1940

Before the Administrator, Wage and Hour Division, United States Department of Labor: Petition by the American Institute of Accountants for Amendment of the Definition of the Term "Employee Employed in a Bona Fide...Professional...Capacity"

American Institute of Accountants

BEFORE THE ADMINISTRATOR
WAGE AND HOUR DIVISION

Petition by

THE AMERICAN INSTITUTE OF ACCOUNTANTS

December 6, 1940

BEFORE THE ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

PETITION BY THE AMERICAN INSTITUTE OF ACCOUNTANTS FOR AMENDMENT OF THE DEFINITION OF THE TERM "EMPLOYEE EMPLOYED IN A BONA FIDE . . . PROFESSIONAL . . . CAPACITY" PURSUANT TO SECTION 13 (a) (1) OF THE FAIR LABOR STANDARDS ACT, NOW CONTAINED IN SECTION 541.3 OF THE REGULATIONS, EFFECTIVE OCTOBER 24, 1940

The American Institute of Accountants, a body of over 5,500 members representing most of the independent public accountants actually engaged in the practice of their profession, respectfully submits this petition in accordance with Section 541.6 of the regulations cited above, which reads as follows:

> "Sec. 541.6. Petition for Amendment of Regulations.—Any person wishing a revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views, either in support of or in opposition to the proposed changes. In determining such future regulations, separate treatment for differ-

ent industries and for different classes of employees may be given consideration."

AMENDMENT DESIRED

The American Institute of Accountants asks *that accountants actually engaged in the practice of their profession as employees of independent public accountants* be exempted from the provisions of sections 6 and 7 of the Act as "employees employed in a bona fide . . . professional capacity" as defined in the present regulation, but without the salary delimitation now prescribed in paragraph (B) of Section 541.3 of the regulations.

In order to effect this result we suggest the addition of the following clause to paragraph (B) of Section 541.3:

> ". . . nor in the case of an accountant actually engaged in the practice of accounting as an employee of an independent public accountant or firm of independent public accountants."

Our argument naturally is directed toward the application of the definition to our own profession, but if, for administrative reasons, a broader provision, applicable to other groups who may be similarly situated, is desired, we propose the following alternative:

> ". . . nor in the case of a person actually engaged in the public practice of a profession as an employee of an individual or firm engaged in the public practice of that profession."

The reasons for this proposed amendment are as follows:

1. *The effect of the present salary delimitation of $200 is to remove from the professional classification approximately one-half of the accountants actually engaged in the practice of their profession as employees of independent public accountants, who would be exempt under the terms of the present definition without such delimitation.*

Accountancy has properly been recognized as a profession. The effect of the present delimitation, however, is to exclude from the professional definition about half of the persons actually engaged in the practice of that profession as employees of independent public accountants.

The exclusion of such a large proportion of the actual practitioners of this profession does not seem to be within the letter or the spirit of the Act.

It appears that in Section 13 (a) of the Act, Congress intended to exempt from the provisions of Sections 6 and 7 employees who were truly employed in a bona fide professional capacity, without any reference to the earnings of such employees.

The actual public practice of a recognized profession is prima facie evidence of eligibility for such exemption.

For administrative reasons a salary delimitation may be desirable in conjunction with the definition of "professional" employees employed in industry, as to whom there may be some doubt whether they are engaged in the practice of their professions, but such delimitation is neither necessary nor appropriate in the case of accountants clearly engaged in the practice of their profession as employees of independent public accountants.

We have attempted to ascertain what salaries are received by employees of independent public accountants throughout the country, and we have received replies from nearly 800 firms of independent public accountants regularly employing more than 8,000 accountants. The replies come from firms in all sections of the country, among which there are diversities in salary scales, but we feel that the average figures indicate a fair sample of the entire country.

Of these employed accountants, we find that about half receive salaries of less than $200 a month.

We also find that more than 98% of the employed accountants covered in the replies to the questionnaire receive full rate of pay during vacations, holidays, and time lost through sickness.

Therefore, the present salary delimitation seems unnecessary and inappropriate so far as accountants employed by independent public accountants are concerned.

2. *A distinction should be made between accountants actually engaged in the practice of their profession as employees of independent public accountants, whose hours of work in a given week are largely determined by the demands of clients, and employees employed by industrial, commercial, institutional, or other organizations, whose hours of work are determined by the employer himself.*

It is clear from a reading of his report that the presiding officer at the hearings preliminary to redefinition of the terms "executive," "administrative," and "professional" perceived administrative difficulties which might arise from the overlapping of the definitions of "administrative" and "professional" *as applied to employees in industry*. When discussing the $200 a month salary test in conjunction with the definition of "administrative," in Section VII of the report (page 32), he says: "Inasmuch as the two definitions necessarily overlap, it is desirable to set the same requirements for both groups. . . . Accordingly $2,400 per annum or $200 per month is recommended as the salary qualification for 'administrative.' The same figure, although independently arrived at, will also be recommended for 'professional.'"

At the same time the presiding officer evidently recognized the inappropriateness of applying a salary test to members of the professions of law or medicine actually engaged in the practice of their profession, and his solution was to except them from the salary test on the grounds that they were members of "traditional" professions, while accountancy was specifically referred to as a new profession.

As nothing in the Act suggests a distinction between traditional and new professions, we cannot escape the conclusion that the real, perhaps subconscious, reason why law and medicine were excepted was a recognition that

lawyers and doctors must work irregular hours, which are fixed not by their choice but by the necessities of their practice.

Actually, circumstances surrounding the practice of public accounting are in certain basic respects similar to the practice of law. Practitioners of both professions hold themselves out to the public as qualified, by professional knowledge acquired through prolonged study, to render special services on a fee or retainer basis. They do not work for a single employer but for as many clients as may wish to retain them, and the *demands of clients* necessarily determine to a large extent the hours of work.

The demands of clients, in turn, are often actuated by demands of government agencies.

The lawyer engaged in the preparation of an argument for presentation in court at a specified date may be required to work more than 40 hours in a given week. Similarly, a public accountant, engaged in examining accounts as a preliminary to the preparation of reports which must be filed by a specified date with the Treasury Department, with the Securities and Exchange Commission, with stock exchanges, at annual meetings of stockholders, or at court hearings, may be required to work more than 40 hours in a given week. In performing such services the same men must work on the job until it is completed. Obviously, accountants cannot work on a job in shifts, because the knowledge acquired by those who begin an accounting examination is essential to its continuation and completion. There must be continuous effort by the same minds.

On the other hand, there are bound to be periods when no client requires service, and in those periods there is no work for the professional practitioner to do except to study and improve his knowledge.

This irregularity of working hours caused by the demands of clients is perhaps more marked in public accounting than in any other profession. The adoption by the vast majority of corporations of the calendar year as

their fiscal year means that their accounts must be closed December 31st. Audits of their accounts must take place after that date, and financial statements, which, in the case of listed companies or companies registered with the Securities and Exchange Commission, must be accompanied by certificates of independent public accountants, must be submitted to stockholders as soon thereafter as possible. In addition, income-tax returns of such corporations must be filed by March 15th, and under present practice of the Treasury Department extensions of time for filing returns are extremely difficult to secure.

Accordingly public accountants are inescapably required to work long hours, and frequently to work on Sundays and holidays during the first three months of the year, while at other periods of the year there is often little or no work to be done, and in these periods employees are customarily given time off with pay to compensate them for the overtime during the busy season.

For these reasons it is apparent that there is an important distinction between accountants actually engaged in the practice of their profession as employees of independent public accountants, so that the demands of clients must largely determine their hours of work, and persons employed in industry.

Recognition of this distinction would not entail administrative difficulties which might arise from the overlapping of the definitions of "administrative" and "professional" as applied to employees of industrial or similar organizations.

3. *The present definition, with the salary delimitation, will tend to retard the development of the profession and curtail the opportunity for young men to obtain experience and advancement in the profession of public accounting, and the ultimate result may be curtailment of regular employment and earning power, which it is the declared policy of the Act to avoid.*

Studies show that about 75% of the representative corporations close their accounts at the end of the calendar

year, December 31st. This means that most of the accounting service which they require from professional public accountants is concentrated in the first three months of the year.

With the passage of the income-tax laws, the development of mass production and widely-flung corporate organizations, requirements of the Securities and Exchange Commission, and other factors resulting from increasing complexities and higher technical standards in accounting, it became necessary for public accountants to develop well-educated and well-trained staff assistants.

In the earlier periods there were not many opportunities for a young man to prepare himself to enter the profession, as there were few schools or colleges offering courses in accountancy. In 1900 there were four schools of collegiate grade offering accounting courses. Today there are 88 schools and colleges offering approved courses in accountancy.

In order to attract graduates of these schools and colleges, permanent employment and fair compensation had to be offered.

Salaries paid to those entering the practice of public accounting compare very favorably with those in law and medicine. The standard salary paid to the young graduate of an accounting course in a university entering the staff of a representative public accounting firm is about $125 a month. Generally he may expect annual raises in salary, and, as older employees are continually being elevated to partnership, or leaving their employers to enter practice on their own account or to accept executive positions in industry, there is a continual flow of young men from the colleges into staff positions with public accounting firms. Consequently, in the average firm there is always a considerable proportion of staff assistants receiving from $125 to $200 a month.

If public accountants are to be required to pay these employees time-and-a-half for overtime during the busy season, it will be difficult—if not impossible—for them to

continue to pay the regular salary during the periods of the year when it is impossible to assign such assistants to productive work.

It is our belief that the result would be to curtail employment and lower earning power among employees in the profession—a result which it is the declared policy of the Fair Labor Standards Act to avoid.

Public accounting would not be regarded as an attractive profession by promising and ambitious young men, if employment only during the busy season were available or if advancement were correspondingly delayed. To such men permanent employment is an essential requirement. If the opportunities to obtain experience in public accounting were limited to a few months in each year, if the employees were deprived of continual association with more experienced practitioners, with all the opportunity to learn from them which regular employment on the staff of a public accounting firm provides, it would increase the time necessary to acquire sufficient public accounting experience to qualify the young accountant for a partnership in a firm or for practice on his own account.

It is essential to the proper fulfillment of the role of the accounting profession in the national economy that highly educated young men be encouraged to enter the profession. This can be done if continuity of employment is assured. It would be a long step backward if one of the consequences of the wage-and-hour-law were to force upon the profession a policy of short-time employment of accountants receiving less than $200 a month who are now carried through the year on a permanent salary basis.

This group of young accountants is engaged in professional work. Such young men are being employed to do public accounting work on the basis of having been well grounded in the principles of the various subjects in which they will have to be proficient if they are to be able to exercise judgment and professional skill necessary in

the examination of accounts, in auditing and in tax service.

The building up of a strong profession may be greatly retarded if the delimitation of a salary of $200 a month remains in effect in the application of the definition of "professional" to accountants employed by independent public accountants.

4. *Circumstances surrounding the public practice of accounting merit special consideration. These circumstances have not heretofore been presented to the Administrator because the original regulations did not contain the $200 delimitation and appeared generally satisfactory to the profession.*

Since the accounting profession may suffer irreparable damage from application of the present delimitation, we are compelled to request with all possible urgency that the provisions of Section 541.6, with respect to "separate treatment for different industries and for different classes of employees" be invoked immediately in this case.

We believe that we are entitled to a hearing on this question without delay because the present delimitation was adopted without consideration of the peculiar circumstances surrounding the actual public practice of the accounting profession.

In discussing the appropriateness of salary tests in conjunction with the terms "executive" and "administrative," Section IV (p. 5) of the report and recommendations of the presiding officer at hearings preliminary to redefinition of the terms "executive," "administrative," and "professional," contains the following statement:

> "The propriety of a salary test for professional employees was not given such full consideration at the hearings but in so far as the question was raised there was considerable agreement on its appropriateness; this is discussed in Section VIII."

In Section VIII of the report (page 42) the following statement appears:

> "At least some of these reasons for applying a salary test appear to have been recognized by employers who proposed such a test for 'professional.' "

A related footnote (130) reads as follows:

> "A salary test for 'professional' was proposed by the Mid-Continent Oil and Gas Association, Oklahoma Stripper Well Association, Photographers' Association of America, and Automatic Electric Company. The propriety of such a proposal was agreed to by other employer representatives."

Nowhere in the report is there any indication that representatives of any of the recognized professions expressed an opinion on the appropriateness of a salary test in conjunction with the definition of "professional" as applied to employees engaged in the public practice of recognized professions. The American Institute of Accountants did not request a change in the original definition of "professional" because it appeared clearly to exempt accountants actually engaged in the practice of their profession as employees of independent public accountants. The hearings were devoted to arguments of representatives of industry, whose problems were entirely distinct from those of professional practitioners.

Obviously the opinion as to a proper definition of "professional" of such organizations as Mid-Continent Oil and Gas Association, Oklahoma Stripper Well Association, Photographers' Association of America and Automatic Electric Company did not take into consideration the facts we have suggested in regard to the application of such definition to accountants actually engaged in the practice of their profession.

In view of these facts, the American Institute of Accountants believes that it may properly request the Administrator at this time to amend the delimitation of "professional" as proposed in this petition.

5. *The Delimitation is Invalid.*

Section 13 (a) of the act provides

> "The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator). . . ."

Whether or not a person is employed in a professional capacity depends on the nature of his services, and not upon his salary, and the words "defined and delimited" do not, we believe, authorize or permit the Administrator to require compensation at any fixed amount for inclusion in the professional class.

If the word "delimited" may permit in any case a requirement of compensation at a fixed amount, the figure of $200 is arbitrary as regards accountants who are employed by independent public accountants, since the $200 requirement excludes approximately one-half of these accountant employees and thus largely destroys the effect of the professional exemption granted in the statute.

We submit, therefore, that the regulation is in conflict with Section 13 (a) of the Fair Labor Standards Act of 1938, is issued without authority, and is invalid.

Inapplicability of Act to Employees of Accountants

Without regard to the professional exemption contained in the Act, it is the view of the accounting profession that employees of practising accountants are not "engaged in commerce or in the production of goods for commerce," and that not only employee accountants who receive less than $200 a month but all employees of accounting firms are completely outside the provisions of the Act. This point is not directly applicable to the present discussion, but it should be understood that by presenting

this petition for change in the regulations relating to the professional definition the Institute does not waive the point that no employees of practising accountants are within the Act, but expressly reserves this point for the benefit of its members.

Respectfully submitted,
AMERICAN INSTITUTE OF ACCOUNTANTS
By: C. OLIVER WELLINGTON,
President

Attest:
JOHN L. CAREY
Secretary

December 6, 1940