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INTERPRETATIVE BULLETIN

NO. 3

GENERAL STATEMENT AS TO THE METHOD OF PAYMENT UNDER THE FAIR LABOR STANDARDS ACT AND THE APPLICATION OF SECTION 3(m) THERETO

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UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

OFFICE OF THE ADMINISTRATOR

* This represents a complete revision of both the form and substance of the bulletin. Paragraphs 6, 7 and 8 of the old bulletin have been materially revised, clarifying changes have been made in other paragraphs, and new paragraphs have also been added.

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GENERAL STATEMENT AS TO THE METHOD OF PAYMENT UNDER THE FAIR LABOR STANDARDS ACT AND THE APPLICATION OF SECTION 3(m) THERETO

1. Various federal, state and local legislation requires the payment of wages in cash; prohibits or regulates the issuance of scrip, tokens, credit cards, "dope checks" or coupons; prevents or restricts payment of wages in services or facilities; controls company stores and commissaries; outlaws "kick-backs"; restrains assignment and garnishment of wages; and generally governs the calculation of wages and the frequency and manner of paying them. Where such legislation is applicable and does not contravene the requirements of the Fair Labor Standards Act of 1938, nothing in the act, the regulations or the interpretations announced by the Administrator should be taken to override or nullify the provisions of these laws.

The following discussion deals only with the independent requirements of the Fair Labor Standards Act. This bulletin will set forth the interpretations which will guide the Administrator in the performance of his duties unless he is directed otherwise by authoritative rulings of the court, or unless he should subsequently decide that his prior interpretation has been incorrect. It is to be noted, nevertheless, that the Supreme Court has recently held that the interpretations expressed in bulletins of this division are entitled to great weight. 1/

Methods of Payment

2. From October 24, 1938 through October 24, 1939 employees subject to the wage and hour provisions of the act were entitled to receive at least 25 cents per hour and not less than one and one-half times their regular rate of pay for hours worked in excess of 44 during a single workweek. Since October 24, 1939, such employees have been entitled to receive at least 30 cents per hour and not less than one and one-half times their regular rate of pay for hours worked in excess of 42 during a single workweek. On October 24, 1940, the overtime rate will begin after 40 hours have been worked during a single workweek. A higher hourly rate of pay has been or may be established in some industries by wage orders issued under section 8 of the act. 2/

1/ United States v. American Trucking Associations, Inc., et al., decided May 27, 1940.

2/ The general wage and hour provisions of the law are subject to qualifications contained in sections 7(b), 7(c), 13 and 14. See Interpretative Bulletins 6-12 and 14. The illustrations employed in this bulletin are based on the present minimum wage of 30 cents and the overtime standard of 42 hours per week.

3. Standing alone, sections 6 and 7 of the act require payment of wages and overtime compensation in cash or negotiable instrument payable at par. Section 3(m) provides that the "'wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees." It is section 3(m) which permits and governs the payment of wages in other than cash.

Although it may be argued that because the term "wage" does not appear in section 7, all overtime compensation must be paid in cash and may not be paid in board, lodging or other facilities, there appears to be no evidence in either the statute or its legislative history which demonstrates the intention to provide one rule for the payment of the minimum wage and another rule for the payment of overtime compensation. In the interest of administrative convenience, at least for the present, the same principles will be held equally applicable to payment of the minimum wage under section 6 and payment of overtime compensation under section 7. 3/ Thus, in determining whether he has met the minimum wage and overtime requirements of the act, the employer may credit himself with the reasonable cost to himself of board, lodging or other facilities customarily furnished by him to his employees.

4. Scrip, tokens, credit cards, "dope checks," coupons and similar devices are not proper mediums of payment under the act. They are neither cash nor "other facilities" within the meaning of section 3(m). However, the use of such devices for the purpose of conveniently and accurately measuring wages earned or facilities furnished during a single pay period is not prohibited. Piece work earnings, for example, may be calculated by issuing tokens (representing a fixed amount of work performed) to the employee which are redeemed at the end of the pay period for cash. The tokens do not discharge the obligation of the employer to pay wages, but they may enable him to determine the amount of cash which is due to the employee. Similarly, board, lodging or other facilities may be furnished during the pay period in exchange for scrip or coupons issued prior to the end of the pay period. The reasonable cost of furnishing such facilities may be included as part of the wage, since payment is being made not in scrip but in facilities furnished under the requirements of section 3(m). But the employer may not credit himself with "unused scrip" or "coupons outstanding" at the pay day in determining whether he has met the requirements of the act because such scrip or coupons have not been redeemed for cash or facilities within the pay period. Similarly, the employee cannot be charged with the loss or destruction of scrip or tokens.

3/ Unless the context clearly indicates otherwise, the term "wage" is used in this bulletin to designate the amount due under either section 6 or section 7 without distinction.

5. Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the act will not be met where the employee "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash.

Applicability of Section 3(m) and Part 531 of the Regulations

6. Section 3(m) applies to both of the following situations: (1) where board, lodging or other facilities are furnished in addition to a stipulated wage; and (2) where charges for board, lodging or other facilities are deducted from a stipulated wage. The use of the word "furnishing" and the legislative history of section 3(m) clearly indicate that this section was intended to apply to all facilities furnished by the employer as compensation to the employee, regardless of whether the employer calculates charges for such facilities as additions to or deductions from wages.

7. It appears to have been the clear intention of Congress to protect the basic minimum wage and overtime compensation required to be paid to the employee by sections 6 and 7 of the act from profiteering or manipulation by the employer in dealings with the employee. Section 3(m) and Part 531 of the Regulations, issued under the authority contained in that section, accordingly prescribe certain limitations and safeguards which control the payment of wages in other than cash. These provisions, it should be emphasized, do not prohibit payment of wages in facilities furnished either as additions or deductions; they prohibit only the use of such a medium of payment to avoid the obligations imposed by sections 6 and 7.

(a) Thus, when no overtime is worked by the employee, section 3(m) and Part 531 of the Regulations are applicable only to the minimum wage of 30 cents per hour for each hour worked. To illustrate, where an employee is employed at a rate of 50 cents per hour for 42 hours and receives $15 in cash free and clear at the end of the workweek, and in addition receives facilities valued at $6, no consideration need be given to the question of whether such facilities meet the requirements of section 3(m) and the regulations, since the employee has received in cash more than the statutory minimum wage of 30 cents for each hour worked. Similarly, where the employee is employed at a salary of $21 for a 42 hour week and the employer deducts $6 from his wages for facilities, whether such deduction meets the requirements of section 3(m) and the regulations need not be considered, since the employee is still receiving, after the deduction has been made, a cash wage in excess of 30 cents per hour. Where the employee receives only $10 in cash, however, and facilities valued at $11 are furnished to him by way of additions or deductions, such facilities must be measured by the requirements of section 3(m) and Part 531 of the Regulations to determine if the employee has received the minimum of $12.60 in cash or in facilities which may legitimately be included in "wages" payable under the act.

(b) Where overtime is worked and the employee receives the whole or part of his wage in facilities, all such facilities must be measured by the requirements of section 3(m) and Part 531 of the Regulations. To illustrate, where an employee is employed at a rate of 50 cents per hour for 42 hours but during a particular workweek works 48 hours, he will be entitled to an additional $4.50 as overtime compensation, or a total of $25.50. 4/ At the end of the workweek the employee is paid this total aggregate amount, of which $18.50 is delivered in cash free and clear and $7 is represented by facilities. Any profit which is retained by the employer in furnishing such facilities, or any charge for items not authorized by section 3(m) correspondingly reduces the employee's total wages. To establish that there has been no violation of either section 6 or section 7, it must be demonstrated that the facilities furnished as part of the wage meet the requirements of section 3(m) and Part 531 of the Regulations. Thus, if the "reasonable cost" to the employer of supplying the employee with legitimate facilities was $7, there has been no violation of the act.

Board, Lodging or Other Facilities

8. The reasonable cost of board, lodging or other facilities may be considered as part of the wage paid an employee only where customarily "furnished" to the employee. Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced. 5/

9. The reasonable cost of board, lodging or other facilities may be considered as part of the wage paid an employee only where "customarily" furnished to the employee. In the interest of administrative convenience, at least for the present, it will be considered a sufficient satisfaction of this requirement if the facilities were furnished by the employer, to his employees, before the effective date of the act, or if the same or similar facilities were customarily furnished by other employers engaged in the same or similar trade, business or occupation in the same or similar communities. Facilities furnished in violation of any federal, state or local law, ordinance or prohibition will not be considered "customarily" furnished.

10. "Other facilities," as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: meals furnished at company restaurants or cafeterias; general merchandise furnished at company stores and commissaries (including articles of food, clothing and household effects); fuel (including coal, kerosene, firewood and lumber slabs), electricity, water and gas for the noncommercial personal use of the employee.

4/ The calculation of overtime compensation is explained in Interpretative Bulletin No. 4.

5/ See Williams v. Atlantic Coast Line Railroad Company (D.C.E.D.N.C.) decided February 17, 1940.

Shares of capital stock in an employer company, representing only a contingent proprietary right to participate in profits and losses or in the assets of the company at some future dissolution date, do not appear to be "facilities" within the meaning of the section.

It should also be noted that under section 531.1(c) of the Regulations, Part 531, "the cost of furnishing 'facilities' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages." Items in addition to those set forth in section 531.1 of Part 531 of the Regulations which have been held to be primarily for the benefit or convenience of the employer and are not therefore to be considered "facilities" within the meaning of section 3(m) are: safety caps, explosives and miners' lamps (in the mining industry); electric power (used for commercial production in the interest of the employer); company police and guard protection; taxes and insurance on buildings of the employer; "dues" to chambers of commerce and other organizations used, for example, to repay subsidies given to the employer to locate his factory in a particular community; transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad); charges for rental of uniforms where the nature of the business requires the employee to wear a uniform; medical services and hospitalization which the employer is bound to furnish under workmen's compensation acts or similar federal, state or local law.

11. Section 3(m) directs the Administrator to determine "the reasonable cost . . . to the employer of furnishing . . ." facilities to the employee. Two methods of determining such reasonable cost are provided in Part 531 of the Regulations: (1) employers may consider facilities furnished as part of wages when the cost of such facilities is calculated in accordance with the requirements set forth in section 531.1; (2) the procedure by which an individual hearing may be held to determine the reasonable cost of furnishing facilities to particular employees is outlined in section 531.2. At least for the present, a determination of reasonable cost under either section will be deemed compliance with section 3(m). In hearings conducted under section 531.2 of the Regulations the Administrator or his duly authorized representative will apply the principles announced in section 531.1 unless a clear and persuasive reason for special treatment is shown.

12. Reasonable cost, as defined in section 531.1(a) of the Regulations, "does not include a profit to the employer or to any affiliated person." Although the question of affiliation is one of fact, where any of the following persons operate company stores or commissaries or furnish lodging or other facilities they will normally be deemed "affiliated persons" within the meaning of the Regulations: (1) a spouse, child, parent or other close relative of the employer; (2) a partner, officer or employee in the employer company or firm; (3) a parent, subsidiary or otherwise closely connected corporation; and (4) an agent of the employer.

Additions and Deductions Not Within Section 3(m)[6/]

13. Taxes which are assessed against the employee and which are collected by the employer and forwarded to the appropriate governmental agency may be included as "wages" although they do not technically constitute "board, lodging or other facilities" within the meaning of section 3(m). This principle is applicable to the employee's share of social-security and state unemployment insurance taxes, as well as other federal, state or local taxes, levies and assessments. No deduction may be made for any tax or share of a tax which the law requires to be borne by the employer.

14. Where an employer is legally obliged as by order of a court of competent and appropriate jurisdiction to pay a sum for the benefit or credit of the employee to a creditor of the employee, trustee, or other third party, under garnishment, wage attachment, trustee process or bankruptcy proceeding, deduction from wages of the actual sum so paid is not prohibited, provided that neither the employer nor any person acting in his behalf or interest derives any profit or benefit from the transaction. In such case, payment to the third person for the benefit and credit of the employee will be considered equivalent, for the purposes of the act, to payment to the employee.

15. Where an employer is directed by a voluntary assignment or order of his employee to pay a sum for the benefit of the employee to a creditor, donee or other third party, deduction from wages of the actual sum so paid is not prohibited, provided that neither the employer nor any person acting in his behalf or interest directly or indirectly, derives any profit or benefit from the transaction. In such case, payment to the third person for the benefit and credit of the employee will be considered equivalent, for purposes of the act, to payment to the employee.

No payment by the employer to a third party will be recognized as valid where it appears that such payment was part of a plan or arrangement to evade or circumvent the requirements of section 3(m) or the Regulations, Part 531. For the protection of both employer and employee, it is suggested that full and adequate record of all assignments and orders be kept and preserved and that provisions of the applicable state law with respect to signing, sealing, witnessing and delivery be observed.

Under these principles employers have been permitted to pay sums to third persons for the following purposes: union dues paid pursuant to a collective bargaining agreement with bona fide representatives

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6/ The principles discussed in the following paragraphs 13, 14 and 15 need be considered only where section 3(m) and Part 531 of the Regulations are held applicable as explained in paragraph 7 of this bulletin--that is, when the required minimum wage and overtime compensation have not been paid to the employee in cash free and clear.

of the employees; employees' store accounts with merchants wholly independent of the employer; insurance premiums (paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it); voluntary contributions to churches and charitable, fraternal, athletic and social organizations or societies from which the employer receives no profit or benefit directly or indirectly.

Effect of Payment in Facilities on Calculation of Overtime

16. Section 7 requires that the employee receive compensation for overtime hours at "a rate not less than one and one-half times the regular rate at which he is employed." Where deductions are made for board, lodging or other facilities, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made. Where facilities are customarily furnished as additions to a cash wage, the reasonable cost of the facilities to the employer must be considered as part of the employee's regular rate of pay.