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G. STEVEN ROWE
ATTORNEY GENERAL

Telephone: (207) 626-8800
TDD: (207) 626-8865

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES:
84 HARLOW ST., 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

44 OAK STREET, 4TH FLOOR
PORTLAND, MAINE 04101-3014
TEL: (207) 822-0260
FAX: (207) 822-0259
TDD: (877) 428-8800

128 SWEDEN ST., STE. 2
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

March 8, 2001

Donald F. Fontaine, Esq.
Fontaine & Beal, P.A.
482 Congress Street
P.O. Box 7590
Portland, Maine 04112

Dear Mr. Fontaine:

This letter is in response to your letter dated January 4, 2001, in which you provide legal research and argument disputing the conclusions reached in a memorandum by an Assistant Attorney General dated April 22, 1966. Upon review of the case law that you sent and the memorandum, I agree that the memorandum appears to be outdated in light of the case law that has developed since it was written in 1966. Moreover, the Fair Labor Standards Act ("FLSA") permits states to set more stringent standards regarding overtime wage provisions than the FLSA. See 29 U.S.C. §218(a) and Pettis Moving Co. v. Lillian Roberts, 784 F.2d 439, 441 (2nd Cir. 1986).

A memorandum authored and signed by an Assistant Attorney General is not an opinion formally issued by the Attorney General under 5 M.R.S.A. § 195. However, this memo (and others like it on a variety of topics) is kept in the notebooks which contain the formal opinions. Accordingly, I will append a copy of this letter to the memorandum issued on April 22, 1966 to notify the public that it is no longer the view of this office.

Sincerely,

LINDA M. PISTNER
Chief Deputy Attorney General

Printed on Recycled Paper

April 22, 1966

Madge E. Ames — Labor and Industry

Phillip M. Kilmister, Assistant — Attorney General

The overtime payment provision of the state minimum wage law and certain employees of interstate motor carriers.

FACTS:

Confusion has arisen over the applicability of the overtime payment provision of the minimum wage law of the State of Maine, 26 M.R.S.A. § 664, to those employees of interstate motor carriers whose maximum hours of employment and qualifications pertaining thereto are subject to determination by the Interstate Commerce Commission.

The following opinion represents the final opinion of this office on this subject and in effect represents nothing more than a projected calculation of how a court would rule on the applicability of the state overtime payment provision to the employees under discussion.

ISSUE:

Does the overtime payment provision of the state minimum wage law (26 M.R.S.A. § 664) apply to those employees of interstate motor carriers whose qualifications and maximum hours of service are subject to regulation by the I.C.C.?

ANSWER:

No.

OPINION:

Briefly stated, the overtime payment provision of the state minimum wage law, 26 M.R.S.A. § 664 provides that an employer must pay his employees 1½ times their regular rate of pay for all work done in excess of 48 hours in any one week. Certain employees are exempt from coverage under this overtime payment provision such as employees who work in sardine plants and certain agricultural workers, to name but a few. There is no express provision exempting an employee of an interstate carrier such as a truck driver or a helper, with respect to whom the I.C.C.

has the exclusive power to establish qualifications and maximum hours of service however.

When analyzing a state's overtime payment statutes, it is also necessary to look at the comparable provisions of the federal law.

29 U.S.C.A. § 207 (a) (1) (Fair Labor Standards Act) provides in part:

> "Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; . . . ."

Employees in the State of Maine who work for interstate motor carriers, if not exempt from the terms of 207 (a) (1), would therefore receive overtime pay at 1½ times their regular rate of pay for all hours worked in excess of 40 hours in a week. The Maine law (26 M.R.S.A. § 664) would not apply because it is less favorable to the employee. However if the State of Maine were to revise its present overtime provision to provide for payment of time and one half for all hours worked in excess of 39 hours per week then the Maine law would apply. This is so because where employees are subject to the terms of F.L.S.A. they are also subject to the more favorable terms of similar state legislation should the latter exist.

29 U.S.C.A. § 218 (F.L.S.A.) provides that:

> "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter; . . . ."

However, certain employees of interstate carriers clearly are exempt from coverage under the Fair Labor Standards Act as far as overtime payment is concerned.

29 U.S.C.A. § 213 (b) (1) (F.L.S.A.) states:

> "The provisions of section 207 of this title (1½ times regular rate of pay for work in excess of 40 hours per week) shall not apply with respect to -
>
> (1) any employee with respect to whom the Interstate Commerce Commission has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49 U.S.C.A.; . . . ."
>
> "The Commission has power to establish maximum hours of service for employees of interstate motor carriers whose activities affect safety of operation; and such employees are exempt from the overtime provisions of the Fair Labor Standards Act (29 U.S.C.A. § 207 (a) (1), but the Commission does not have such power over employees whose activities do not affect safety of operation." Tobin v. Mason & Dixon Lines, 102 F. Supp. 466.

There is no need to cite extensive case law defining the employees covered, i.e., whether the work of certain employees is sufficiently connected with safety of operation or not so as to come within the terms of exemption. It is well established that the categories of employees exempted under, 213 (b) (1) F.L.S.A. are drivers, drivers helpers, loaders and mechanics.

It does not follow that the above-designated employees, although exempt from the overtime payment provision of the F.L.S.A., automatically fall under the umbrella of state overtime payment provisions however. Indeed an opposite conclusion seems imperative since the determination of the qualifications and maximum hours of work of these employees is specifically placed under the jurisdiction of the Interstate Commerce Commission.

Certainly if the State of Maine were to enact legislation setting up maximum hours of service for drivers of motor carriers it would not apply to those drivers who are engaged in interstate commerce. Congress did not intend to have the states share jointly with the I.C.C. the power to regulate interstate commdrce, or the power to establish qualifications of employment for the above-designated employees engaged therein.

By recognizing that where the responsibility for the regulation of hours of employment of certain employees of interstate motor carriers rests with the I.C.C. that its own overtime payment provision (207 (a) (1) F.L.S.A.) should not apply, <u>can it be logically argued that Congress intended that the individual states should be free to enact laws which would govern the overtime pay of these very same employees</u>?

Although it cannot be said that the power to establish maximum hours of service and qualifications pertaining thereto and the power to establish overtime payment provisions are absolutely synonymous, the fact remains that the two are part and parcel of the same package.

We cannot believe that Congress intended to deny each of the 50 states the power to enact laws governing the maximum hours of employment and qualifications pertaining thereto in regard to certain employees, and at the same time to allow the individual states to enact overtime payment laws relative to the hours of employment of said employees.

One purpose for the imposition of overtime wages is to discourage employers from demanding excessive hours of work from employees, thereby endangering the health and safety of the latter. Where the health and safety of employees are adequately protected by regulations promulgated by the I.C.C. however, this purpose of overtime payment is greatly weakened.

Certainly there are other reasons for the imposition of overtime wage rates, such as the creation of more job opportunities by limiting the number of hours of labor of those workers presently employed. This can easily be accomplished in certain industries. However, the revision of hours of employment of the above-designated employees would be most difficult for an interstate motor carrier, and in some instances, impossible.

In conclusion we do not entirely dismiss the possibility of a different interpretation as to the applicability of the terms of 26 M.R.S.A. § 664 to the employees under discussion. In the absence of any case law specifically upholding or rejecting the applicability of a state overtime payment provision to said employees, we can only predict the conclusion which we believe a court would reach in determining the issue presented.

Phillip M. Kilmister
Assistant Attorney General

PMK/sll