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U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
WASHINGTON, D. C.

In response to requests for comment on an opinion of John C. Gall, Counsel for the National Association of Manufacturers, dealing with the Fair Labor Standards Act, Administrator Elmer F. Andrews, of the Wage and Hour Division, U. S. Department of Labor, today made the following statement:

I feel obliged to comment upon an opinion just rendered by John C. Gall, Esq., Counsel of the National Association of Manufacturers, on The Method of Determining Regular Wage as a Basis of Computing Overtime under the Terms of the Fair Labor Standards Act.

That Act had two distinct objectives.

In Section 6 Congress laid a "floor for wages" in providing a minimum wage rate of not less than 25¢ an hour. The benefits of this section apply immediately only to the lowest paid category of workers in so called "sweated" industries; though provision is made for gradually stepping up the minimum wage rate to 40¢ an hour.

In Section 7 Congress was concerned not with minimum wage rates but with achieving a shorter work week, which would have the incidental desirable effect of tending to spread employment. The benefit of Section 7 was evidently not intended to be limited to the depressed category of workers benefited by Section 6. Congress refrained from taking the more drastic step of prescribing an absolute maximum work week, but made it unlawful for an employer to work an employee for longer than 44 hours a week "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed". Congress thus made it economically disadvantageous to an employer to maintain a work week in excess of 44 hours. The expectation evidently was

that this provision would tend to bring down the customary work week to 44 hours. The question now is whether this expectation can be defeated by various devices, with the probable result that the coming Congress will renew consideration of more farreaching proposals.

Mr. Gall, in his opinion, rendered to the National Association of Manufacturers, seems to adopt an interpretation of the law which, in effect, would make the overtime benefits available only to employees compensated at the basic minimum wage. If this had been the intention of Congress it could have been simply expressed. No such intention can be derived from a fair reading of Section 7.

In his opinion, Mr. Gall, in answer to the question whether the employer may by varying the regular rate of pay and establishing a new rate, continue to work the employee on the same schedule of hours for the same total compensation without violating the law, reaches this conclusion:

"After the most careful consideration I am convinced that he may do so, the only limitation being that the compensation must be such in relation to the number of hours worked that it will not result in paying less than 25¢ per hour for the first 44 hours and 37½¢ per hour thereafter".

In reaching this conclusion, Mr. Gall makes reference to certain impromptu remarks I made in Birmingham, Alabama, on September 29, 1938, in reply to random questions asked me at the conclusion of the speech. He does not, however, quote from our Interpretative Bulletin No. 4, officially released on October 21, 1938, which set forth the considered opinion of my General Counsel's office on the points in question. In order that Mr. Gall's published opinion may not, however unintentionally, create in the minds of employers the misapprenhension that the Wage and Hour Division is in agreement with his interpretation of the law, I quote the following from that bulletin:

"Several questions may arise as to the interpretation of the regular rate of pay in light of the provision in Section 18: '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'. Several cases will be supposed:

'1. An employer prior to October 24 pays his employees 50 cents an hour for the 48-hour week customarily worked by his employees. On October 24 the employer reduces the hours to 44, without altering the hourly rate. This is not a violation of the statute. Congress intended to make it economically disadvantageous for an employer to work his employees excessive hours. If an employer eliminates the excessive hours, he is under no statutory obligation to increase his total wage bill by increasing the hourly rate.

'2. An employer works his employees 48 hours, at an hourly rate well in excess of the 25 cents minimum. On and after October 24, he intends to continue the 48-hour week, but announces a reduction in the hourly rate to such an amount (but still above the statutory minimum) which, figured at the lower rate for 44 hours and at time and one-half for the 4 excess hours, will maintain the employee's weekly earnings exactly as they were prior to the effective date of the statute. No attempt will be made at this time to give any definite interpretation of Section 18, as applied to such a case. It may be pointed out, however, (1) that it is not safe to assume that a section of an Act of Congress is meaningless and (2) the attempt of the employer, in negotiations with his employees in reference to this proposed reduction in the rate of pay, to 'justify' the reduction in the hourly

rate by reference to the overtime provisions of Section 7 as the excuse for resorting to this device, might be considered a violation of Section 18, and warrant a court in holding that the purported reduction in the hourly rate is not really a reduction in legal contemplation; and that consequently 'the regular rate', which is the basis on which the time and one-half overtime compensation is calculated in Section 7(a), remains the higher rate as it existed prior to the purported reduction.

'3. An employer pays 50 cents an hour for a customary workweek of 44 hours. In anticipation of an expected rush of 2 or 3 weeks, during which the obligation to pay time and one-half overtime would accrue, he announces a reduction of the hourly rate, which he later restores after the rush has receded to the normal 44-hour week. Such a subterfuge would seem to be clearly unavailing; the regular rate of pay would be the customary rate of 50 cents an hour, rather than the purported reduced rate announced for the weeks of overtime employment in an obvious effort to circumvent the provisions of Section 7.

'4. An employer pays 50 cents an hour for a customary workweek of 44 hours. He announces that he is reducing the hourly rate to 25 cents an hour, but he promises to pay each employee not less than the amount paid prior to October 24. This subterfuge would be equally unavailing; the regular rate of pay would be the customary rate of 50 cents an hour which the employer had guaranteed his employees, rather than the purported or reduced rate."