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U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
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WAGE-HOUR COUNSEL WARNS ON OVERTIME EVASION

Continuing to pay the same salary now paid workers for a 44-hour week after October 24 will be a violation of the Fair Labor Standards Act, even though the employer makes a show of compliance through bookkeeping manipulations, General Counsel George A. McNulty of the Wage and Hour Division, U. S. Department of Labor, warned in a memorandum made public today.

On October 24 the statutory minimum wage for all workers engaged in interstate commerce or in work necessary to the production of goods for interstate commerce is raised to 30 cents an hour; and at the same time the standard workweek, after which overtime at time and one-half the regular rate of pay must be paid, is reduced to 42 hours. Mr. McNulty's memorandum points out the illegality of adopting a bookkeeping rate for the purposes of the overtime provisions of the Wage and Hour Law and a different rate for actual payment.

"The Act requires that overtime must be paid at the rate of time and one-half the 'regular rate' of pay at which the employee is employed," Mr. McNulty wrote. "Time and one-half must be paid upon the rate at which the employee is actually employed and paid, and not upon a fictitious rate which the employer adopts solely for bookkeeping purposes."

These practices are violations of Section 7 and as such will subject the employer to the penalties prescribed in the Act, Mr. McNulty wrote.

The opinion of the Office of the General Counsel on manipulation of rates of pay to avoid the effect of the overtime requirements of the Fair Labor Standards Act follows in full:

"On October 24 the Fair Labor Standards Act will require that every employee subject to its provisions receive time and a half overtime compensation for all hours worked in excess of 42 hours in any workweek. Anticipating the

42-hour week, many employers have written to the Division setting forth a variety of methods by means of which they hope to work their employees the same number of hours presently worked (in excess of 42) without paying them any more than they are now paid. This opinion deals with the legality of these various plans to avoid the effect of the 42-hour week. The opinion is equally applicable, however, to any plans now being used to avoid the effect of the 44-hour week.

"Section 7 of the Act requires that overtime must be paid at the rate of time and one-half the 'regular rate' of pay at which the employee is employed. Time and a half must, therefore, be paid upon the rate at which the employee is actually employed and paid and not upon a fictitious rate which the employer adopts solely for bookkeeping purposes. An examination of the methods suggested by employers as a means of continuing to work overtime hours without any increased wage bill will demonstrate the illegality of adopting a bookkeeping rate for purposes of the Wage and Hour Law and a different rate for any other purpose. Resort to these methods will constitute a violation of Section 7 and will subject the employer to the penalties prescribed in the Act.

"I. Salaried Employees

"It is clear that an employer will violate the Act if he simply pays no attention to its requirements next October 24 but continues to work his employees the same number of hours (in excess of 42) they now work for the same salary they now receive. In our opinion an employer who will continue to work his employees in excess of 42 hours after October 24 for the same salary they now receive but who takes the trouble to manipulate the rates of pay in order to adopt a rate upon which he may calculate the time and a half, without incurring any additional labor cost, stands in no better position than the employer who simply and frankly disregards the overtime requirements of the Act.

"Employers have proposed two principal methods of avoiding overtime payment to salaried employees. The employer, by one plan, will announce that henceforth the employee is employed either at the rate of 30 cents an hour or at an hourly rate in excess of the minimum. But each week the employer will pay the employee a 'bonus' to make up the fixed salary. Obviously, the employee will not actually be paid at the rate adopted by the employer for overtime calculation. His regular rate of pay for overtime purposes must be based on the total weekly earnings including the bonus.

"The employer eliminates the 'bonus' feature in the second method. If the employee works an irregular number of hours the employer proposes to adopt a different rate each week upon which to compute overtime. Each week the employee's earnings, on the basis of the adopted rate for 42 hours and time and a half such rate for the excess hours will equal or approximately equal the fixed salary. Thus, for example, if an employee, during the course of a month, works 43, 46, 52 and 48 hours respectively, the employer, to continue paying him $21 weekly, will adopt 48 cents, 44 cents, 37 cents and 41 cents as the respective rates of pay. Obviously, these rates are pure bookkeeping figures and the regular rate of pay on which overtime must be paid will be determined by dividing the $21 weekly salary by the hours worked each week.

"If the employee works a regular number of hours, the employer proposes to adopt a rate, which for 42 hours and at time and a half such rate for the hours in excess of 42, will yield the present earnings. The fact that the computations on the adopted rate will produce a figure equal to the employee's present total compensation cannot obscure the real situation. This employer will be in no better position than the employer who proposes to adopt the minimum wage as the overtime rate with a 'bonus' scheme, or to juggle the rates from week to week. This employer seeks to adopt one rate for overtime purposes, but will expressly or impliedly guarantee his employees another -- based upon the weekly salary. The

regular rate of pay on which overtime must be based will be determined by dividing the weekly salary by the regular number of hours worked.

"II. Hourly Rate Employees

"The employer will announce that he is 'reducing' the hourly rate of all his employees to 30 cents an hour for the first 42 hours and 45 cents for the hours in excess of 42. However, he will guarantee to each employee a weekly amount not less than the amount presently paid. Obviously, the adopted rate of 30 cents is a fictitious, bookkeeping entry, which does not change the employees' regular rate of pay.

"The case is no different where the rate adopted will not be the minimum but will be a rate which, with time and a half for overtime, will yield approximately the same weekly earnings for the regular number of hours worked. Employees will not generally consent or acquiesce when the employer purports to reduce the rates unless they are assured they will not lose any pay but will continue to receive their present earnings. When the employees are given this assurance, expressly or impliedly, they are receiving an express or implied guarantee of their present earnings and their true rate of pay remains unchanged. In the absence of an express or implied guarantee, the question will be whether the employer has actually reduced the regular rate of pay. Will the employee be paid at the adopted rate or at his present rate when he does not work the full number of hours? If he is paid at his present rate, in such case, then the adopted rate is not his regular rate of pay but only a rate upon which the employer computes overtime on his books. It cannot, therefore, be the regular rate of pay upon which time and a half must be based.

"III. Pieceworkers

"An employee is now employed on a piece-rate basis. The employer will announce that henceforth the employee will be employed at an hourly rate of 30

cents an hour for 42 hours and 45 cents an hour for all hours in excess of 42, although the employee will continue to receive his full piecework earnings at the present piece-rates. Obviously, 30 cents is not the regular rate of pay; it is not the rate at which the employee is actually paid. The case is no different if the employer adopts a rate in excess of the minimum. So long as the employer continues actually to pay at the piece rates now in effect, the regular rate of pay will be determined by dividing the piecework earnings by the hours worked each week, and the employee will be entitled to time and one-half that rate for hours worked in excess of 42.

"IV. Section 18*

"Much has been heard about Section 18 in connection with the plans just set out. But Section 18 does not enter into the picture, except to reinforce the opinions just expressed as to what Congress intended by the words 'regular rate' of pay in Section 7. It may be helpful, however, to discuss briefly some of the situations to which Section 18 is meant to apply.

"By enacting Section 18, Congress primarily intended to discourage the possible tendency that the minimum wage fixed in the Act will become the maximum wage paid by employers. Thus, an employer who cuts the wages of his employees earning in excess of the minimum to avoid an increase in total labor cost due to the fact that he must raise the wages of many of his employees to 30 cents an hour, will violate Section 18. Section 18 was also intended to expressly allay the fears of labor that employers who are bound by contract to maintain higher wage and hour standards than those fixed in the Act, would use the Act as an excuse not to perform their contracts. Where the employer is under contract, the employees have no need to rely upon Section 18. Nothing in the Act relieves an employer from

* "'No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.'"

any obligation he may have assumed by contract to maintain standards higher than those fixed in the Act. Section 18 removes every possible doubt on this score. The employees may proceed to enforce their contract rights."

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