



FLSA2019-5

April 2, 2019

Dear **Name\***:

This letter responds to your request for an opinion concerning whether a farm’s “light processing” activities—cutting or freezing its own agricultural products—and additional activities of packing, storing, and delivering those products, are primary or secondary agriculture for purposes of the Fair Labor Standards Act’s (FLSA) section 13(b)(12) exemption from overtime pay. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

## BACKGROUND

Your letter concerns a certain farm that employs year-round and seasonal workers.<sup>1</sup> You represent that the employees of this farm engage in a range of primary and secondary agricultural activities, including field crop production work; washing, packing, and storing products grown on the farm; and transporting these products to market. You also represent that the farm engages in “light processing” of the farm’s own products without adding other ingredients. These “light processing” activities include cutting or freezing the farm’s own fruit, vegetable, and meat products on and off the farm. The farm also packs, stores, and transports these cut or frozen products to market.

## GENERAL LEGAL PRINCIPLES

FLSA section 13(b)(12) exempts employees employed in agriculture from overtime pay. *See* 29 U.S.C. § 213(b)(12). To determine the scope of this exemption, WHD gives the statutory text a “fair (rather than narrow) interpretation” because the FLSA’s exemptions are “as much a part of the FLSA’s purpose as the overtime-pay requirement.” *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks and citation omitted). Section 3(f) defines the term “agriculture” to “include[ ] farming in all its branches ... and any practices ... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.” 29 U.S.C. § 203(f). WHD regulations and relevant judicial precedent divide this definition of agriculture into two concepts: primary and secondary agriculture. *See* 29 C.F.R. § 780.105 (citing cases).

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<sup>1</sup> Your letter states that the farm “exceed[s] the 500 man-day threshold for coverage under the FLSA throughout the year.” WHD notes that a farm that uses less than five hundred man-days of agricultural labor during any calendar quarter in the preceding calendar year could be *covered* by the FLSA, but it would be *exempt* from minimum wage and overtime pay requirements. 29 U.S.C. § 213(a)(6)(A).

Primary agriculture includes “farming in all its branches” and the specific farming operations enumerated in section 3(f) of the FLSA, 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). If an employee is employed in any of these activities, he or she is employed in agriculture and qualifies for the section 13(b)(12) agricultural exemption, regardless whether he or she is employed by a farmer or on a farm. *See id.*

Secondary agriculture includes activities that are “performed by a farmer or on a farm as an incident to or in conjunction with such farming operations[.]” 29 U.S.C. § 203(f); *see* 29 C.F.R. § 780.105(c). A “farm” is a tract of land devoted to farming activities that are primary agriculture. 29 C.F.R. § 780.135. A “farmer” is any employer engaged in activities ordinarily regarded as farming activities, and includes any employee of the farmer. *See* 29 C.F.R. §§ 780.130, 780.132. An activity is “performed by a farmer or on a farm” only if the farmer or farm produces the product on which the activity is performed. *See* 29 C.F.R. §§ 780.137, 780.141. Additionally, an activity is generally “incident to or in conjunction with such farming operations,” and thus secondary agriculture, only if it (1) is more akin to agriculture than manufacturing, (2) is subordinate to the farming operations involved, and (3) does not amount to an independent business. *See* 29 C.F.R. §§ 780.144–147. This includes “preparation for market [and] delivery to storage or to market or to carriers for transportation to market.” 29 U.S.C. § 203(f); *see* 29 C.F.R. §§ 780.150–155.<sup>2</sup>

## OPINION

You ask whether a certain farm’s “light processing” activities—cutting or freezing its own fruit, vegetables, or meat, either on or off the farm, without adding any ingredients—and its additional activities of packing, storing, and transporting those cut or frozen products to market, constitute primary or secondary agriculture. These activities do not fall within any of the specific farming operations enumerated in section 3(f) or constitute “farming in all its branches,” and thus are not within the scope of primary agriculture. *See* 29 C.F.R. §§ 780.117–118. However, these activities may constitute secondary agriculture. We assume for purposes of this letter that these activities are performed by a farmer or on a farm and assess each activity in turn to determine whether it is performed “as an incident to or in conjunction with such farming operations.” 29 U.S.C. § 203(f).<sup>3</sup>

The farm’s activities of cutting or freezing its own fruits, vegetables, and meat,<sup>4</sup> without adding any ingredients, may be secondary agriculture. These activities are more akin to agriculture than

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<sup>2</sup> WHD notes that the agricultural exemption applies to each individual employee on a workweek basis and does not apply to employees in workweeks in which they perform both exempt work and covered, non-exempt work. *See* 29 C.F.R. §§ 780.10–11.

<sup>3</sup> Your letter asks whether these activities would be exempt even if they are performed off of the farm. The agricultural exemption may indeed apply to such activities, but only if they are performed by the farmer. *See* 29 U.S.C. § 203(f); 29 C.F.R. § 780.134.

<sup>4</sup> The agricultural exemption only covers practices performed on products if those products are produced or raised by the farmer or on the farm. *See* 29 C.F.R. § 780.158(c). This opinion letter therefore assumes

manufacturing. Under 29 C.F.R. § 780.151(b), the activities of drying and preserving fruits and vegetables are listed as examples of secondary agricultural activities—specifically, “preparation for market” under section 3(f). Freezing is a similar method of preservation, and cutting is akin to other “preparation for market” activities, such as cracking nuts, separating dairy products, or trimming nursery stock. *See* 29 C.F.R. § 780.151(c), (f), (h). Additionally, the activities of cutting and freezing do not sufficiently alter the raw or natural state of the commodity, changing its chemical composition, so as to make the activity manufacturing. *See* [Field Assistance Bulletin No. 2013-1](#). Indeed, the farm’s activities of cutting or freezing are similar to breaking eggs and processing whole liquid eggs or components of an egg without adding foreign ingredients that change the egg’s chemical composition—activities which WHD has stated may be secondary agriculture. *See id.*

That said, we cannot determine from the facts presented in your letter whether the farm’s activities of cutting or freezing its own fruit, vegetables, or meat are subordinate to its farming operations or amount to an independent business. *See* 29 C.F.R. §§ 780.144–.147; *see also* [Field Assistance Bulletin No. 2013-1](#) (discussing how to determine whether a farmer’s processing of its own agricultural products is subordinate to or independent from its farming activities). If they are subordinate to farming operations and do not amount to an independent business, these activities are secondary agriculture, and the employees employed in those activities will be exempt from overtime pay under section 13(b)(12).

The farm’s activities of packing and storing its own cut or frozen commodities may also be secondary agriculture. Under 29 C.F.R. § 780.151, the activities of packing and storing fruits and vegetables are generally considered to be “preparation for market” under section 3(f).<sup>5</sup> That is true regardless whether the commodities were cut or frozen prior to being packed or stored. *See* 29 C.F.R. § 780.153. However, the previous activities of cutting or freezing must be agriculture in order for the packing or storing of those commodities to be “incident to or in conjunction with ... farming operations” under section 3(f). *See* 29 C.F.R. § 780.153. If the farm’s cutting or freezing activities are secondary agriculture, the employees employed in packing or storing those cut or frozen commodities will also be engaged in secondary agricultural activities and exempt under section 13(b)(12).

Finally, the farm’s activity of delivering its own cut or frozen commodities to market may also be secondary agriculture. In certain circumstances, “delivery to market”—the taking of agricultural commodities to market—can be secondary agricultural activity. 29 U.S.C. § 203(f); *see* 29 C.F.R. §§ 780.128, 780.154. However, any delivery involving travel off of the farm generally must be performed by the farmer’s employees. *See* 29 C.F.R. § 780.154. Additionally, the farm’s cutting, freezing, packing, or storing of its own fruit, vegetables, or meat must be

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that the meat you describe has been slaughtered and/or processed by the farmer or on the farm. This opinion letter does not apply to meat that has been sent to an outside processor and returned to the farm or farmer.

<sup>5</sup> Packing and storing meat is just as much “preparation for market” as packing and storing fruits and vegetables. As such, packing and storing meat is also, as a general matter, “incident to or in conjunction with ... farming operations”—that is, secondary agricultural activity—under section 3(f).

agriculture in order for the delivery of those commodities to market to be “incident to or in conjunction with ... farming operations” under 3(f). *See* 29 C.F.R. § 780.154. If these activities are secondary agriculture, the farmer’s employees employed in delivering the commodities to market will also be engaged in secondary agricultural activities and exempt from overtime pay under section 13(b)(12).<sup>6</sup>

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith E. Sonderling", with a long horizontal flourish extending to the right.

Keith E. Sonderling  
Acting Administrator

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

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<sup>6</sup> Additionally, WHD notes that employees engaged in intrastate transportation of freshly harvested fruits and vegetables to a place of first processing or marketing may be exempt from the FLSA’s overtime requirements. *See* 29 U.S.C. § 213(b)(16); 29 C.F.R. §§ 780.906–.917.