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THE FEDERAL WAGE AND HOUR LAW

By HERMAN A. WECHT*

Introduction

Twenty-nine and nine-tenths million of the 49.9 million wage and salary workers employed in August, 1950, in continental United States were subject to the provisions of the Fair Labor Standards Act of 1938, popularly known as the Federal Wage and Hour Law. Of these 29.9 million covered employees, approximately 9 million were exempt from both the minimum wage and overtime provisions of the act. The tremendous impact of this law upon every phase of our economy is emphasized when we consider that nation-wide it covers over 715,000 business establishments. Moreover, to anyone who has been following the advance sheets in the labor services and the court reports over the past ten years, it is plain that no other federal statute has been the subject of more litigation during this period. What does this mean to the practicing lawyer?

It means, first, that he is likely to be frequently consulted or confronted with questions in this field. Secondly, that questions which provoke such a huge volume of litigation are sufficiently complex and controversial to warrant careful study and research. Thirdly, that improper advice to a client could mean civil injunction, contempt action, or criminal prosecution by the government, or suit by an employee for double damages plus attorneys' fees and costs.

Coverage

This brief article could not possibly provide a full discussion of all the complicated issues of coverage and exemption from coverage under the act. It can only touch upon some of the highlights of the minimum wage, overtime, child labor and record-keeping problems found in the various provisions of the act. Indeed, a whole volume has been devoted to the problem of coverage alone.

The act has been highly controversial from the very beginning. Strong pressures for raising its standards and extending its benefits to larger numbers of workers have competed with demands for relaxation of its requirements, reduction of its coverage, and even outright repeal. These competing pressures are reflected in the compromises which constitute the Fair Labor Standards Amendments of 1949 which, for the most part, became effective on January 20, 1950. However, the

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2 See, Wage-Hour Law, Volume on Coverage by Wecht.
nature of these compromises and the legislative history of these amendments clearly indicate that federal wage and hour legislation is an established part of our political and economic pattern and will continue to play a significant part in the economic life of the nation. One more thing is clear. The 1949 amendments have upset the guide posts established by the Court after twelve years of stormy litigation since the original passage of the act in 1938 and have substituted new statutory language, the meaning of which is now being hotly debated and strongly contested in the state and federal courts of the nation. It has been said that even if the statute stands as now written for the next ten years, it is likely it will take at least that long before clear lines of demarcation will appear as to the effect of some of these recent amendments.

In adopting the Federal Wage and Hour Law in 1938 in a time of business depression, the Congress sought to use its interstate commerce powers to eliminate labor conditions detrimental to the health, efficiency and well being of workers and to eliminate unfair methods of competition based on these conditions. Accordingly, goods produced in violation of the provisions of the act are prohibited as "hot goods" from the channels of interstate commerce. It is important to keep these purposes in mind because the remedial nature of the statute with its humanitarian goals has been the basis of the liberal construction of coverage and the narrow interpretation of exemptions from coverage given to the act by both the Administrator and the courts.

Basic Standards

Although the business depression and labor surplus of 1938 were soon replaced with an expanding production to meet the demands of World War II and later of reconversion, proponents of the law have argued that because of the stabilizing effect of the basic standards established by the act, its usefulness had not ceased. What are these basic standards? They are three-fold:

1. A minimum wage of not less than 75 cents an hour.
2. Time and one-half pay for overtime after 40 hours (except as otherwise specifically provided).
3. A minimum age of 16 years for general employment (except for occupations declared hazardous and certain occupations outside of school hours).

It is important to remember that the act sets no limit upon the number of hours of work in which an employee may be engaged so long as the overtime provisions are met. It does not provide for different rates of pay for Sundays or holidays as such. Regardless of the number of employees in a firm, the act applies to all of them including home workers who are covered and not specifically exempt. This leads to the all-important question of what constitutes coverage under the act.
Applicability Of Act—Generally

An employer must meet the minimum wage and overtime requirements of the act for each of his employees who is engaged: (1) in interstate or foreign commerce; or (2) in the production of goods for such commerce; or (3) whose activities are “closely related” and “directly essential” to such production.

In determining whether the act is applicable in a given situation, it is important to bear in mind several fundamental principles. First, coverage under the act does not deal in a blanket way with industries as a whole. In the case of Walling v. Kirschbaum, 316 U.S. 517, one of the early cases decided by the Supreme Court, it was held that coverage is primarily an individual matter depending upon the nature of the employment of the particular employee. Thus, the same employer may have some covered and other not covered employees on the same payroll during the same work week. Second, coverage is not limited to employees working on an hourly wage basis. The act applies whatever the method of payment, whether hourly, weekly, piece work, monthly or any other basis. Each covered and non-exempt employee must be paid minimum wages at the rate of not less than 75 cents an hour. Overtime payments must be at the rate of not less than one and one-half times the “regular rate” at which the employee is actually employed and paid, except as specifically exempted. Third, the Supreme Court has made it clear that since the Federal Wage and Hour Law does not apply to activities which simply “affect commerce,” its coverage does not have as broad a sweep as that of the National Labor Relations Act. Fourth, the Administrator and the courts have adopted a “work week” test of coverage. This means that if in any work week an employee’s activities are subject to the act he is entitled to the benefits of the act for the entire work week. However, if the employee’s activities are completely localized during any one work week, he will not be considered covered by the act for that period of time. Fifth, employees are regarded as within the coverage of the act even though a very small proportion of the employer’s total business or the employee’s total activities can be described as engaging in commerce or the production of goods for commerce, so long as the covered activities are regular and recurrent. However, if the activities are only isolated or sporadic, there can be no claim of coverage for the employee.

Many problems of interpretation and much of the litigation under the statute arise not only from the general and inclusive definition in the act of such terms as “commerce” and “produced,” but also as to what are “goods” and what is “for commerce” within the meaning of the act.

Engagement In Commerce

“Commerce” is defined to mean “trade, commerce, transportation, transmission, or communication among the several states or between any state and


any place outside thereof." From this statutory definition it is apparent that the wage and hour provisions apply to employees in the telephone, telegraph, radio, motor transport, railroad, and shipping industries. It applies also to employees in such fields as banking, insurance, finance, and publishing which regularly utilize the channels of commerce. It must be kept in mind, of course, that many employees, notwithstanding their status as within the "in commerce" coverage of the act, are either partially or wholly excepted from the wage and hour provisions by such express statutory exemptions as those for railway, motor carrier, air line, pipe line, water transportation, small telephone exchange, small newspaper and similar employees.

Construction Activities

The original construction of instrumentalities of commerce has been considered not to be "engagement in commerce" within the meaning of the act as distinguished from the repair and maintenance and improvement of existing instrumentalities such as interstate highways, city streets, pipe lines, bridges, radio and television stations, and the like. It can be readily seen that the line between original construction of new facilities and the repair and reconstruction of existing facilities is frequently a very difficult one even for the courts to draw and will hinge upon the special facts in each case.

Employees of Wholesalers

Many employees in the distributive trades are also engaged "in commerce." In the leading case of Walling v. Jacksonville Paper Co., 317 U.S. 564, the Supreme Court held that the act applied to certain employees of a wholesaler who were engaged in distributing locally goods received from outside the state because "there was a practical continuity of movement from the manufacturers or suppliers without the state through respondent's warehouse and on to the customers whose prior orders or contracts were being filled." In this case the temporary holding of the goods at a warehouse did not stop the flow of interstate commerce nor is the circumstance of where and to whom the title passes material. Thus, employees who handle the clerical work with respect to goods shipped to or received from other states and who handle or deliver to local customers out-of-state goods pursuant to special orders or prior understandings are entitled to the benefits of the act. Application of this "practical continuity of movement" test of the Jacksonville Paper case readily indicates coverage of employees of chain stores, mail order houses and manufacturers' outlets.

Production of Goods For Commerce

In addition to the "in commerce" basis for coverage, employees are also covered if they are engaged in "production of goods for commerce." The term "produced" is defined in the act as "producing, manufacturing, mining, handling,

transporting or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof." This term "produced" brings within the coverage of the act all those employees actually engaged in production work on goods for commerce. It also includes, however, those employees engaged in "handling, transporting or in any other manner working on" goods. Thus it also includes the managerial, administrative, planning, research, maintenance, custodial, accounting, advertising, purchasing, sales, and clerical activities which are an integral part of the modern industrial enterprise. The Supreme Court has stated that employees who perform such functions "are actually engaged in the production of goods for commerce just as much as those who process . . . products."6

**Occupations "Closely Related And Directly Essential" To Production**

Employees who are not engaged actually in producing or in any other manner working on goods for commerce, will nevertheless be covered by the act if they are employed "in any closely related process or occupation directly essential to the production thereof." Under the original act such coverage of "fringe employees" extended to those engaged "in any process or occupation necessary to the production" of goods for commerce. There is no doubt that the change in language under the 1949 amendments substituting "closely related" and "directly essential" criteria for the "necessary" test, was intended to narrow the coverage of the act. But these new phrases are not susceptible to precise definition or application and there will be a countless number of borderline cases which must await court decision before authoritative answers can be secured as to the meaning of these new phrases.

**"Goods"—Defined**

The term "goods" as broadly defined in the act has been interpreted by the courts to mean not only articles of trade or tangible property, but to encompass such items as telegraph messages, newspapers, insurance contracts, stocks, bonds, and other commercial paper. It includes also such items as containers and wrapping materials, electric power and gas, and the by-products of other commercial goods such as scrap iron, waste meats, etc. Since the term "goods" is defined by the act to include "any part or ingredient thereof" the character of an original product as "goods" produced for commerce is not affected by the knowledge that the product is processed or changed in form by one or more processes before it leaves the state. For example, if a button maker sells his products locally to a shirt manufacturer with reason to know that the shirts will move in interstate commerce, the employees of the button maker are covered by the act. From this it is apparent that the goods produced by an employer need not always move out of the state in order to involve "production for commerce," and hence coverage under the act.

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Exemptions—Generally

The act provides numerous exemptions and exceptions which take a great variety of forms. Thus express exemption from the minimum wage and overtime standards does not necessarily mean that the employees in question are exempt from the record keeping and child labor requirements, and the converse is also true. Even the minimum wage and overtime exemptions vary greatly depending upon the specific type of work in which the employee is engaged. Some of the exemptions remove employees from both the minimum wage and overtime provisions such as the exemption for employees employed in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesmen as defined by the Administrator in regulations issued by him. Another important exemption of this type involves employees of retail or service establishments or retail-manufacturing establishments. Employees engaged in agriculture, employees employed within the "area of production" as defined by the Administrator, and in the seafood and fishing industries other than canning, and employees employed as seamen, are some of the other types of activities which afford complete minimum wage and overtime exemptions. Other exemptions remove employees from the overtime provisions of the act only, such as certain employees of motor carriers who are subject to regulations by the Interstate Commerce Commission. Other exemptions provide a partial exemption from overtime only, such as employees in industry which the Administrator has specifically found to be of a seasonal nature. Other exemptions merely relax the minimum wage standard. Some of the exemptions require a special certificate issued by the Administrator upon application made by an employer before advantage can be taken of the exemption. These include exemptions for learners, apprentices, messengers, handicapped workers, and for seasonal industries. In general, when an employee engages in both exempt and non-exempt activities during the same week, the exemption is defeated for the entire work week if the amount of non-exempt work is substantial. What is substantial? The Administrator has adopted, and the courts have generally accepted his standard that where the non-exempt activities occupy more than 20% of the employee's time in a given work week it is sufficient to defeat the exemption which may be otherwise applicable. It is important to remember that whereas basic coverage is consistently determined on the basis of the activities of the individual employee, certain exemptions are defined in terms of the nature of the employer's business or of the establishment in which the worker is engaged. Others, however, follow the general pattern of the statute and are phrased in terms of specific individual activities. The retail or service establishment exemption in Section 13 (a) (2) of the act falls into the former category. No exemption has been subject to wider interest and greater controversy. Because the Administrator and the courts gave this exemption a somewhat narrower construction than apparently had been intended by the Congress, the 1949 amendments attempted to liberalize the concept of retail selling previously developed and to transfer some sales for business purposes from the non-retail to the retail category. The extent of the change effected by
the new language of this exemption and the standards by which to determine what are "recognized as retail sales or services in a particular industry" have already been the subject of considerable litigation and it is clear that many more court decisions will be required before the meaning of this exemption is determined.

Overtime—Generally

The basic overtime standard of the act is defined in Section 7(a). It requires that every employee covered by the statute unless specifically exempted shall be paid for each hour of work in excess of 40 per week at not less than one and one-half times his "regular rate" of pay. Although this is a simply stated standard, it has raised more controversy and litigation than any other provision of the act. Litigation reached a climax with the Supreme Court's decision in Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, which involved the famous overtime-on-overtime controversy. It was this decision which was largely responsible for the provision in the 1949 amendments of statutory guides for determining "regular rate" from which overtime compensation must be computed. Section 7(d) of the amended act defines the term "regular rate" as including all remuneration for employment, with the exception of certain specified payments excluded under various sub-sections of Section 7(d). Aside from these statutory exclusions, the 1949 amendments appear to have left the basic principles for determining the "regular rate" which had been developed by the Administrator and the courts under the original act.

Computing Overtime

Alternative methods of computing overtime compensation are provided under certain conditions for (1) employees employed at piece rates; (2) employees performing two or more kinds of work for which different hourly or piece rates have been established; and (3) for employees whose overtime compensation is based on an established rate substantially equivalent to their average hourly straight time earnings. For those employees whose duties necessitate irregular hours of work, the act under Section 7(e), permits payment of overtime pursuant to a certain specified contract arrangement popularly known as a "Belo" type contract.

The following examples illustrate the various methods of computing "regular rate" when the ordinary methods of wage payment are used:

(1) Hourly Pay Basis of Computation.

"John A" is employed at $1.20 an hour and receives no other compensation for his services. That is his "regular rate" of pay, and he would receive 40 times that amount, or $48 for a week in which he worked 40 hours. If he worked 45 hours in a week, he would be entitled to an additional $9 for the 5 overtime hours at the rate of $1.80 an hour (one and one-half times his "regular rate"), or a total of $57 for that week.

(2) Piece-Work Basis of Computation.

For the employee who is employed on a piece-work basis, the regular hourly rate of pay is computed for each work week by dividing the
total piece-work earnings by the total number of hours worked for which such earnings were paid. For overtime work, the piece worker is entitled to be paid, in addition to piece-work earnings for the entire period, a sum equivalent to one-half the regular hourly rate of pay multiplied by the number of hours worked in excess of 40 in the week. Thus, "Helen B" is paid on a piece-work basis. In a week in which she works 45 hours and her piece-work earnings for these hours are $49.50, her regular hourly rate of pay would be $1.10 ($49.50 ÷ 45). But, for the 5 hours of overtime work she would be entitled to additional pay of five times one-half her regular hourly rate of pay, or an additional $2.75, which would bring her total earnings for that overtime week to $52.25.

As indicated above, the act provides an alternative method for the computation of overtime pay for piece workers.

(3) Weekly or Monthly Pay Basis of Computation.

When a salary is paid for a fixed or specified number of hours worked in a work week, the regular hourly rate is the weekly salary (or monthly salary reduced to a weekly basis) divided by the specified weekly number of hours. When a salary is paid for a variable or fluctuating number of hours per week; that is, whatever number of hours is worked in the work week, the weekly salary is divided by the number of hours actually worked each week, to obtain the "regular rate" of pay.

(a) Fixed work week. "Mary C" is paid $156 a month for a specified work week of 40 hours. Her equivalent weekly salary is $36 ($156 x 12 (months) ÷ 52 (weeks)) and her regular hourly rate is 90 cents ($36 ÷ 40).

In a work week in which she works 44 hours, she would be entitled to one and one-half times her hourly rate for the 4 overtime hours, or total pay of $41.40 for that week—$36 plus 4 hours at $1.35, or $5.40 additional.

(b) Variable of Fluctuating Work Week. "Henry D" whose hours fluctuate from week to week, is paid $50.00 for a work week of unspecified number of hours. One week he works 37 hours, the next 46, etc. Therefore, his regular hourly rate of pay changes weekly (although it cannot lawfully go below the act's minimum wage rate of 75 cents). In a week in which he works 50 hours, for instance, his regular hourly rate would be $1.00 ($50 ÷ 50) and his total pay would be $55.00 (the first 40 hours at $1.00, plus 10 hours at $1.50—or 50 hours at $1.00, plus 10 hours at 50 cents).

Compensable Working Time

Practical application of the act immediately raises the basic question of what constitutes "hours worked" for which payment must be made in compliance with the minimum wage and overtime standards. The original statute did not define compensable working time although Section 3(g) states broadly that to employ "includes to suffer or permit to work." Many questions and much controversy arose when employees claimed compensation for activities preliminary or postliminary to their principal duties, such as changing clothes, washing up
or traveling to and from their usual work place. In the decisions of 1944 and 1945 the Supreme Court held that time spent by iron ore and coal miners returning to the portal was time for which pay was due under the act, notwithstanding that neither contract nor custom recognized such time as compensable. In 1946 this principle was extended to a manufacturing plant in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680. These decisions provided a flood of law suits demanding "portal to portal" pay and these in turn led to enactment of the Portal to Portal Act of 1947, to provide a legal stop gap for these law suits.

To a large extent determination of time worked is now governed by Section 4 of the Portal to Portal Act supplemented by Section 3(o) of the act as amended in 1949. It is important to remember that neither the Portal to Portal Act, nor the 1949 amendments, affect the compensability of employees during their regular working hours. They exclude from the concept of "hours worked" those functions which come before or after the employees' "principal duties" unless such functions are compensable by contract, custom or practice. This necessitates a determination between principal and fringe activities and once again the line of demarcation is a very difficult one to draw and depends largely upon the facts in each case. Travel time, waiting time, time spent in meetings, lectures, and in instruction courses held outside normal working hours, grievance time, recesses and meal periods, time spent on call—all raise knotty problems involving the concept of "hours worked" and require careful study of the facts and application of the technical requirements of the law. It may be predicted safely that many determinations in this phase of the law will ultimately be made by the Supreme Court.

Child Labor Provisions

The "Child Labor" provisions of the Fair Labor Standards Act prohibit the employment of "oppressive child labor" in commerce or in the production of goods for commerce. Also prohibited is the shipment or delivery for shipment in interstate commerce by any producer, manufacturer or dealer of any goods produced in establishments in or about which "oppressive child labor" has been employed within 30 days prior to removal of the goods. "Oppressive child labor" is defined in Section 3(1). In general, the minimum age is 16 years but in certain hazardous occupations, such as driving a truck, or operating an elevator or power driven machinery, etc., the employee must be at least 18 years old. On the other hand, children as young as 14 may be employed in some non-manufacturing and non-mining occupations, subject to regulations of the Secretary of Labor. The employment of a child under 14 in any occupation is "oppressive child labor" unless specifically exempt by the act. Specific exemptions from the provisions of the Child Labor Act are provided for children employed in agriculture outside of school hours for the school district were the child is living; children delivering newspapers to the consumer; children employed as actors in motion picture or radio or television productions, and children under 16 years employed by their parents in other than hazardous occupations. A broad exception from the provisions of the
Child Labor Act is provided under specified conditions for certain purchasers acting in good faith in reliance upon written assurance from the producer, manufacturer or dealer that the goods were produced in compliance with the requirements of the "Child Labor" provisions of the act. To take advantage of this so-called good faith defense for innocent purchasers, an employer must have acquired the goods for value and without notice of any child labor violation.

Record-Keeping Requirements

A brief word about records. All employers subject to the act are required to make and preserve employment records in accordance with regulations issued by the Administrator. No particular order or form of records is prescribed by these regulations for employers generally. It is required only that an employer must make and keep clear, accurate and complete records of the wages, hours and other conditions and practices of employment maintained by him. Special provisions are contained in the regulations for records regarding employees to whom the various exemptions provided by the act are applicable and for home workers for whom a homework handbook is required to be kept by the employer. The records containing the information required by the regulations must be preserved for three years. In addition, the employer must preserve for a two-year period records of employment and earnings of employees which he uses as a basis for his wage and hour records, work time schedules, order shipping and billing records, and records of additions to and deductions from wages.

Accurate records are important to the employer as a protection against claims either by employees or the government that he has violated the act. Once his records are shown to be unreliable, he cannot use them as a defense to charges filed by present or former employees or the Administrator. Where records are concealed or receipts submitted to hide non-payment or kickbacks of wages or restitution, a number of employers have been indicted under the Federal False Information Act.

Conclusion

From the foregoing summary statement of some of the essential provisions of the Federal Wage and Hour Law, it can readily be seen that it affects an infinite variety of complicated industrial and other business situations which repeatedly present themselves in the every day work of the practicing lawyer. A few of the underlying concepts of the law, some of the "bread and butter" problems it presents, and some of the recent legislative changes have been touched upon. They should make one thing clear. The practitioner who fails to recognize these questions of coverage and exemption, of hours worked and travel time, of fixed and fluctuating work weeks, of overtime and record keeping, and of what constitutes "oppressive child labor" is inviting trouble for himself and for his client. He is asking for even more trouble if he fails to secure the proper answers to these questions.