raking, roller chopping, aerating, and re-seeding land are performed on a farm or ranch and are "incident to or in conjunction with that farming operation," such work could qualify as agriculture.

Such work when performed on a farm may or may not be connected "with such farming operations" depending on whether the farmer intends to devote the cleared land to farm use.[11] Conversely, to the extent that such work is not performed on a farm and, hence, cannot be incidental to or in conjunction with farming operations, such work would not qualify as agriculture.

As previously stated, your constituent also purchases the materials that have been grubbed and processes these materials into cedar mulch, cedar oils and mesquite chips. This processing and all the activities relating to it are not secondary agriculture, regardless of whether the activities are performed on a farm, since they are carried on as separate productive activities in furtherance of your constituent's own business purposes and are not incident to or in conjunction with the farmer's agricultural operations.[12]

[6] 29 CFR 780.117(a)
[7] Id.
[8] 29 CFR 780.112
[9] 29 CFR 780.121
[10] 29 U.S.C 203(f); 29 CFR 780.103
[11] 29 CFR 780.142
[12] 29 CFR 780.143

Finally, the agricultural exemption applies on a workweek basis. Therefore, an employee who performs any activities which do not come within the definition of agriculture would not be exempt in that workweek.[13]

This correspondence is based exclusively on the facts and circumstances described in your constituent's request and is given on the basis of those representations, explicit or implied, provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in the request might require a different conclusion that the one expressed herein.

I trust that the information provided has been responsive to your constituent's request. For your convenience, I am enclosing copies of the FLSA and the Interpretive Bulletin at 29 CFR 780 --Exemptions Applicable to Agriculture, Processing of Agricultural Commodities, and Related Subjects under the Fair Labor Standards Act of 1938, as amended. If you have any further questions, please contact the Wage and Hour Office of Enforcement Policy, Farm Labor Team, at (202) 693-0070.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

*Note: * The actual name(s) was removed to preserve privacy.*

[13] 29 CFR 780.10