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UNITED STATES DEPARTMENT OF LABOR
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WALLING COMMENTS ON PORTAL PROBLEMS

Because of the widespread misunderstanding as to the decision of the Supreme Court in the Mt. Clemens case with respect to the necessity for considering walking time on the employer's premises as working time under the Fair Labor Standards Act, L. Metcalfe Walling, Administrator of the Wage-Hour law issued the following statement today:

"There seems to be a misconception that the Supreme Court held in the Mt. Clemens Pottery case that all time spent on the employer's premises was working time under the Fair Labor Standards Act. Actually, the Court, on the facts in this case, merely decided that the minimum necessary walking time to the work place from the time clock, including the time required for necessary make-ready activities, was working time, and sent the case back to the District Court to determine in detail whether the amount of time spent by the employees was so trivial as to be ignored under a "de ~~minimum~~ minimis rule, and, if not, to determine how much was due the employees. As the court put it, 'No claim is here made, though, as to the time spent in waiting to punch the time clocks and we need not explore that aspect of the situation.....But the time necessarily spent by the employees in walking to work on the employer's premises, following the punching of the time clocks, was working time within the scope of Sec. 7(a).'" (Italics supplied.)

Mr. Walling added that the Divisions cannot issue a definitive guide to employers on their method of computing working time until the courts have clarified what aspects of travel time are compensable and have determined the amount of time which is so trivial that it can be ignored under the de minimis rule laid down by the Supreme Court. This latter question is now being considered by the District Court to which it was remanded by the Supreme Court.

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Mr. Walling indicated that the question of "make-ready" activities is in a different category. The Divisions have always held that preparatory work required by the employer or by the nature of the work was working time under the Act, and should be counted as such. The Divisions' view was sustained by the Supreme Court. The vast majority of employers have followed this interpretation and it would seem that only in relatively few cases are there problems of retroactive pay on this account.

Mr. Walling reiterated his belief that the fundamental solution of the problem of retroactive liability insofar as the future is concerned is to grant the Administrator power to issue authoritative interpretations of the general provisions of the Act, including the definitions of terms used in the Act, with protection for employers from any civil or criminal liability where they are complying with the Administrator's regulations. He pointed out that a recommendation along these lines was made in his Annual Report for the fiscal year ending June 30, 1944 and that subsequently he had recommended this type of amendment. If the Administrator were to have such power, employers would know where they stood under the law and would not be subject to retroactive liability in the event that the Administrator's interpretation were overruled by the courts.

A second recommendation made by Mr. Walling, which would have obviated some of these difficulties, is a uniform Statute of Limitations. Mr. Walling recommended a three-year statute as coinciding with the most common period for filing claims allowed by the state statutes of limitations. This would give the employee an adequate opportunity to file claims and still permit the employer to close his books within a reasonable period without fear of unanticipated liability.

Mr. Walling said itwas his personal opinion that the reports of some billions of portal to portal liability under the Mt. Clemens decision were grossly exaggerated and that the ultimate liability would only be a small

fraction of the amounts now being talked about. He said that he recognized and was not attempting to minimize the fact that a number of suits for large amounts had been filed in the courts but based his statement on the factors which must be considered by the courts before they actually make awards. Among such limiting factors he mentioned state statutes of limitations, absence of coverage, exemptions, difficulties of proof, the presence of many non-overtime or short weeks, methods of payment, and other difficulties inherently present in any lawsuit.

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