U.S. Department of Labor

Employment Standards Administration
Wage & Hour Division
Washington, D.C 20210

APR 2 1999

Mr. Randy Clark
National Environmental Fuels Association
P.O. Box 768
Albany, Oregon 97321-0768

Dear Mr. Clark:

This is in response to your letter of March 8, concerning issues discussed at a meeting held in Portland, Oregon on Thursday, February 25. You seek clarification about whether or not employees may be made to purchase work boots.

Federal government contracts granted to forestry service contractors under the McNamara-O'Hara Service Contract Act (SCA) and Contract Work Hours and Safety Standards Act (CWHSSA) often, if not always, require certain boots necessary to perform the work. These boots are not a personal preference of the employee, but are tools of the trade. SCA wage determinations for forestry contracts specifically state that if employees are required to wear uniforms in the performance of the contract for which the wage determination has been issued (either by the terms of the Government contract, by the employer, by the state or local law, etc.), the cost of furnishing and maintaining such uniforms is an expense that may not be borne by an employee where such cost reduces the hourly rate below that required by the wage determination.

Therefore, a "boot draw" may be deducted from the workers' pay only if the contractor pays an hourly rate in excess of the wage rate required by the contract. The difference between the actual wage paid and the rate required by law is what you refer to as the "pad". Any deduction for the actual cost of the boots could be taken from the pad in an

overtime week only if: 1) the deduction is *bona fide*, and 2) made for particular items under a prior agreement, and 3) the purpose is not to evade statutory overtime requirements or other laws. In addition, if the contractor is covered by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), such deduction may be legal if the contract specifically discloses that the employer will make certain particularized deductions not otherwise prohibited by law.

Deductions for boots may be made in an overtime workweek to the same extent as in a non-overtime workweek. However, the deduction must not have the purpose and effect to evade the overtime requirements of the FLSA or other law and be a bona fide deduction made for particular items according to an agreement or understanding between the employer and the employee. If all conditions are met, the total amount that an employer may deduct from an employee in an overtime workweek may not exceed the amount that could be deducted if the employee had only worked a 40-hour week. If an employer makes deductions from the stipulated wage of an employee, the employee's regular rate for calculating statutory time-and-one-half overtime pay is the stipulated wage before the deductions are made.

An employer must pay an employee all of the straight time compensation due under an express or implied contract or under any applicable statute for the non-overtime hours worked before it can be said that the employer has paid proper time-and-one-half overtime compensation for the overtime hours worked. This reinforces two principles that apply in an overtime workweek: 1) only an express or implied contract addressing deductions would authorize an employer to make any deductions that reduce earnings below the regular rate for the straight time hours; and 2) the minimum amount that must be paid "free and clear" for the straight time hours may never be less than the highest applicable statutory minimum wage.

If an employee owns a pair of the required boots when he goes to work for a contractor, the employee may choose not to wear his own boots and the contractor must provide the boots for the employee to use. If an employee chooses to wear his own boots and they wear out, the contractor must replace them and any cost to the employee could occur only within the criteria discussed above.

SEE NOTES FROM FEB. 25 '99 MEETING

Your letter also raises a question about whether *prescribed burning* falls within the scope of MSPA coverage. You state that "Prescribed burning uses predominately mechanical means for ignition and control. These methods include ignition by helicopter, terra torch and other mechanical sources. Control is primarily provided by the use of engines and tenders as well as helicopters when needed."

The United States Court of Appeals for the 9th Circuit, in the case Bresgal v Brock enjoined the Department of Labor to cease refusing to enforce MSPA for any migrant or seasonal worker engaged in predominantly manual forestry work, including, but not limited to, tree planting, brush clearing, precommercial tree thinning and forest fire fighting. You further state that *prescribed burning* is not "predominantly manual" and does not "plant trees", "clear brush", "precommercial thin", or "fight forest fires". Based on the information furnished in your letter, it would appear that *prescribed burning* would not constitute forestry work that would be covered by MSPA. However, the existence of any other factual or historical background not contained in your letter might require a different conclusion than the one expressed herein.

I trust that this is responsive to your concerns.

Sincerely,

Michael Hancock
Office of Enforcement Policy
Farm Labor Team