

U.S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS

FD

March 12, 1970

WASHINGTON, D.C. 20210



21 AB 102
201
104.41
21 AC 451.291

Reply to
Attn of:

Subject:

To:

This is in further reply to your letter of December 2, 1969, in which you raised the issue whether the bank, or the particular estate, trust, or guardianship, is regarded as the employer, under the Fair Labor Standards Act, of persons employed to care for and maintain trust property in those cases where the bank has accepted appointment as, and to act in the fiduciary capacity of, an executor, or a trustee, or a guardian.

The employer-employee relationship which is a prerequisite to the application of the minimum wage and overtime provisions of the statute is defined in sections 3(d), 3(e) and 3(g) of the statute. You will note that section 3(g) provides that "employ" includes "to suffer or permit to work", and section 3(d) defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee. . .".

Although the facts contained in your letter are not sufficient for us to give you a definite answer to the situations you describe, it is our opinion that where a bank, acting in the capacity of an executor, a trustee, or a guardian and entrusted with the care, management, or disposition of the property of an estate, a trust or a ward, or where its officers or other personnel of its trust department selects and hires and/or supervises and pays persons to operate and/or maintain the trust property, it is acting in the capacity of an employer under the Fair Labor Standards Act, with respect to the persons so engaged, even though such individuals were not initially hired by the fiduciary, the bank, and even though checks to meet the payroll and other expenses are drawn on the trust account.

Similarly, a guardian might deem it necessary to hire attendants to look after the property of an incompetent ward. In such cases, the bank, being the trustee, and charged with the duty of managing the affairs of the ward's estate would be regarded as the employer. Accordingly, in view of the fact that managing the affairs of a trust, estate, or guardianship is an integral part of the bank's business for which it charges a fee, coverage of the employees employed by the trustee would depend on whether the bank as a whole was a covered enterprise and not on the nature of the particular estate, trust, or guardianship.

On the other hand, the Department would not assert that persons engaged by the guardian to serve the personal needs of an incompetent ward are engaged in covered employment. It is unlikely that such individuals are engaged in interstate commerce or in the production of goods for such commerce, nor is it likely that the guardianship (of the person as distinguished from managing the property of the ward) would qualify as a covered enterprise within the tests of section 3(s)(1) of the Act. Furthermore, it would not appear that the activities of the personal servants of the incompetent would constitute related activities performed through common control or unified operation for a common business purpose with the property maintenance and management activities of the bank enterprise. The personal servants' activities are performed for a different purpose than the other activities of the bank. Their activities are performed primarily to meet the personal needs of the incompetent ward rather than the business needs of either the ward or bank. This is so even though the employees so engaged are employed by the bank.

In other words, if as we have previously stated in other contexts, an individual can be engaged in activities so unrelated as not to be included in the same "enterprise", so also may a bank. The business functions involved in the maintenance and management of property would seem to be unrelated to the care and feeding of a physically helpless or mentally incompetent person.

If you have any further questions concerning the application of the Fair Labor Standards Act you may wish to contact the WHPC Divisions' District Office at Federal Office Building, 1240 E. Ninth Street, Cleveland, Ohio 44199. That office will be pleased to give you every possible assistance.

Sincerely,

ROBERT D. MORAN

Robert D. Moran
Administrator