September 21, 1959

Marion Martin, Commissioner — Labor and Industry

James Glynn Frost, Deputy Atty. Gen. — Attorney General

Minimum Wage Law

This memo is in response to your request of August 11, 1959, that we examine proposed rules and regulations relating to Chapter 30, sections 132-A to 132-J as enacted by Chapter 362, Public Laws of 1959, being the minimum wage law.

The general principles of law applied by the courts of this State to rules and regulations promulgated by an administrative agency are set forth in our memo to you dated August 31, 1959, and we offer the following comments based upon the principles in that memo.

R-1 (Sec. 132-B, III C) DEFINING AND GOVERNING WAITERS, WAITRESSES AND SERVICE EMPLOYEES EXEMPT.

R-1 establishes, by administrative rule, a presumption that any individual waitress and bellhop employed in a certain class restaurant or hotel dining room (year-round: minimum of $50,000 per year in sale and service of food to the public on premises; season: minimum of $30,000 per year) receive the major portion of his remuneration in the form of gratuities "and is, therefore, exempt."

The rule also creates a presumption that waitresses and bellhops who are employed by business establishments other than those above-mentioned do not receive the major portion of their remuneration in the form of gratuities.

It appears clear that this proposed rule is based upon the premise that exemptions are to be determined and granted by the Commissioner of Labor and Industry. As we pointed out in our opinion dated August 31, 1959, we believe exemptions are granted by statute, and not by administrative determination. In excluding waitresses from the definition of employees, the minimum wage law did not make such exclusion dependent upon the gross business of the employer, nor require certain evidence from one class of employers and not require it from another class. The only standard to be applied in ascertaining if a waitress is excluded from being counted as an employee is that standard supplied by the legislature: does she receive the major portion of her remuneration in the form of gratuities.

The standard above-mentioned is the rule to be applied by the Commissioner in determining whether or not the law is being violated, thereby requiring steps to be taken under the provisions of sections 132-G and H,I.

R-2 (Sec. 132-B, XII E) DEFINING AND GOVERNING EMPLOYEES REGULARLY ENROLLED IN AN EDUCATIONAL INSTITUTION, OR ON VACATION THEREFROM.

In relation to this rule, we would again draw to your attention the answer to question #2, contained in our opinion of August 31, 1959. The answer to that question, when applied to the proposed rules, indicate that Rule-2 Defining and Governing Employees Regularly Enrolled In An Educational Institution, or On Vacation Therefrom; Rule 5 Defining and Governing Tips, Gratuities and Commissions; Rule-9 Defining and Governing Records; are improper rules, for the reasons stated in that opinion. The over-all intent of the minimum wage law, and as particularly set out in sections 132-G and H, appears to deny to the Commissioner access to records for the purpose of enforcing the law, except upon receipt of a written complaint. Any rule requiring the submission of records would clearly be in conflict with the law, and we believe any rule specifying the nature of reports would be in conflict with the law. And as pointed out in our opinion of August 31, an administrative rule in conflict with a statute is invalid.

R-3 (Sec. 132-B, XII I) DEFINING AND GOVERNING BUSINESS OR SERVICE ESTABLISHMENT HAVING 3 OR LESS EMPLOYEES AT ANY ONE LOCATION.

The first part of this regulation sets forth certain classes of individuals not to be counted as employees:

1. Officers of a corporation.
   (We agree. Officers are generally employers when considered in a statute of this type, and are not the "wage-earners" whom the statute intends to benefit.)

2. Members of the family of the proprietor who are dependent upon and residing with the proprietor.
   (This rule is inconsistent with out answer to August 31, to question #7 which asked for an opinion on this situation.)

The second part of the rule sets up three alternative solutions to a situation where a business sometimes has 3 or more employees, and sometimes has 3 or less employees. We approve the last such alternative as being more nearly the proper rule:

> "For any day on which a business or service establishment employs four or more persons, all persons there employed shall be paid not less than the minimum wage of $1.00 per hour unless otherwise exempted, provided, however, that such business or service establishment shall be exempt from payment of the minimum wage on day that 3 or less employees are employed."

See answer to question #8, opinion dated August 31.

This proposed rule would more properly be utilized as an administrative opinion or interpretation of the law, than as a rule and regulation. It is a guide to help you determine whether an action under the law would be appropriate. As noted in our opinion of August 31, a proper rule and regulation is a law, and would be considered as such by a court. The nature of this proposed rule is such that it is merely an interpretation which might be accepted or rejected by a court, depending upon the court's judgment of what the legislature intended.

The same can be said of Rule-10 Defining and Governing Hours Worked.

R-4 (Sec. 132-B, V) DEFINING AND GOVERNING REASONABLE VALUE OF BOARD AND LODGING.

This Rule must have for its basis section 132-B, V, of Chapter 30, as enacted by Chapter 362, Public Laws 1959.

> " "Wages" paid to any employee includes compensation paid to such employee in the form of legal tender of the United States, checks on banks convertible into cash on demand, and also includes the reasonable cost, which shall be consistent with the rules and regulations as set forth by the Employment Security Commission, to the employer of furnishing such employee with board, lodging or other facilities as are customarily furnished by such employer to his employees and used by employees, provided that in the computation of such wages there shall be included tips, gratuities and commissions of every kind." (Underline ours)

The proposed rule as outlined is inconsistent with the rules and regulations as set forth by the Employment Security Commission, in that it goes beyond those rules and regulations in defining the nature of the meal, and the nature of the lodging facilities.

We are of the opinion that a rule and regulation relating to cost to the employer of furnishing board and lodging to employees, drawn consistently with the rules and regulations promulgated by the Employment Security Commission, would be a proper rule and regulation.

R-5 (Sec. 132-B, V) DEFINING AND GOVERNING TIPS, GRATUITIES AND COMMISSIONS.

This is covered in our discussion of Rule-2.

R-6 (Sec. 132-D) DEFINING AND GOVERNING HANDICAPPED WORKERS.

We are of the opinion that this proposed rule and regulation is proper.

R-7 (Sec. 132-E) DEFINING AND GOVERNING APPRENTICES.

With the exception of that portion of the proposed rule that provides that the Maine State Apprenticeship Council must give its approval to a wage to an apprentice of less than $1.00 per hour, we approve the proposed rule and regulation. The law states that the Commissioner may fix a wage less than the minimum for an apprentice, after compliance with certain requirements, and does not provide for the consent of the Apprenticeship Council to such action.

R-8 (Sec. 132-E) DEFINING AND GOVERNING LEARNERS.

We are of the opinion that this proposed rule and regulation is proper.

R-9 (Sec. 132-H) DEFINING AND GOVERNING RECORDS.

This proposed rule is covered in our discussion of Rule-2.

R-10 DEFINING AND GOVERNING HOURS WORKED.

This proposed rule is covered in our discussion of Rule-3.

Frank E. Hancock
Attorney General

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