

§ 780.132 Operations must be performed “by” a farmer.

“Farmer” includes the employees of a farmer. It does not include an employer merely because he employs a farmer or appoints a farmer as his agent to do the actual work. Thus, the stripping of tobacco, i.e., removing leaves from the stalk, by the employees of an independent warehouse is not a practice performed “by a farmer” even though the warehouse acts as agent for the tobacco farmer or employs the farmer in the stripping operations. One who merely performs services or supplies materials for farmers in return for compensation in money or farm products is not a “farmer.” Thus, a person who provides credit and management services to farmers cannot qualify as a “farmer” on that account. Neither can a repairman who repairs and services farm machinery qualify as a “farmer” on that basis. Where crops are grown under contract with a person who provides a market, contributes counsel and advice, make advances and otherwise assists the grower who actually produces the crop, it is the grower and not the person with whom he contracts who is the farmer with respect to that crop (*Mitchell v. Huntsville Nurseries*, 267 F. 2d 286).

§ 780.133 Farmers’ cooperative as a “farmer.”

(a) The phrase “by a farmer” covers practices performed either by the farmer himself or by the farmer through his employees. Employees of a farmers’ cooperative association, however, are employed not by the individual farmers who compose its membership or who are its stockholders, but by the cooperative association itself. Cooperative associations whether in the corporate form or not, are distinct, separate entities from the farmers who own or compose them. The work performed by a farmers’ cooperative association is not work performed “by a farmer” but for farmers. Therefore, employees of a farmers’ cooperative association are not generally engaged in any practices performed “by a farmer” within the meaning of section 3(f) (*Farmers Reservoir Co. v. McComb*, 337 U.S. 755; *Goldberg v. Crowley Ridge Ass’n.*, 295 F. 2d 7; *McComb v. Puerto Rico Tobacco Mar-*

keting Co-op Ass’n., 80 F. Supp. 953, 181 F. 2d 697). The legislative history of the Act supports this interpretation. Statutes usually cite farmers’ cooperative associations in express terms if it is intended that they be included. The omission of express language from the Fair Labor Standards Act is significant since many unsuccessful attempts were made on the floor of Congress to secure special treatment for such cooperatives.

(b) It is possible that some farmers’ cooperative associations may themselves engage in actual farming operations to an extent and under circumstances sufficient to qualify as a “farmer.” In such case, any of their employees who perform practices as an incident to or in conjunction with such farming operations are employed in “agriculture.”

PRACTICES PERFORMED “ON A FARM”

§ 780.134 Performance “on a farm” generally.

If a practice is not performed by a farmer, it must, among other things, be performed “on a farm” to come within the secondary meaning of “agriculture” in section 3(f). Any practice which cannot be performed on a farm, such as “delivery to market,” is necessarily excluded, therefore, when performed by someone other than a farmer (see *Farmers Reservoir Co. v. McComb*, 337 U.S. 755; *Chapman v. Durkin*, 214 F. 2d 360, cert. denied 348 U.S. 897; *Fort Mason Fruit Co. v. Durkin*, 214 F. 2d 363, cert. denied 348 U.S. 897). Thus, employees of an alfalfa dehydrator engaged in hauling chopped or unchopped alfalfa away from the farms to the dehydrating plant are not employed in a practice performed “on a farm.”

§ 780.135 Meaning of “farm.”

A “farm” is a tract of land devoted to the actual farming activities included in the first part of section 3(f). Thus, the gathering of wild plants in the woods for transplantation in a nursery is not an operation performed “on a farm.” (For a further discussion, see § 780.207.) The total area of a tract operated as a unit for farming purposes is included in the “farm,” irrespective of the fact that some of this area may

not be utilized for actual farming operations (see *NLRB v. O'Leary Sugar Co.*, 242 F. 2d 714; *In re Princeville Canning Co.*, 14 WH Cases 641 and 762). It is immaterial whether a farm is situated in the city or in the country. However, a place in a city where no primary farming operations are performed is not a farm even if operated by a farmer (*Mitchell v. Huntsville Nurseries*, 267 F. 2d 286).

§ 780.136 Employment in practices on a farm.

Employees engaged in building terraces or threshing wheat and other grain, employees engaged in the erection of silos and granaries, employees engaged in digging wells or building dams for farm ponds, employees engaged in inspecting and culling flocks of poultry, and pilots and flagmen engaged in the aerial dusting and spraying of crops are examples of the types of employees of independent contractors who may be considered employed in practices performed "on a farm." Whether such employees are engaged in "agriculture" depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm, as discussed in §§ 780.141 through 780.147; that is, whether they are carried on as a part of the agricultural function or as a separately organized productive activity (§§ 780.104 through 780.144). Even though an employee may work on several farms during a workweek, he is regarded as employed "on a farm" for the entire workweek if his work on each farm pertains solely to farming operations on that farm. The fact that a minor and incidental part of the work of such an employee occurs off the farm will not affect this conclusion. Thus, an employee may spend a small amount of time within the workweek in transporting necessary equipment for work to be done on farms. Field employees of a canner or processor of farm products who work on farms during the planting and growing season where they supervise the planting operations and consult with the grower on problems of cultivation are employed in practices performed "on a farm" so long as such work is done entirely on farms save for

an incidental amount of reporting to their employer's plant. Other employees of the above employers employed away from the farm would not come within section 3(f). For example, airport employees such as mechanics, loaders, and office workers employed by a crop dusting firm would not be agriculture employees (*Wirtz v. Boyls dba Boyls Dusting and Spraying Service* 230 F. Supp. 246, aff'd per curiam 352 F. 2d 63; *Tobin v. Wenatchee Air Service*, 10 WH Cases 680, 21 CCH Lab Cas. Paragraph 67,019 (E.D. Wash.)).

"SUCH FARMING OPERATION"—OF THE FARMER

§ 780.137 Practices must be performed in connection with farmer's own farming.

"Practices * * * performed by a farmer" must be performed as an incident to or in conjunction with "such farming operations" in order to constitute "agriculture" within the secondary meaning of the term. Practices performed by a farmer in connection with his nonfarming operations do not satisfy this requirement (see *Calaf v. Gonzalez*, 127 F. 2d 934; *Mitchell v. Budd*, 350 U.S. 473). Furthermore, practices performed by a farmer can meet the above requirement only in the event that they are performed in connection with the farming operations of the same farmer who performs the practices. Thus, the requirement is not met with respect to employees engaged in any practices performed by their employer in connection with farming operations that are not his own (see *Farmers Reservoir Co. v. McComb*, 337 U.S. 755; *Mitchell v. Hunt*, 263 F. 2d 913; *NLRB v. O'Leary Sugar Co.*, 242 F. 2d 714; *Mitchell v. Huntsville Nurseries*, 267 F. 2d 286; *Bowie v. Gonzalez*, 117 F. 2d 11). The processing by a farmer of commodities of other farmers, if incidental to or in conjunction with farming operations, is incidental to or in conjunction with the farming operations of the other farmers and not incidental to or in conjunction with the farming operations of the farmer doing the processing (*Mitchell v. Huntsville Nurseries*, supra; *Farmers Reservoir Co. v. McComb*, supra; *Bowie v. Gonzalez*, supra).