

FLSA-644

April 16, 1979

This is in reply to your recent correspondence on behalf of *** concerning employment contracts that he has with his employees.

*** states that as a condition of employment, employees are required to sign a contract agreeing to give him two weeks' notice before terminating their employment. If the employees fail to give this notice before leaving the company, they are to pay liquidated damages at the time of termination.

We have considered your constituent's comments under the provisions of the Fair Labor Standards Act, the Federal law of most general application concerning wages and hours of work. The major highlights of this law concerning wage payments are contained in the enclosed copy of 29 CFR Part 531 which you may wish to send to ***.

This law requires that all covered and nonexempt employees be paid at least a minimum wage of \$2.90 an hour for all hours worked and overtime pay of one and one-half times the regular rate of pay for all hours worked over 40 in the workweek. Such deductions as described above are illegal to the extent that they reduce the wage of the employees below the minimum wage required by the Act or reduce the amount of overtime compensation due under the Act. This is discussed in sections 531.36 and 531.37 of the enclosed bulletin.

Wages cannot be considered to have been paid by the employer unless they are tendered finally and unconditionally or "free and clear". The wage requirements of the Act are not met where the employee "kicks back" directly or indirectly to the employer or to any person for the employer's benefit the whole or any part of wages which have been delivered to the employee. This principle is discussed in section 531.35 of the enclosed bulletin. See also Walling v. Peavy Wilson Lumber Co., 49 Supp 846 wherein the court said "A voluntary agreement to permit excessive deductions is no more valid than a direct agreement to accept less than the minimum wage. Voluntary agreements between employer and employee which are prohibited by or inconsistent with the provisions of the law are illegal. Mayhue Super Liquor Store, Inc. v. Hodgson, 20 WH Cases 803, the Court stated that an agreement to return wages to the employer "tended to shift part of the employer's business expense to the employees and was illegal to the extent that it reduced an employee's wage below the statutory minimum. This amounts to nothing more than an agreement to waive the minimum wage requirements of the Fair Labor Standards Act". The Court also stated that "... if the intent of the parties were to make repayment purely voluntary on the part of the employee, an agreement would not be necessary. The agreement would be pointless. Yet the employer requires the execution of the agreement as a condition of employment.... It overrides any agreement that the repayments are voluntary on the part of the employee".

It is our opinion that employees who must execute liquidated damage payments to an employer as a condition of employment, in the instant case as much as \$115.00 for failing to give two weeks' notice prior to employment separation, are denied the protection of the Act when such payments reduce the employees' wages below the minimum standard established by the Act.

Sincerely,

Xavier M. Vela
Administrator

Enclosure