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MEMORANDUM FOR: REGIONAL ADMINISTRATORS
AND DISTRICT DIRECTORS

FROM: MARY BETH MAXWELL
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SUBJECT: Egg Processing Activities as Agriculture
Under the Fair Labor Standards Act (FLSA)

This memorandum provides guidance regarding whether employees engaged in egg processing activities are exempt as agricultural employees from the minimum wage and/or overtime compensation requirements of the Fair Labor Standards Act (FLSA), specifically 29 U.S.C. 213(a)(6)(A) and/or 29 U.S.C. 213(b)(12). While the exemptions apply on an individual employee basis, the nature of the employer's activities and facilities are relevant factors when determining whether the work done by the employees comes within the scope of agriculture. It is the position of the Wage and Hour Division (WHD) that employees engaged in egg processing activities fall outside the scope of the FLSA agriculture exemptions when the processing is performed on eggs not produced by the farmer-employer; when the processing is more akin to manufacturing than agriculture; or when the egg processing facility operates as an independent business that is not subordinate to the farm's farming operations.

As explained in greater detail below, whether employees processing eggs as part of agricultural activities are exempt agricultural employees depends on the facts of the individual case. Certain activities of egg processors, however, such as the salting and sugaring of eggs, do not qualify as FLSA agriculture and employees engaged in such activities are therefore generally entitled to the FLSA's minimum wage and overtime protections.

Background

Coverage under the FLSA is broadly construed, and exemptions are narrowly interpreted and limited in application to those who are clearly within the terms of the exemption. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); 29 C.F.R. 780.2. Section 13(a)(6)(A) of the FLSA exempts employees employed in agriculture from minimum wage and overtime pay protections in certain circumstances. *See* 29 U.S.C. 213(a)(6)(A). Similarly, Section 13(b)(12) of the

FLSA exempts from overtime pay "any employee employed in agriculture." 29 U.S.C. 213(b)(12).

The definition of agriculture is divided into two branches: primary and secondary agriculture. Primary agriculture includes "farming in all its branches," including the 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, bees, fur-bearing animals, or poultry. 29 C.F.R 780.105(b). Secondary agriculture encompasses "any practices . . . performed either by a farmer or on a farm as an incident to or in conjunction with" farming operations. 29 C.F.R. 780.105(c). While raising chickens and harvesting eggs can be classified as primary agriculture, egg processing cannot be so classified. *See* 29 C.F.R. 780.151(d). This memorandum will therefore focus on the question of whether egg processing constitutes secondary agriculture.

In order to qualify as secondary agriculture, an activity must be (1) "performed by a farmer or on a farm," and (2) "incident to or in conjunction with such farming operations." 29 U.S.C. 203(f). This guidance will focus on the analysis needed to determine if the activities are "incident to or in conjunction with such farming operations." In determining whether employees employed in an egg processing facility meet the criteria for the agriculture exemptions, investigators should first determine if the eggs that are being processed were produced by the farmer-employer. If so, investigators must then evaluate whether the processing activities of the facility are more akin to agricultural activities or manufacturing activities. Finally, if the egg processing activities are more akin to agriculture, investigators must examine whether the processing facility amounts to an independent business.

Eggs Produced by the Farmer or by a Third Party

Generally, a practice "performed in connection with farming operations is within the statutory definition only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business." 29 C.F.R. 780.144. The Supreme Court has explicitly acknowledged that "'[t]he line between practices that are and those that are not performed 'as an incident to or in conjunction with' such farming operations is not susceptible of precise definition.'" *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 408 (1996) (quoting 29 C.F.R. 780.144). Typically, whether egg processing workers employed in their employer's own processing facility are within the scope of secondary agriculture and therefore exempt from FLSA minimum wage and/or overtime pay protections depends on a fact-specific determination. Investigators should be aware that certain practices of egg processing facilities will exclude them from coverage by the agriculture exemptions. Importantly, processing that is performed upon any eggs that have been produced by another egg producer does not constitute an activity that is incidental to the farming operations and cannot be considered secondary agriculture under the Act. *See* 29 C.F.R. 780.141. If during the workweek the employee handles eggs from outside producers, the exemption criteria is not met in that workweek and no other analysis is required. *See* 29 C.F.R. 780.10-.11. For workweeks in which the employee handles only

those eggs produced by the farmer-employer, then the further analysis set forth below is necessary to determine if the exemptions apply in those workweeks.

Processing Activities More Akin to Agriculture or Manufacturing

When examining whether activities performed on agricultural commodities[1] fall within the definition of secondary agriculture, courts also consider the following non-exhaustive list of "special" factors:

- the type of product resulting from the practice (i.e., whether the raw or natural state of the commodity has been changed);
- the value added to the product as a result of the practice;
- whether a sales organization is maintained for the disposal of the product;
- the length of the period during which the operations are performed (when considered together with the amount of investment, payroll, and other factors discussed above); and
- whether products resulting from the activity are sold under the producer's own label rather than under that of the purchaser.

See 29 C.F.R. 780.147.

In assessing whether employees employed in egg processing operations fall within the agricultural exemptions, factors such as whether supervisory personnel oversee both the regular farming and the processing operations may also be relevant. *See, e.g.*, *Hodgson v. Idaho Trout Processors Co.*, 497 F.2d 58, 60 (9th Cir. 1974). Courts examine factors such as those listed above to determine whether processing activities are separately organized as a productive enterprise independent of the agricultural activity. *Id.*

If the facility itself is integrated into the producer's farming operations and processes eggs only from its own farming operations, investigators must consider whether the facility's activities are "incident to or in conjunction with" farming operations. 29 C.F.R. 780.105(c). In making this determination, investigators must consider whether the activities are agricultural in nature or more similar to manufacturing. The regulation at 29 C.F.R. 780.151(d) identifies certain egg processing activities (the "[h]andling, cooling, grading, candling and packing" of eggs) that may be performed in the "preparation for market," and therefore are closer to common agricultural activities. Such processing activities are thus considered secondary agriculture.[2]

WHD's regulation at 29 C.F.R. 780.147 instructs that it is "necessary to consider the type of product resulting from the practice--as whether the raw or natural state of the commodity

[1] Eggs are included among the agricultural and horticultural products listed in 29 C.F.R. 780.112.

[2] *See also Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966) (concluding that a corporation engaged in "assembling, grading, handling, sizing, candling, packing, and shipping" of eggs fell within the scope of agriculture under the FLSA).

has been changed" because it "marks the dividing line between processing as an agricultural function and processing as a manufacturing operation." *Id. See also Mitchell v. Budd*, 350 U.S. 473, 481-82 (1956); *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 268 (1955). WHD has explained that "a process that results in important changes to an agricultural or horticultural commodity is 'more akin to manufacturing than to agriculture.' Once the agricultural or horticultural commodity is no longer in its unmanufactured state, the establishment loses the agriculture exemption." WHD Opinion Letter, 2001 WL 58865 (Jan. 17, 2001) (citing *Maneja*, 349 U.S. at 265). *See also Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1205 (10th Cir. 2004).[3] Courts therefore consider factors such as whether the chemical composition of the product has been changed and whether foreign ingredients have been added to the commodity. *See, e.g., United Foods, Inc.*, 1999 WL 958486, at *3 (N.L.R.B. 1999).

As noted above, the regulation contains a non-exhaustive list of "preparation for market" activities, including the "[h]andling, cooling, grading, candling, and packing" of eggs. *See* 29 C.F.R. 780.151(d). The regulation also identifies other similar activities from which we can analogize. Pursuant to this regulation, the *cracking and shelling* of nuts and the *extraction and blending* of honey qualify as secondary agriculture. *See* 29 C.F.R. 780.151(c), (l). The breaking and shelling of eggs seems analogous to the cracking and shelling of nuts because both activities involve the removal of an exterior protective casing without altering the raw or natural state of the edible interior. The extraction of honey from the honeycomb also seems substantively similar to the extraction of egg yolks from their shells. We conclude therefore that the breaking of eggs and the processing in preparation for market of whole liquid eggs, egg yolks, egg whites, and other various components of the eggs are all activities that may fall within the scope of secondary agriculture so long as they do not involve adding foreign ingredients to the eggs or effecting an essential change to the raw or natural state of the eggs.

Certain other egg processing activities, such as salting and sugaring eggs, however, do not qualify as secondary agriculture because such activities involve adding foreign ingredients to the agricultural commodity. Such activities alter the raw or natural state of the eggs and are more akin to manufacturing than to agricultural processing.

Similarly, when the drying of eggs transforms the liquid interior of an egg into a solid powder form, it thereby effects a substantial change to the natural state of the commodity. As discussed above, when the raw or natural state of an agricultural commodity is altered and the chemical composition of the product changes, such processing is more likely to be considered a manufacturing operation than an agricultural activity. The egg drying process, generally performed using a spray drying method, is more akin to manufacturing and

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[3] A processing activity may result in some amount of change from the raw or natural state of a product and still be included in secondary agriculture. For example, the cleaning, ripening, and shelling of agricultural commodities fall within the scope of secondary agriculture. *See, e.g.*, 29 C.F.R. 780.151. If the processing activity makes "important changes" to the product, however, then the activity will be viewed as manufacturing rather than agricultural processing. WHD Opinion Letter, 2001 WL 58865 (Jan. 17, 2001) (citing *Maneja*, 349 U.S. at 265).

would not qualify as a preparation for market activity.[4] Powdered eggs can no longer be considered to be in an unmanufactured state and thus the activity does not fall within the scope of the secondary agriculture exemption. *See, e.g.*, *Williams v. Hilarides*, 2013 WL 459611, at *9-11 (E.D. Cal. Feb. 5, 2013) (ultrafiltration process by which a significant amount of water is removed from raw milk is more akin to manufacturing than agriculture).

Based upon this analysis, if employees are only handling eggs produced by their employer and the processing activities in which they are engaged are more akin to agriculture than manufacturing, then the further analysis set forth below is needed to determine if the employees are exempt agricultural employees.

Processing Subordinate to or Independent of the Farming Activity

The Supreme Court has explained that whether a particular type of activity falls within the FLSA's agricultural exemption "is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity." *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 761 (1949).

If an egg producer operates an egg processing facility as an independent business enterprise, not integrated into the producer's farming operations, then the egg processing work will not be considered "incidental to or in conjunction" with the primary egg-farming activities, and would therefore also not qualify as secondary agriculture under the Act. *See* 29 C.F.R. 780.145. The FLSA regulations instruct that "[t]he character of a practice as a part of the agricultural activity or as a distinct business activity must be determined by examination and evaluation of all the relevant facts and circumstances in the light of the pertinent language and intent of the Act." 29 C.F.R. 780.145. The regulations and applicable case law both discourage "mechanical application of isolated factors or tests" in making this determination and instead focus on the overall circumstances or "total situation." 29 C.F.R. 780.145. Whether an activity falls within secondary agriculture is therefore highly fact-intensive. *See Maneja*, 349 U.S. at 264 (explaining that "it is clear that we must look to all the facts surrounding a given process or operation to determine whether it is incident to or in conjunction with farming"); *Mitchell*, 350 U.S. at 481 (same); *Herman v. Continental Grain Co.*, 80 F. Supp. 2d 1290, 1292-93 (M.D. Ala. 2000) (observing that "courts often hinge the distinction between the qualifying and the non-qualifying employee [under Section 13(b)(12)] on the exact nature of the work performed, the organization and structure of the employer's business, and the relationship between the two").

WHD's regulations identify several factors that investigators should consider in determining if a practice is "part of the agricultural activity" or a "distinct business

[4] The regulation at 29 C.F.R. 780.151 indicates that the drying of certain agricultural commodities (such as grain, seed, and forage crops; fruits and vegetables; tobacco; and fur) may fall within the scope of the agriculture exemption. Such drying activities, however, generally result in a less radical change in form to the agricultural product than occurs during the egg drying process.

activity." Investigators should look to "the general relationship, if any, of the practice to farming as evidenced by common understanding, competitive factors, and the prevalence of its performance by farmers." 29 C.F.R. 780.145. Investigators should also analyze the processing activities using any combination of the following factors deemed appropriate based on the facts and circumstances of the investigation. No single factor is controlling, and each factor may be entitled to greater or lesser weight. These factors are:

- the size of the operations;
- respective sums invested in land, buildings and equipment for the regular farming operations and in plant and equipment for performance of the practice;
- the amount of the payroll for each type of work;
- the number of employees and the amount of time they spend in each of the activities;
- the extent to which the practice is performed by ordinary farm employees and the amount of interchange of employees between the operations;
- the amount of revenue derived from each activity;
- the degree of industrialization involved; and
- the degree of separation established between the activities.

See 29 C.F.R. 780.145.

Conclusion

The FLSA's regulations and applicable case law reject "mechanical application of isolated factors or tests" in making a determination as to whether an activity falls within the agricultural exemption. *See* 29 C.F.R. 780.145. Accordingly, the overall circumstances of the egg processor's facilities, operations, and workforce will be examined in determining the applicability of the section 13(a)(6)(A) exemption and section 13(b)(12) exemption.

In order for employees performing egg processing activities to be considered exempt under the agriculture exemptions to the FLSA's minimum wage and/or overtime requirements for a particular workweek, all conditions outlined in this memo must be met:

- The employee must only be processing goods produced by the farmer-employer;
- The processing must be more akin to agriculture than it is to manufacturing; and
- The processing operation must be subordinate to the farming operation and not an independent business operation.