



August 26, 2005

FLSA2005-7NA

Dear *Name**,

This is in response to your request regarding the application of the overtime exemption contained in section 13(b)(28) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(b)(28), to a timber land operation.

You have a client who manages and maintains a large tract of timber land. Income for the operation is derived from timber sales and hunting leases. The client has five employees: a supervisor, shop mechanic, and three field staff. The field staff maintains, prunes, and fells timber. They also perform additional duties: they mow roads and pastures, pull feed wagons, plant feed patches, pull a chopper, and plow fire lines. Much of this work involves the use of heavy equipment which is maintained and repaired by the shop mechanic. You do not indicate whether the field staff's additional duties are a part of maintaining the timber land operation and are incidental to the field staff's performance of maintaining, pruning, and felling timber, or whether any of the additional duties are related to the hunting lease operation.

Section 13(b)(28) of the FLSA exempts from the FLSA's overtime requirements "any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the 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." Section 13(b)(28) was effective on May 1, 1974, and it replaced section 13(a)(13), which provided an exemption from both the minimum wage and overtime provisions for forestry and logging operations. The regulatory provisions implementing the overtime exemption of section 13(b)(28) are contained in 29 C.F.R. §§ 788.1-17.

Under 29 C.F.R. § 788.6 (copy enclosed), "the exemption is limited to those employed in the named operations by an employer who employs not more than eight employees therein." You employ only five total employees. Therefore, you satisfy that portion of the requirement that there be no more than eight such employees. The regulations also state that the named operations include "incidental activities normally performed by persons employed in them." 29 C.F.R. § 788.6. The Field Operations Handbook further explains that "Crew supervisors, ... cooks, kitchen helpers, bullcooks, timekeepers, and general repair shop mechanics of a logging camp are engaged in such incidental activities and are the usual members of crews which go into the woods for the purpose of felling timber and preparing and transporting logs. Therefore, these employees must be counted in determining the number of employees the employer has engaged in forestry and logging operations. If the total number of employees so engaged exceeds eight ... when crew supervisors, cooks, kitchen helpers, bullcooks, timekeepers and repair shop mechanics are counted, the exemptions do not apply." FOH 25e03. FOH 25e02 in relevant part states that an employer may have more than eight employees as long as only eight or fewer of the employees are employed in the named logging operations (including incidental activities) for the particular workweek. See FOH 25e02 and 25e03 (enclosed).

You state that the timber land operation also derives income from hunting leases and that the field staff has additional duties beyond those described in the exemption. Under 29 C.F.R. § 788.17, "[t]he exemption for an employee employed in exempt work will be defeated in any workweek in which he performs a substantial amount of non-exempt work. For enforcement purposes, non-exempt work will be considered substantial in amount if more than 20 percent of the time worked by the employee in a given workweek is devoted to such work. Where two types of work cannot be segregated, however, so as to permit separate measurement of the time spent in each, the employee will not be exempt."



We requested additional information from you regarding the amount of time any of the employees spend outside of the specific activities covered by the exemption. You have not provided this information, and we are, therefore, unable to determine which, if any, of the employees qualify for the section 13(b)(28) overtime exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of 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 request might require a different conclusion than 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.

Sincerely,

Barbara R. Relford
Office of Enforcement Policy
Fair Labor Standards Team

Enclosures:
29 C.F.R. 788.6
29 C.F.R. 788.17
FOH 25e02
FOH 25e03

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