

IN THE SUPREME COURT OF OHIO

JOHN HAIGHT, et al.,)	Supreme Court Case No.: 2014-1241
)	
Plaintiffs/Appellees,)	On appeal from the Montgomery
)	County Court of Appeals, Second
vs.)	Appellate District
)	
ROBERT MINCHAK, et al.,)	Court of Appeals Case No. 25983
)	
Defendants/Appellants.)	Trial Court Case No. 2012 CV 00946
)	
)	

MERIT BRIEF OF DEFENDANTS-APPELLANTS, ROBERT MINCHAK AND JOAN MINCHAK

ANDREW BILLER (0081452)*

**Counsel of Record*

The Law Firm of Andrew Biller

Easton Town Center
4200 Regent Street, Suite 200

Columbus, OH 43219

P: 614-604-8759

F: 614-583-8107

andrewbilleresq@gmail.com

*Counsel for Plaintiffs-Appellees, John Haight
and Christopher Pence*

MICHAEL DEWINE (0009181)

Ohio Attorney General

MICHAEL D. ALLEN (0020693)*

**Counsel of Record*

Assistant Attorney General

Labor Relations Section

30 East Broad Street, 16th Floor

Columbus, Ohio 43215-3400

Counsel of Record for the State of Ohio

JOHN P. SUSANY (0039472)*

**Counsel of Record*

KATHLEEN A. HAHNER (0084113)

Stark & Knoll Co., L.P.A.

3475 Ridgewood Road

Akron, Ohio 44333-3163

(330) 376-3300/ FAX (330) 376-6237

jsusany@stark-knoll.com

khahner@stark-knoll.com

Counsel for Defendants-Appellant, Robert

Minchak and Joan Minchak

JENNIFER BRUMBY (0076440)*

**Counsel of Record*

MICHAEL P. BRUSH (0080981)

Freund, Freeze & Arnold

Fifth Third Center

1 South Main Street, Suite 1800

Dayton, Ohio 45402

Counsel for Defendant-Appellant, Mark Kosir

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INTRODUCTION

Against Appellees' attempt at one of the largest re-writes in Ohio's wage and hour law's history, Appellants, Robert and Joan Minchak, request that this Court uphold the constitutionality of R.C. 4111.14 to maintain the state's long-standing laws regarding entitlement to minimum wage. As a result of the Second District's failure to analyze properly the constitutionality of Ohio's wage and hour laws, businesses and their owners now need protection from lawsuits by commissioned outside salespeople, who are seeking minimum wage under a drastically new interpretation of Ohio's wage and hour law. Before the Second District's decision, Ohio law, like the federal Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*, did not extend minimum wage entitlement to outside salespeople or other types of employees that receive compensation through commissions or other means. In fact, the Ohio Department of Commerce continues to tell employers – and requires them to post the information conspicuously – that outside salespeople are not entitled to minimum wage. *See* Ohio Department of Commerce Division of Industrial Compliance Employment flier at ¶ 3.¹

Now, however, Appellees want to change the law by declaring a portion of it unconstitutional, with the result being that commissioned outside salespeople, as well as other traditionally exempt employees (meaning the employees not entitled to minimum wage or overtime), would receive an hourly minimum wage in addition to an earned commission.

STATEMENT OF FACTS

Appellees worked for Cheap Escape as outside sales representatives and were paid either commissions plus a draw, or commissions without a draw. *See* Appendix C at ¶ 5. Robert Minchak

¹ *See* http://www.com.ohio.gov/documents/dico_2014minimumwageposter.pdf.

and Joan Minchak owned Cheap Escape. *Id.* at ¶ 1. Until its bankruptcy during the underlying case at the trial court, Cheap Escape published a coupon book for consumers. *See id.* at ¶¶ 5-6. With Cheap Escape no longer in business, Appellees amended their complaint and brought claims only against Robert Minchak and Joan Minchak personally as “employers” under Article II, Section 41 of the Ohio Constitution. *Id.*

In short, Appellees claim that in addition to the entitlement to commissions, the Minchaks were obligated to pay them minimum wage. *Id.* Even though Appellees admit that they were “outside salespeople”, they nevertheless claim that they were entitled to receive minimum wage (in addition to earned commissions) under Article II, Section 34a of the Ohio constitution.² *Id.* at ¶ 5, 15. The Minchaks paid Appellees their earned commissions, but deny that Appellees were also entitled to an additional hourly minimum wage. The Minchaks base their position, not on some flight of fancy, but upon long-standing federal and Ohio laws that exempt “outside salespeople” from minimum wage. *Id.* at ¶¶ 5, 14.

The entirety of Appellees’ claim is predicated upon a complete revision and rewriting of Ohio’s wage and hour law. In fact, the only way Appellees’ claims can succeed is to convince this Court to change Ohio’s wage and hour law to extend minimum wages to traditionally exempt employees, including outside sales people who also receive commission, thereby declaring O.R.C § 4111.14 unconstitutional. To do that, Appellees must demonstrate *beyond a reasonable doubt* that R.C. 4111.14 conflicts irreconcilably with Article II, Section 34a of the Ohio Constitution and that there is no way the two can be harmonized. Because 4111.14 exists in harmony with Article II, Section 34a, Appellees cannot meet their burden.

² Ohio Constitution Article II, Section 34a will be referred to in this brief as “Article II, Section 34a”.

ARGUMENT

Proposition of Law No. 1: The meaning of the term “employee” under R.C. 4111.14(B)(1) is constitutionally valid because it does not clearly conflict with or restrict the meaning of that same term under Article II, Section 34a of the Ohio Constitution.

A. R.C. 4111.14 is Constitutional

Before Ohio’s current wage and hour laws existed, the federal government enacted the Fair Labor Standards Act (“FLSA”), 29 U.S.C. 201, *et seq.* The FLSA, among other things, limits the types of “employees” that are entitled to receive minimum wage. Ohio later enacted its own minimum wage laws. The provisions applicable to this case are found jointly in Article II, Section 34a and R.C. 4111.14. Although there are two different provisions, both have the same underlying intent – to apply the FLSA to Ohio. In fact, both expressly state that “employee” has “the same meanings as . . . the Fair Labor Standards Act[.]”

In pertinent part, Article II, Constitution Section 34a states:

The provisions of this section shall not apply to employees of a solely family owned and operated business who are family members of an owner.

As used in this section: “employer,” “employee,” “employ,” “person” and “independent contractor” *have the same meanings as under the federal Fair Labor Standards Act or its successor law*, except that *** “employee” shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Only the exemptions set forth in this section shall apply to this section. [Emphasis added.]

Similarly, R.C. 4111.14 provides:

(B) In accordance with Section 34a of Article II, Ohio Constitution, the terms “employer,” “employee,” “employ,” “person,” and “independent contractor” *have the same meanings as in the “Fair Labor Standards Act of 1938,”* 52 Stat. 1060, 29 U.S.C. 203, as amended. In construing the meaning of these terms, due consideration and great weight shall be given to the United States department of labor’s and federal courts’ interpretations of those terms under the Fair Labor Standards Act and its regulations. As used in division (B) of this section:

(1) “Employee” means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of “employee” under 29 U.S.C.

203(e) or individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213 and from the definition of “employee” in this chapter.

(Emphasis added.)

These provisions were meant to work together to accomplish the same goal – allowing certain employees to receive minimum wage, while exempting others in the same manner as the FLSA. No dispute exists that both provisions expressly adopt the FLSA’s *meaning* of employee. Therefore, for this Court to uphold the constitutionality of R.C. 4111.14, it simply has to follow the instruction from Article II, Section 34a: apply the *meaning* of employee from the FLSA to Ohio’s minimum wage laws.

1. Ohio law incorporates the FLSA’s “Meaning” versus its “Definition” of employee.

The primary dispute between the parties is the difference between the words “meaning” and “definition”. A term’s “meaning” is broader than its “definition.” “Meaning” is defined as: “The sense of anything, but especially of words; that which is conveyed (or intended to be conveyed) by a written or oral statement or other communicative act.” BLACK’S LAW DICTIONARY (9th Ed. 2009). In contrast, a “definition” is “[t]he meaning of a term as *explicitly* stated in a drafted document such as a contract, a corporate bylaw, an ordinance, or a statute ***.” (Emphasis added.) *Id.* In other words, a term’s *definition* is just one particular and explicit piece of the term’s broader *meaning*. See *Bilstad v. Wakalopulos*, 386 F.3d 1116, 1122 (Fed.Cir.2004) (finding that the ordinary *meaning* of the term “plurality” encompassed multiple *definitions* of the same term). Determining the FLSA’s complete *meaning* of “employee” requires both the strict definitions, exceptions, and exemptions.

With respect to the *meaning* of “employee” for Ohio’s minimum wage laws, the plain language used by Article II, Section 34a and R.C. 4111.14 is virtually identical. Both provisions look to the *meaning* (not “definition”) of “employee” through the FLSA. The difference between

the two is minor: Article II, Section 34a incorporates the *entire* FLSA to determine the meaning of “employee”, whereas R.C. 4111.14 points to the applicable provisions of the FLSA – the strict definition and exemption sections. The difference between the two is not conflicting, as both share a common goal. Moreover, the provisions cited in R.C. 4111.14 provide necessary precision to enable courts and employers to implement Article II, Section 34a consistently.

2. The entire FLSA applies to Article II, Section 34a.

One thing is clear – Ohio intended to identify “employee” through the meaning provided by the FLSA. Ohio did not have to reference or incorporate the FLSA into Article II, Section 34a or R.C. 4111.14 to establish the meaning of an employee entitled to minimum wage. In fact, if the legislature wanted to change the *meaning* of employee from that set forth by the FLSA, the drafters of Article II, Section 34a could have easily devised a separate definition. They also could have pinpointed one specific section of the FLSA and discarded the rest. They chose not to do either of those things. Instead, both Article II, Section 34a and R.C. 4111.14 expressly incorporate the general *meaning* of “employee” under the FLSA. Because the drafters chose to use *meaning* as opposed to *definition*, the Second District could not – and this court cannot – change the wording “by judicial fiat.” *See Hulsmeyer v. Hospice of Southwest Ohio, Inc.* (2014), Ohio St. No. 2014-Ohio-5511. Therefore, to find that R.C. 4111.14 is constitutional, all this Court has to do is exactly what Article II, Section 34a and R.C. 4111.14 say to do: adopt the *meaning* of employee under the FLSA.

The FLSA uses several sections to create the *meaning* of an employee entitled to minimum wage: *strict definitions*, *exceptions*, and *exemptions* to the general definition. *See* 29 U.S.C. §§ 203 and 213. The *exceptions* and *exemptions* categorize individuals who meet the strict definitional requirements, but are **not** entitled to minimum wage. *See* 29 U.S.C. § 203(e) and 29

U.S.C. § 213. For example, the *exemptions* exclude outside salespeople, executives, those working in a professional capacity, newspaper delivery people, part time farmers, and summer camp counselors from receiving minimum wage.³ The FLSA exemptions are crucial to common compensation structures, and serve as the foundation for current wage and hour laws. It is these definitions and exemptions that entitle executives to receive compensation from dividends only, or that allow business partners to work without taking a salary. In other words, to determine whether an “employee” – broadly defined as “any individual employed by an employer” – is required to receive minimum wage under the FLSA, one must review multiple provisions of the FLSA. *See* 29 U.S.C. § 203(e).

By arguing that Article II, Section 34a only applies the FLSA’s strict *definition* of “employee” when it references the entire FLSA, Appellees and the Second District both pretend that the FLSA is a much smaller law than what Ohio adopted. In short, rather than adopting the entire FLSA, as Article II, Section 34a expressly states, Appellees have cherry-picked only one piece of the FLSA in an effort to expand the types of employees entitled to minimum wage. Had the legislature intended to broaden the categories of individuals who are entitled to minimum wage under the FLSA in drafting Article II, Section 34a, it would not have incorporated the entire FLSA. To argue otherwise does not make any sense.

B. Article II, Section 34a and R.C. 4111.14 are compatible.

Despite the foregoing, Appellees want a new understanding of Ohio’s wage and hour laws that neither voters nor the legislature ever considered. The new outcome would be that huge numbers of employees who historically have **not** been entitled to receive minimum wage would

³ If Appellees’ argument prevails, these employees would also be entitled to receive minimum wage – even though they never had been previously entitled in Ohio.

now get it – in addition to whatever other compensation they might receive. However, to have their way, Appellees must prove to this court that R.C. 4111.14 is unconstitutional. Before this Court can declare R.C. 4111.14 unconstitutional, Appellees must prove **beyond a reasonable doubt** that the statute and the constitutional provision are **clearly incompatible and irreconcilable**. *State v. Carswell* (2007), 114 Ohio St.3d 210 (citations omitted). This means that before this Court may strike down R.C. 4111.14 as unconstitutional, it must be convinced beyond a **reasonable doubt** that the statutory meaning of “employee” is so incompatible with the meaning of that same term under Article II, Section 34a that it cannot be reconciled. Appellees cannot meet their burden.

First, since Article II, Section 34a and R.C. 4111.14 both adopt the *meaning* of “employee” under the FLSA, by definition the two should not conflict. Second, even if the two provisions were interpreted to be at odds, a reviewing court **must** attempt to reconcile them. When the Second District declared 4111.14 unconstitutional, it completely abandoned the required standard. The Second District seemingly went out of its way to find conflict between R.C. 4111.14 and Article II, Section 34a, ignoring any alternative interpretations. In fact, in his dissent Judge Welbaum shows how easily Article II, Section 34a and R.C. 4111.14 can be harmonized:

Notably, Article II, Section 34a of the Ohio Constitution uses the plural term “meanings,” which encompasses more than just a single definition. In addition, Section 34a does not confine itself only to the meaning of employee under 29 U.S.C. 203(e)(1). Instead, Section 34a states that “[a]s used in this section: ‘employer,’ ‘employee,’ ‘employ,’ ‘person’ and ‘independent contractor’ have the same meanings as under the federal Fair Labor Standards Act or its successor law * * *.” This reference includes the entirety of the act, not just a specific section. **Under 29 U.S.C. 213(a)(1) of the FLSA, outside sales employees are excluded from eligibility to receive minimum wages, and they are properly excluded from coverage under Section 34a and R.C. 4111.14(B) as well.**

My conclusion is also buttressed by the fact that Article II, Section 34a of the Ohio Constitution includes a specific exemption for “employees of a solely family owned and operated business who are family members of an owner.” This exemption is

not one that was included in the FLSA. **Logically, the drafters of Ohio's constitutional amendment would have specifically mentioned the existing exemptions and exclusions in the FLSA if they believed that these categories were not already excluded from the meaning of “employees” for purposes of Section 34a. Exempting one specific category of employees from Ohio's coverage, while failing to exempt other previously-excluded categories, makes no sense.**

Haight v. Cheap Escape Co., 2014-Ohio-2447, 1 N.E.3d 1258, (2d Dist.), dissent at ¶¶ 29-30
appeal allowed, 140 Ohio St. 3d 1466 (emphasis added).

Whenever there are “two possible interpretations of a statute, one unconstitutional and the other valid, it is the duty of the court to adopt that which will save the act.” *State ex rel Mack v. Guckenberger* (1942), 139 Ohio St. at 278. **“[T]he statute and constitutional provisions must be read together and so harmonized as to give effect to both when this can be done consistently.”** *Id.* This applies to both state and federal law. The United States Supreme Court stated it is “beyond debate” that “the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (citations omitted)(emphasis added). Had the Second District considered any reasonable alternative to harmonize Article II, Section 34a and R.C. 4111.14, **as it was required to do**, it would have easily reconciled the provisions and found in the Minchaks’ favor. It did not.

1. The Second District failed to follow the law.

Nothing in the Second District’s decision reveals any effort to harmonize Article II, Section 34a and R.C. 4111.14. Neither does the decision contain any analysis of an effort to save R.C. 4111.14 from unconstitutionality. Instead, the Second District looked at the language of Article II, Section 34a wearing blinders and declared – without explanation – only a small subsection of the FLSA applied to the provision. *See* Appendix C at ¶ 23. The Second District agreed the FLSA

exempts certain classes of employees from its meaning of the term, and it agreed that Appellees would not be entitled to minimum wage under the FLSA. *See id.* at ¶ 15. Yet, even though Article II, Section 34a expressly incorporates the entire FLSA, the Second District somehow determined the FLSA exemptions are inapplicable in Ohio. Appellees and the Second District fail to apply – or even to consider – the concept that the *meaning* of an employee under the FLSA extends beyond one short sentence picked from one subsection of one provision – that, instead, the *meaning* could incorporate the FLSA’s strict definitional provision to include the exemptions and exceptions. Had it done so, following Judge Welbaum’s lead and Ohio law, it would have found that R.C. 4111.14 and Article II, Section 34a can be – and historically have been – reconciled consistently.⁴

The Second District similarly employed an unwarranted restrictive reading of the FLSA when it declared Article II, Section 34a intended the meaning of “employee” to be only “any individual employed by an employer[.]” *See* Appendix C at ¶ 17. The FLSA first defines “employee” broadly as “any individual employed by any employer”. 29 U.S.C. § 203(e). That same section then goes on to list several *exceptions* to that definition, such as government workers and certain volunteers. *Id.* Then, in 29 U.S.C. § 203 the FLSA separately defines a “tipped employee” and “employee in fire protection activities”. 29 U.S.C. § 203(t) and (y).

The FLSA also exempts multiple classes of employees from minimum wage, including “any employee employed in a bona fide executive, administrative, or professional capacity,” any employee working for a recreational establishment, such as a camp, that is not operational for more than seven months a year, and employees employed in fishing operations. 29 U.S.C. 213(a)(1)-

⁴ The Second District abused its discretion when it failed to consider any alternative interpretations of the provisions. *See State ex rel Cleveland Professional Football, LLC v. Buehrer*, 140 Ohio St.3d 480, 2014-Ohio-3615.

(5). The FLSA also exempts employees that circulate and publish county newspapers, computer experts, and criminal investigators that are paid based upon their availability. *Id.* at (a)(8)-(17). Ohio adopts these exemptions broadly through Article II, Section 34a and explicitly through R.C. 4111.14. Is it Appellees' position that all of these should be paid an hourly minimum wage in Ohio, and that employers must record all such employees' hours worked? That does not make sense. This lends more weight to the position that, as the express language of both provisions state, the drafters adopted the entirety of the *meaning* from the FLSA, including the exemptions and exceptions.

2. The FLSA should be read *in pari materia*.

The Second District ignored the FLSA's *meaning* of employee. That failure led to a holding that lacks a proper foundation. In fact, reading several related provisions together is a standard concept of statutory interpretation. "The general rule is that statutes or statutory provisions relating to the same class of persons or things, or the same or a closely allied subject or object, may be regarded as *in pari materia*." *McKenzie v. Registrar, Bureau of Motor Vehicles*, 12th Dist. No. CA95-01-005, 1995-WL-399379, *2 (citing American Jurisprudence 2d (1974) 288, Statutes, Section 189). "*In pari materia*" means "on the same subject; relating to the same matter." BLACK'S LAW DICTIONARY (9th ed. 2009). With respect to statutory or constitutional construction, it is fundamental that provisions relating to the same subject "may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." *Id.* In other words, this doctrine requires courts to construe provisions "so that they are consistent and harmonious with a common policy and give effect to legislative intent." *Ohio Bus Sales, Inc. v. Toledo Bd. Of Edn.* (1992), 82 Ohio App.3d 1, 7 (citing *Suex Co. v. Young* (1963), 118 Ohio App. 415).

There is no dispute that the provisions of the FLSA all relate to the same subject – who is entitled to minimum wage. Therefore, when construing the meaning of what class of individuals Ohio law considers an “employee” entitled to minimum wage, the Second District needed to give due consideration to all sections of the FLSA, including the exemption section. *See Kruse v. Holzer*, 34 Ohio App.3d 356, 360, 518 N.E.2d 961 (10th Dist.1986)(Whiteside, J., dissenting)(arguing that had the legislature intended to permit simultaneous recovery under both R.C. 5311.27(A) and (B), it would have written the words “under this *section*” rather than the words “under this *division*”). In this case, the Second District failed to do it.

Moreover, this Court must make every effort to harmonize R.C. 4111.14 and Article II, Section 34a. As shown above, R.C. 4111.14(B)(1) and Constitution Section 34a can be – and historically have been – read together and consistently harmonized, meeting the threshold of constitutionality. In fact, the Second District’s decision, as it stands, is likely to create more confusion and discord as to which employees are entitled to minimum wage under Article II, Section 34a. For example, can executives receive dividends in lieu of an hourly minimum wage paid weekly or biweekly? Are struggling small businesses required to pay all owners an hourly minimum wage, even though they would normally merely take profits, lest they risk lawsuits? Do employers have to record the number of hours all employees work – including outside sales people, executives, professionals, newspaper delivery people, and administrators – to ensure the appropriate minimum wages are paid? The FLSA specifically exempts such practices, and Ohio always has as well. In fact, the Second District acknowledges that federal law excludes Appellees from receiving minimum wage. *See* Appendix C at ¶ 15. Although Article II, Section 34a does

not specifically exempt such employees, the Ohio Department of Commerce has shown that these exemptions do apply, publishing Ohio's minimum wage law for all employers to rely upon.⁵

The Second District's ultimate disposition is curious since the Second District cannot ignore that Article II, Section 34a expressly adopts the entire FLSA to explain what "employees" receive minimum wage. R.C. 4111.14 implements Article II, Section 34a by specifically pinpointing the applicable provisions of the FLSA, consistently harmonizing the meaning of "employee" under both provisions and under the FLSA. At the very least, these issues create a reasonable doubt as to the unconstitutionality of R.C. 4111.14(B)(1)'s definition of the term "employee". Therefore, the Second District's decision must be overturned and this Court, after attempting to harmonize R.C. 4111.14 and Article II, Section 34a, should declare R.C. 4111.14 constitutional.

C. Article II, Section 34a is not self-executing. Even if it were, it does not matter because R.C. 4111.14 can still exist to implement the constitutional provision.

Appellees focused much of their argument in the lower courts about Article II, Section 34a being self-executing, but even if that were true, that alone is not dispositive. Although the Second District did not directly address this issue, one federal court has cited the underlying appellate decision to state Article II, Section 34a is self-executing. *See Brenneman v. Cincinnati Bengals*, S.D. Ohio No. 1:14-cv-136, 2014WL5448864; *Castillo v. Morales, Inc.*, S.D. Ohio No. 2:12-cv-00650, 2014WL4377835.

As both *Brenneman* and *Castillo* arise from federal courts, they are persuasive authority at best and do not have any effect on this Court. First, neither case addresses the constitutionality of R.C. 4111.14, nor do the decisions mention the definition or meaning of "employee". Second,

⁵ See http://www.com.ohio.gov/documents/dico_2014minimumwageposter.pdf.

these decisions do not discuss what impact R.C. 4111.14(B)(1) has on Article II, Section 34a. They merely interpret the lower court's decision to find that Article II, Section 34a is self-executing, nothing more. However, deeming a constitutional provision self-executing, in and of itself, does not render other, related statutes meaningless.

Regardless, the plain text of Article II, Section 34a shows it is not self-executing. To be self-executing, a constitutional provision must be complete on its face, without needing supplemental legislation. *State v. Williams* (2000), 88 Ohio St.3d 513, 521 (citations omitted). On the other hand,

[A] constitutional provision is not self-executing if its language, duly construed, cannot provide for adequate and meaningful enforcement of its terms without other legislative enactment. Stated more succinctly, the words of a constitutional provision **must be sufficiently precise in order to provide clear guidance** to courts with respect to their application if the provision is to be deemed self-executing.

Id. (emphasis added).

Enacting R.C. 4111.14 to implement Article II, Section 34a was proper and necessary. Article II, Section 34a relies upon the FLSA to supplement the constitutional language. However, R.C. 4111.14 is necessary to clarify several essential terms, including “employee”. Article II, Section 34a explicitly contemplates subsequent implementing language. *See* Article II, Section 34a at ¶¶ 3, 5. Accordingly, Article II, Section 34a is incomplete on its face and is not self-executing.

Article II, Section 34a requires some understanding of the FLSA to be effective, because it merely points to the FLSA in its entirety to determine the *meaning* of “employee”. The drafters of Article II, Section 34a essentially told Ohio employers to read nineteen sections of the United States Code – which, when printed, totals more than fifty pages – to determine which employees are entitled to minimum wages. By not explicitly drafting a definition or otherwise explaining the

meaning of “employee”, the language of Article II, Section 34a is broad, and requires supplemental legislation to implement its provisions. Accordingly, R.C. 4111.14 was enacted shortly after Article II, Section 34a, incorporating the constitution into it and identifying the applicable provisions of the FLSA and defining other key terms.

In addition to the meaning of “employee”, R.C. 4111.14 explains many of the terms Article II, Section 34a fails to define. Without R.C. 4111.14, important terms such as “interested person,” “damages”, and the applicable statute of limitations remain undetermined. *Compare* Art. II § 34a *with* R.C. 4111.14(H), (J) and (K). Simply put, Article II, Section 34a cannot stand alone, and R.C. 4111.14 is necessary to implement it.

However, even if this Court were to find Article II, Section 34a self-executing, it does not matter because the inquiry does not stop there. Instead, the focus must be on the relationship between R.C. 4111.14 and Article II, Section 34a. This Court has stated that non-conflicting statutory provisions apply to self-executing constitutional provisions. *See State ex rel. Vickers v. Summit Ct. Council*, 97 Ohio St.3d 204 at ¶¶ 30-31. In fact, in *Vickers* this Court stated the self-executing constitution provisions “may still be limited by relevant charter, statutory, or constitutional provisions” **if the constitution and the statute do not conflict**. *Id.* at ¶¶ 24 and 31. Thus, even if this Court deemed Article II, Section 34a self-executing, the meaning of “employee” under R.C. 4111.14 would still apply to implement Article II, Section 34a, so long as the two are not irreconcilably in conflict. As shown above, they are not.

In *Vickers*, a number of individuals formed a committee to file a petition proposing an amendment to the Charter of Summit County, Ohio, which would establish term limits for certain county offices. The Ohio Constitution provided that a legislative authority must immediately submit a proposed amendment to the county charter once a petition was signed by eight percent

(8%) of the electors of the county. However, the Ohio Revised Code provided that all such petitions were required to contain a specific election-falsification statement.

The petition submitted by the committee in *Vickers* contained the appropriate number of signatures required by the Constitution, but contained an outdated version of the election-falsification statement required by statute. The committee argued that the petition did not have to comply with the statutory requirements because they conflicted with the constitutional provision and because the constitutional provision was self-executing. In rejecting these arguments, the Ohio Supreme Court stated:

[T]he fact that Section 4, Article X is self-executing does not alter [the conclusion that nonconflicting laws may be added]. Self-executing means merely that this section is “effective immediately without the need of any type of implementing action.” Black's Law Dictionary (7th Ed.1999) 1364; see, also, *State ex rel. Russell v. Bliss* (1951), 156 Ohio St. 147, 151, 46 O.O. 3, 101 N.E.2d 289. **Although power authorized by the self-executing constitutional grant in [the Constitution] exists without the aid of legislation, these provisions may still be limited by relevant charter, statutory, or constitutional provisions.** See *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections* (1991), 62 Ohio St.3d 17, 20, 577 N.E.2d 645. In *Vickers*, which involved a county charter amendment under Section 4, Article X, **we specifically recognized that nonconflicting statutes are applicable to the county charter amendment process.** 93 Ohio St.3d at 528, 757 N.E.2d 310. We also noted in *Vickers* that Section 3.05, Article III of the Summit County Charter incorporated general law relating to municipalities. *Id.*

(Emphasis added.) *Vickers*, 2002-Ohio-5582, at ¶¶ 30-31.

Just as in *Vickers*, Article II, Section 34a expressly permits laws to be passed to implement its provisions. R.C. 4111.14 does just that – it simplifies Article II, Section 34a’s reference to the FLSA and other terms, while maintaining the purpose and intent of the provision. Self-executing constitutional provisions do not exist in a vacuum. Instead, the focus must be on the relationship between a statute and the constitutional provision, and whether the two can be harmonized. The legislature is not *required* to pass implementing legislation, but if it chooses to do so, compliance with those statutory provisions is *mandatory* unless they conflict with the constitutional provision.

See State ex rel Vickers v. Summit Ct. Council, 97 Ohio St.3d 204 at ¶ 24. Therefore, the statutory definition of “employee” under R.C. 4111.14 will still apply to actions brought under Article II, Section 34a, unless this Court concludes – after making every effort to harmonize the two provisions – that the statutory definition irreconcilably conflicts with the constitutional provision.

As stated above, R.C. 4111.14 and Article II, Section 34a are compatible such that they can be, and have been, consistently reconciled to provide clear guidance to employers and employees alike. For these, and all of the foregoing reasons, R.C. 4111.14 is constitutional.

Proposition of Law No. 2: If the statutory meaning of “employee” under R.C. 4111.14(B)(1) is unconstitutional and invalid, that conclusion and ruling should apply prospectively only under the three-part test propounded in *DiCenzo v. A-Best Products Co.*

Should this Court conclude that the statutory meaning of “employee” under R.C. 4111.14 is unconstitutional and invalid, this Court should apply that conclusion and ruling prospectively only, under the three-part test propounded by this Court in *DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327.

First, the issue of the constitutionality of the statutory definition of “employee” under R.C. 4111.14 is one of first impression. A conclusion finding this statutory provision unconstitutional would alter over seventy-five years’ worth of Ohio wage and hour law. Ohio employers could not have foreseen such a result, especially considering the fact that the Ohio Attorney General already concluded this statutory definition was consistent with Article II, Section 34a.

Second, retroactive application of the decision would neither promote nor hinder the purpose behind the new rule. Ensuring that the minimum wage is paid according to Article II, Section 34a would remain the purpose of a decision striking down R.C. 4111.14 as unconstitutional, regardless of whether the decision is given retroactive or prospective effect.

Third, retroactive application would impose an extremely inequitable result. Specifically, retroactive application would expose Ohio employers, like the Minchaks, to a propagation of collective action lawsuits under Article II, Section 34a for payment of back wages, despite the fact that the employers, like the Minchaks, have complied with Ohio law at all times. Simple payment of back wages would not even be the extent of this exposure. These law-abiding employers could also be required to pay liquidated damages and attorney fees – all as a result of following Ohio law and its published directives. In light of these considerations, any conclusion or ruling that the definition of employee under R.C. 4111.14 is unconstitutional should be applied not to the Minchaks but only prospectively to any litigants who come after this Court provides clear direction to the state and its employers.

A. *DiCenzo’s three-part test for prospective only application.*

In *DiCenzo*, this Court concluded that its previous decision in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, which imposed strict liability on nonmanufacturing sellers of defective products, applied prospectively only. *DiCenzo*, 2008-Ohio-5327, at ¶ 1. In so holding, this Court recognized that “the general rule is that an Ohio court decision applies retrospectively unless a party has contract rights or vested rights under the prior [law].” *Id.* at ¶ 25 (citing *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, at the syllabus). However, this Court also noted that it has the discretion to apply its decision only prospectively after weighing the following considerations:

- (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions;
- (2) whether retroactive application of the decision promotes or hinders the purpose behind the rule defined in the decision; and,

(3) whether retroactive application of the decision causes an inequitable result.

Id. (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

Moreover, this Court also emphasized that under the so-called *Sunburst* Doctrine, state courts can apply a decision prospectively to avoid widespread injustice. *See Minster Farmers Coop. Exchange Co., Inc. v. Meyer* (2008), 117 Ohio St.3d 459, 2008-Ohio-1259, ¶ 30 (quoting *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St.3d 1, 9, (Douglas, J., concurring)). Applying the three-part test in *DiCenzo*, should the Court conclude the statutory definition of “employee” under R.C. 4111.14 is unconstitutional and invalid, the decision should be applied prospectively only, or should be limited only to the named Appellees – John Haight and Christopher Pence – against Minchaks.

1. Such a decision would establish a new principle of law that was not foreshadowed in prior decisions.

The issue presented in this case, whether the statutory definition of “employee” under R.C. 4111.14 is constitutional, was a matter of first impression before the appellate court and is likewise a matter of first impression before this Court. No other cases even foreshadowed the issue presented in this case. In fact, quite the contrary is true. The Ohio Attorney General issued an opinion letter in 2007 which specifically states that R.C. 4111.14 is “consistent with, and further delineates, the analysis of who constitutes an ‘employee’ that is dictated by Section 34a.” *See* Office of the Attorney General, State of Ohio, Opinion No. 2007-033, at p. 6, n.9.⁶

Since the enactment of the FLSA in 1938, outside salespeople have been exempt from the minimum wage entitlement under federal law. Until June 6, 2014, outside salespeople were also exempt from the minimum wage entitlement under Ohio law. Thus, employers have been

⁶ This letter is found at <http://www.ohioattorneygeneral.gov/getattachment/3de639e0-997f-4570-9fc0-cd2b26dcc65d/2007-033.aspx>.

operating for over seventy-five years with the expectation that an individual employed as an outside salesperson (or in any other capacity that the FLSA historically exempts) could be paid commissions and was not entitled to minimum wage. The Second District’s decision destroyed this predictability by eviscerating the FLSA exemptions under Ohio minimum wage law. The newly-created entitlement, which would result from striking down R.C. 4111.14’s meaning of “employee”, would be a new principle of law that was not foreshadowed in prior decisions.

In such circumstances, the first factor of the *DiCenzo* test weighs in favor of prospective only application. See *Beaver Excavating Co. v. Testa* (2012), 134 Ohio St.3d 565, 2012-Ohio-5776, ¶ 44. In *Beaver Excavating*, this Court concluded that the allocation of revenues from the commercial-activity tax (“CAT”) contained in R.C. 5751.20 violated Article XII, Section 5a of the Ohio Constitution. *Id.* at ¶ 38. However, this Court then applied the *DiCenzo* three-part test and concluded that its decision in that case should be applied prospectively only. *Id.* at ¶¶ 42-47. In so concluding, this Court determined that the first factor weighed in favor of prospective only application because the case presented an issue of first impression. *Id.* at ¶ 44.

Since this case also presents an issue of first impression, the application of such a change in minimum wage law should be applied prospectively only. Otherwise, every employer in Ohio who paid outside salespeople commissions, in accordance with federal and Ohio law, could face minimum wage liability for the past three years. Instead, employers should be given time to adjust their payroll, compensation, and reporting policies to comply with the new law. Similarly, this Court should not penalize the Minchaks for following Ohio law.

2. Retroactive application of such a decision would neither promote nor hinder the purpose behind the corresponding rule.

In *Beaver Excavating*, this Court stated the purpose of its decision striking down R.C. 5751.20 as unconstitutional was to ensure “the constitutional allocation of the CAT revenues ***.”

Beaver Excavating Co. v. Testa (2012), 134 Ohio St.3d at ¶ 45. As a result, this Court concluded that retroactive application of its decision would neither promote nor hinder the purpose behind its determination “that allocation and crediting of the CAT revenue must be made according [to] the provisions of Section 5a.” *Id.*

The same holds true in this case. Regardless of whether the decision is given retroactive or prospective effect, ensuring that the minimum wage is paid according to Article II, Section 34a would remain the purpose of a decision striking down R.C. 4111.14 as unconstitutional. Thus, retroactive application of such a decision would neither promote nor hinder the purpose behind such a rule.

3. Retroactive application of such a decision would cause an extremely inequitable result.

In examining the third factor of the *DiCenzo* test, this Court often looks to the fiscal effect of retroactive application. For instance, in *DiCenzo*, this Court stated:

[N]onmanufacturing sellers of asbestos *** could not have foreseen that these products, distributed from the 1950s to the 1970s, could decades later result in [their] being liable for injuries caused by that product. Imposing such a potential financial burden on these nonmanufacturing suppliers years after the fact for an obligation that was not foreseeable at the time would result in a great inequity.

DiCenzo, 2008-Ohio-5327, at ¶ 47.

Moreover, in *Beaver Excavating*, this Court stated:

The fiscal effect of reallocating other state revenue to replace money that has been expended for nonhighway purposes would have a significant, consequential, and negative impact on the state's fiscal footing, which has been under sustained stress for several years during the course of the economic recession. ***.

Clearly, the considerable sum of money implicated in this litigation and its significant effect on state finances satisfy the foregoing standard with respect to causing an inequitable result.

Beaver Excavating, 2012-Ohio-5776, at ¶¶ 46-47.

Finally, in *Minster*, which was decided before *DiCenzo*, this Court invoked the so-called *Sunburst* Doctrine and concluded that its decision should apply prospectively only stating that it did not intend to “create shock waves” throughout the affected sectors of Ohio’s economy, nor did it intend to “encourage propagation of pleadings regarding past practices.” *Minster*, 2008-Ohio-1259, at ¶ 30.

These same considerations weigh heavily in favor of prospective only application in this case. As stated above, retrospective application would expose Ohio employers, like the Minchaks, to collective action lawsuits, despite that they have complied with both Ohio law and the FLSA at all times. At a minimum, should this Court determine R.C. 4111.14 is unconstitutional, this result should only apply retrospectively to the named Appellees against the Minchaks. This would allow the named Appellees, i.e. John Haight and Christopher Pence, the benefit of their appellate efforts, without unnecessarily exposing the Minchaks to a class action when they had scrupulously followed the law.

In conclusion, the three-part test propounded by this Court in *DiCenzo* weighs in favor of prospective only application. Therefore, should this Court conclude that the statutory definition of “employee” under R.C. 4111.14 is unconstitutional and invalid, this Court should apply that conclusion and ruling prospectively, or at a minimum, retrospectively as to the named Appellees only, only under the three-part test propounded by this Court in *DiCenzo*.

CONCLUSION

The starting point for this Court’s de novo review is that R.C. 4111.14 is constitutional and operates in harmony with Article II, Section 34a. Appellees have the immense burden to prove R.C. 4111.14 is incapable of being harmonized with the constitution beyond a reasonable doubt.

They cannot meet this high burden because there is no doubt that the two provisions are compatible.

Ohio law requires that courts must presume a statute is constitutional, and must make every effort to harmonize the two provisions. The Second District failed to do that. If it had, it never would have found in Appellees' favor. In fact, Judge Welbaum easily harmonized R.C. 4111.14 and Article II, Section 34a in a matter of a few paragraphs. This was possible because the two provisions were drafted to work together. They both incorporated the FLSA's *meaning*, not strict definition, of "employee."

There is absolutely no evidence that the legislature or the people intended what Appellees argue and the Second District held. Article II, Section 34a was intended to incorporate the FLSA and to require employers to keep records – not to drastically alter Ohio wage law by expanding minimum wage entitlement to employees exempt under the FLSA.

For this Court to enforce the constitutionality of R.C. 4111.14, it simply has to do exactly what Article II, Section 34a and R.C. 4111.14 say to do: adopt the *meaning* of employee under the FLSA. Accordingly, this Court should uphold the constitutionality of R.C. 4111.14 and reverse the court of appeals' decision.

However, even if this Court were to uphold the Second District's decision and declare R.C. 4111.14 unconstitutional, the holding should be applied prospectively only. Such a decision would drastically change Ohio's minimum wage laws in a way that employers never anticipated. Employers, like the Minchaks, should not be penalized for following the law, and should be given an opportunity to make the necessary changes. At a minimum, any retrospective holding should

be limited to the named appellees, Haight and Pence, and no others.

Respectfully Submitted,

/s/ Kathleen Hahner

JOHN P. SUSANY (0039472)
KATHLEEN A. HAHNER (0084113)
STARK & KNOLL CO., L.P.A.

3475 Ridgewood Road

Akron, Ohio 44333-3163

(330) 376-3300/ FAX (330) 376-6237

jsusany@stark-knoll.com

khahner@stark-knoll.com

*Counsel for Defendants-Appellants, Robert
Minchak and Joan Minchak*

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 5th day of January, 2015, a copy of the foregoing was served upon the following by regular mail:

Andrew Biller
The Law Firm of Andrew Biller
Easton Town Center
4200 Regent Street, Suite 200
Columbus, OH 43219
Attorney for Plaintiffs-Appellees

Michael P. Brush
Jennifer Brumby
Freund, Freeze & Arnold
Fifth Third Center
1 South Main Street, Suite 1800
Dayton, OH 45402
*Attorneys for Defendant-Appellant,
Mark Kosir*

MICHAEL DEWINE (0009181)
Ohio Attorney General
MICHAEL D. ALLEN (0020693)
Assistant Attorney General
Labor Relations Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
Counsel of Record for the State of Ohio

/s/ Kathleen Hahner

JOHN P. SUSANY (0039472)
KATHLEEN A. HAHNER (0084113)
*Attorneys for Defendants-Appellants, Robert
and Joan Minchak*

APPENDIX

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Judgment from Second District Court of AppealsB1

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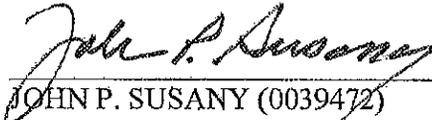
NOTICE OF APPEAL

Appellants, Robert Minchak and Joan Minchak, hereby give notice of appeal to the Supreme Court of Ohio from the Decision of the Montgomery County Court of Appeals, Second Appellate District, entered in the Court of Appeals Case No. 25983, on June 6, 2014, a copy of which is attached hereto and incorporated herein by reference as **Exhibit "A"**.

This case involves a substantial constitutional question and is one of public or great general interest, and a Memorandum in Support of Jurisdiction is filed contemporaneously with this Notice of Appeal.

DATED this 15th day of July, 2014.

Respectfully Submitted,



JOHN P. SUSANY (0039472)
PATRICK G. O'CONNOR (0086712)
STARK & KNOLL CO., L.P.A.
3475 Ridgewood Road
Akron, Ohio 44333-3163
(330) 376-3300/ FAX (330) 376-6237
jsusany@stark-knoll.com
poconnor@stark-knoll.com

*Counsel for Defendants-Appellants, Robert
Minchak and Joan Minchak*

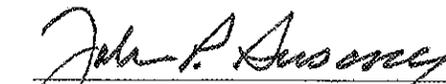
CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 18th day of July, 2014, a copy of the foregoing was served upon the following by regular mail:

Andrew Biller
The Law Firm of Andrew Biller
Easton Town Center
4200 Regent Street, Suite 200
Columbus, OH 43219
Attorney for Plaintiffs-Appellees

Michael P. Brush
Jennifer Brumby
Freund, Freeze & Arnold
Fifth Third Center
1 South Main Street, Suite 1800
Dayton, OH 45402
*Attorneys for Defendant-Appellant,
Mark Kosir*

MICHAEL DEWINE (0009181)
Ohio Attorney General
MICHAEL D. ALLEN (0020693)
Assistant Attorney General
Labor Relations Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
Counsel of Record for the State of Ohio


JOHN P. SUSANY (0039472)
PATRICK G. O'CONNOR (0086712)
*Attorneys for Defendants-Appellants, Robert
and Joan Minchak*



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GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO, OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

JOHN HAIGHT, et al.	:	
Plaintiffs-Appellants	:	C.A. CASE NO. 26983
v.	:	T.C. NO. 12CV946
CHEAP ESCAPE COMPANY, et al.	:	<u>FINAL ENTRY</u>
Defendants-Appellees	:	

.....

Pursuant to the opinion of this court rendered on the 6th day of June, 2014, the judgment of the trial court is reversed, and the case is remanded to the trial court.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.


JEFFREY M. WELBAUM, Presiding Judge


MIKE FAIN, Judge

JEFFREY M. WELBAUM, Judge

[Cite as *Haight v. Cheap Escape Co.*, 2014-Ohio-2447.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

JOHN HAIGHT, et al.	:	
Plaintiffs-Appellants	:	C.A. CASE NO. 25983
v.	:	T.C. NO. 12CV946
CHEAP ESCAPE COMPANY, et al.	:	(Civil appeal from
Defendants-Appellees	:	Common Pleas Court)
	:	
	:	

.....
OPINION

Rendered on the 6th day of June, 2014.

.....
ANDREW BILLER, Atty. Reg. No. 0081452, 4200 Regent Street, Suite 200, Columbus, Ohio 43219

and

FREDERICK M. GITTBS, Atty. Reg. No. 0031444, 723 Oak Street, Columbus, Ohio 43205
Attorneys for Plaintiffs-Appellants

JOHN P. SUSANY, Atty. Reg. No. 0039472 and PATRICK G. O'CONNOR, Atty. Reg. No. 0086712, 3475 Ridgewood Road, Akron, Ohio 44333

Attorneys for Defendants-Appellees, Robert Minchak and Joan Minchak

JENNIFER D. BRUMBY, Atty. Reg. No. 0076440 and MICHAEL P. BRUSH, Atty. Reg. No. 0080981, Fifth Third Center, 1 S. Main Street, Suite 1800, Dayton, Ohio 45402

Attorneys for Defendant-Appellee, Mark Kosir
NEIL E. KLINGSHIRN, Atty. Reg. No. 0037158, 4040 Embassy Parkway, Suite 280,
Akron, Ohio 44333
Attorney for Amicus Curiae, Ohio Employment Lawyers Association

.....

FROELICH, P.J.

{¶ 1} John Haight and Christopher Pence appeal from a judgment of the Montgomery County Court of Common Pleas, which found that they were not “employees” of Cheap Escape Company (d.b.a. JB Dollar Stretcher), as that term is defined in Ohio’s minimum wage laws, when they were working at the company as salespersons. Defendants-Appellees Robert Minchak, Joan Minchak, and Mark Kosir were Cheap Escape’s principals during the times relevant to this lawsuit.

Background

{¶ 2} The Ohio Fair Minimum Wage Amendment (State Issue 2) was approved by Ohio voters in November 2006, and was incorporated into the Ohio Constitution at Article II, Section 34a (“Section 34a”). It went into effect on December 8, 2006. A central provision of the amendment was that “every employer shall pay their (sic) *employees* a wage rate of not less than six dollars and eighty-five cents per hour beginning January 1, 2007,” (emphasis added) with the amount to be adjusted annually thereafter pursuant to a formula tied to the consumer price index. The amendment did not require any action by the Ohio General Assembly to implement its protections, but it provided that “[l]aws may be passed to implement its provisions and to create additional remedies, increase the minimum wage rate and extend coverage of the section, but in no manner restricting any provision of the section * * *.”

{¶ 3} Shortly after voter approval of Section 34a, the Ohio General Assembly

enacted R.C. 4111.14 and amended other portions of R.C. 4111.01 through R.C. 4111.10 (H.B. 690) "in implementation of Section 34a of Article II, Ohio Constitution."

{¶ 4} This appeal presents the question whether the General Assembly's actions, particularly its passage of R.C. 4111.14, imposed requirements or defined terms in a manner that conflicts with Section 34a and its express provision that laws passed for its implementation may extend, but not restrict, its coverage. If the statute clearly conflicts with the constitutional provision beyond a reasonable doubt, it cannot stand. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 146, 128 N.E.2d 58 (1955).

Facts and Procedural History

{¶ 5} Haight and Pence are former salespersons of Cheap Escape, which published a coupon magazine and operated a website for electronic coupons; they sold advertising space in the magazine and website. There is some dispute as to how Cheap Escape's salespersons were paid, but all or a substantial part of their pay was through commissions. Haight and Pence allege that they were paid less than the minimum wage during the time that they worked for Cheap Escape, and this fact does not appear to be in dispute. The parties disagree about whether Ohio law required Cheap Escape to pay Haight and Pence the minimum wage.

{¶ 6} On February 6, 2012, Haight and Pence filed a complaint against Cheap Escape and the Minchaks seeking "monetary, declaratory, and injunctive relief."¹ The complaint identified the claims as follows: failure to pay minimum wages under Section 34a,

¹ Haight and Pence brought their minimum wage claim "on behalf of themselves and all similarly situated individuals," as permitted under Section 34a.

declaratory action regarding definition of “employee” under Ohio’s minimum wage laws, failure to tender pay (earned commissions) by regular payday (R.C. 4113.15), breach of contract in failing to pay all earned commissions, and quantum meruit (unjust enrichment). Cheap Escape filed a counterclaim for unjust enrichment. Haight and Pence thereafter filed two amended complaints. In pertinent part, the amended complaints sought class action certification, omitted Cheap Escape as a defendant, added Mark Kosir as a defendant-employer, added additional claims against the Minchaks and Kosir under Section 34a and R.C. 4111.14 (which are not relevant to this appeal),² and dropped the claims against Cheap Escape for breach of contract and unjust enrichment. Cheap Escape and the Minchaks thereafter dismissed their counterclaim for unjust enrichment. We will hereafter refer to the Minchaks and Kosir, collectively, as the owners of Cheap Escape.

{¶ 7} On February 19, 2013, Haight and Pence filed a motion for a declaratory judgment on the constitutionality of the definition of “employee” contained in R.C. 4111.14(B)(1), arguing that the resolution of this legal question would “go a long way in resolving the lawsuit.” On October 13, 2012, the trial court concluded that R.C. 4111.14(B)(1) did not unconstitutionally contradict or restrict the meaning of the term “employee,” as set forth in Section 34a, and therefore that R.C. 4111.14(B)(1) was constitutionally valid. The court’s judgment included a statement that it was a final appealable order and Civ.R. 54 certification that there was no just cause for delay.

²These additional claims included a challenge to the constitutionality of the written consent requirement contained in R.C. 4111.14(K)(2), failure to maintain and provide employee records, retaliation, and spoliation of evidence.

[Cite as *Haight v. Cheap Escape Co.*, 2014-Ohio-2447.]

{¶ 8} Haight and Pence appeal, raising two assignments of error, which we will address together.³

The trial court erred in declaring that R.C. § 4111.14(B)(1)'s "additional exemptions to the definition of 'employee'" apply to actions brought under Ohio Const. Art. II, Sec. 34a.

The trial court erred in declaring that R.C. § 4111.14(B)(1)'s definition of "employee" is constitutionally valid.

{¶ 9} The pivotal question posed by the assignments of error is whether the trial court erred in concluding that the definition of an "employee" set forth in R.C. 4111.14(B)(1) is not in conflict with the definition of an "employee" contained in Ohio Constitution, Article II, Section 34a, and that R.C. 4111.14(B)(1) permissibly implements Section 34a. This question turns on whether the definition of an "employee" in the statute is incompatible with the definition of that term in Section 34a. If the statute, or any part of it, conflicts with the constitutional provision, it is unconstitutional.

{¶ 10} "It is difficult to prove that a statute is unconstitutional. All statutes have a strong presumption of constitutionality. * * * Before a court may declare unconstitutional an enactment of the legislative branch, 'it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'" *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 25, citing *Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus.

"A legislative act is presumed in law to be within the constitutional power of

³The Ohio Employment Lawyers Association filed a brief of amicus curiae in support of Haight, Pence, and others similarly situated.

the body making it, whether that body be a municipal or a state legislative body. * * * That presumption of validity of such legislative enactment cannot be overcome unless it appear that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution. * * * The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." * * * [A] law should not be held unconstitutional on "slight implication" and "vague conjecture" but only where the court has a "clear and strong conviction" that the challenged law is incompatible with the Constitution. (Internal citations omitted.)

N. Olmsted v. N. Olmsted Land Holdings, Ltd., 137 Ohio App.3d 1, 7, 738 N.E.2d 1 (8th Dist.2000), citing *Defenbacher*.

{¶ 11} Section 34a defines "employee" and other terms as follows:

As used in this section: "employer," "employee," "employ," "person" and "independent contractor" have the same meanings as under the federal Fair Labor Standards Act or its successor law, except that "employer" shall also include the state and every political subdivision and "employee" shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Only the exemptions set forth in this section shall apply to this section.

The Fair Labor Standard Act, 29 U.S.C. 203, defines an "employee" as "any

individual employed by an employer"; the definition set forth in this section is subject to certain exceptions, also set forth in that section, related to employees of a "public agency," an agricultural employer's family members, and volunteers for a public agency. 29 U.S.C. 203(e).

{¶ 12} R.C. 4111.14, enacted less than two months after Section 34a, acknowledges that its purposes are "in implementation of Section 34a of Article II, Ohio Constitution," R.C. 4111.14(A), and to ensure that the wage rate required by Section 34a is paid to "Ohio employees, as defined in division (B)(1) of this section." R.C. 4111.14(A)(1).

The statute also states that

In accordance with Section 34a of Article II, Ohio Constitution, the terms "employer," "employee," "employ," "person," and "independent contractor" have the same meanings as in the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 203, as amended. In construing the meaning of these terms, due consideration and great weight shall be given to the United States department of labor's and federal courts' interpretations of those terms under the Fair Labor Standards Act and its regulations. * * *

R.C. 4111.14(B).

{¶ 13} Although R.C. 4111.14(B)(1) acknowledges that Section 34a defines "employee" as having the "same meaning" as under the federal Fair Labor Standards Act, it also includes its own definition of "Employee":

"Employee" means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of "employee" under 29

U.S.C. 203(e) [the Fair Labor Standards Act] or individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213 and from the definition of "employee" in this chapter.

R.C. 4111.14(B)(1).

{¶ 14} 29 U.S.C. 213 contains exemptions to the minimum wage and maximum hour requirements of the Fair Labor Standards Act. These exemptions include "any employee employed in a bona fide executive, administrative, or professional capacity * * *, or in the capacity of outside salesman * * *." 29 U.S.C. 213(a)(1). Other exemptions include, very generally, summer camp employees, immediate family members working in agriculture, criminal investigators, and employees of fishing operations and small publications.

{¶ 15} For purposes of this appeal, the parties seem to agree, and we will assume, that Haight's and Pence's positions with Cheap Escape fell within the definition of an "outside salesperson," which is exempt from minimum wage requirements under 29 U.S.C. 213. Thus, they would not have been entitled to the federal minimum wage under federal law.

{¶ 16} The question, then, is whether Haight and Pence were entitled under Ohio law to be paid the Ohio minimum wage. They claim that they were, because the definition of an employee under Section 34a is very broad and does not exclude employees who are exempt from the federal minimum wage law under 29 U.S.C. 213. Haight and Pence further argue that, in enacting R.C. 4111.14(B)(1), the legislature impermissibly narrowed the definition of an "employee" set forth in Section 34a. The owners of Cheap Escape contend

that the “*meaning*” of “employee” under the federal Fair Labor Standards Act, as that term is used in Section 34a, is broader than the “*definition*” of “employee” in Section 34a, and that the definition of employee contained in R.C. 4111.14(B)(1) does not clearly conflict with the constitutional provision.

{¶ 17} Section 34a’s statement that “employee” and other terms have “the same meanings as under the federal Fair Labor Standards Act,” coupled with its statement that “[o]nly the exemptions set forth in this section shall apply to this section,” preclude interpreting Section 34a in the manner advocated by the owners of Cheap Escape. The exemptions from minimum wage requirements set forth in 29 U.S.C. 213 do not alter the definition of “employee” set forth in 29 U.S.C. 203. Rather, the exemptions provide that minimum wage (and maximum hour) requirements do not apply to certain categories of employees. In other words, the exemptions remove certain categories of *employees* from the minimum wage requirements set forth in other parts of the Fair Labor Standards Act, but they do not remove persons in those categories from the definition of an employee. Thus, the definition or “meaning” of an employee under the Fair Labor Standards Act is the broad definition contained in 29 U.S.C. 203(e) – “any individual employed by an employer” – rather than any narrower classification that applies for the provision of particular federal protections, such as wage and hour rules.

{¶ 18} This conclusion is bolstered by the statement in Section 34a that “[o]nly the exemptions set forth in this section shall apply to this section.” This provision refutes the owner-employers’ argument that the legislature was permitted to graft exemptions to minimum wage requirements set forth in 29 U.S.C. 213 of the Fair Labor Practices Act onto

the definition of an employee contained in 29 U.S.C. 203.

{¶ 19} Moreover, by incorporating the exemptions to minimum wage and maximum hour requirements contained in 29 U.S.C. 213 into the R.C. 4111.14(B)(1) definition of “employee,” the legislature impermissibly narrowed Section 34a’s definition of an employee and its scope. Section 34a states:

This section shall be liberally construed in favor of its purposes. Laws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section or the power of municipalities under Article XVIII of this constitution with respect to the same.

Any deliberate or inadvertent narrowing of the definition of an employee covered by Section 34a violates its express intent that legislative provisions implementing Section 34a may in no manner restrict its applicability. To the extent that R.C. 4111.14(B)(1) narrowed the definition of an employee and, thus, the scope of Section 34a, such action must be viewed as an impermissible restriction or modification – rather than a permissible “implementation” – of the constitutional provision.

{¶ 20} Having found that there is a clear conflict between the definition of an employee in R.C. 4111.14(B)(1) and the definition of an employee in Section 34a, we must conclude that the legislative enactment is invalid.

{¶ 21} In finding that R.C. 4111.14(B)(1) does not conflict with Section 34a, the trial court relied on *Ellington v. East Cleveland*, 689 F.2d 549 (6th Cir.2012). *Ellington* held that the Deputy Clerk of the East Cleveland City Council fell within the “legislative

employee” exclusion from the definition of an employee under the federal Fair Labor Standards Act, R.C. 4111.14(B), and Section 34a. We note that the “legislative employee” exclusion upon which *Ellington* relies is contained in 29 U.S.C. 203, which defines an employee, rather than 29 U.S.C. 213, which sets forth *classifications of employees* who are exempt from the minimum wage requirements. Unlike a “legislative employee,” who is excluded from the definition of an employee under 29 U.S.C. 203(e)(2)(C)(V), an “outside salesperson” is an employee who is exempt from the minimum wage requirement under 29 U.S.C. 213. *Ellington* does not address exempt employees, and the trial court does not discuss this distinction.

{¶ 22} In *Ellington*, the court found that the Deputy Clerk’s claims under Section 34a and R.C. 4111.14(B) failed because, on their face, “[l]ike the FLSA, both § 34a and [R.C. 4111.14(B)] limit the scope of the minimum wage and overtime provisions to individuals who qualify as ‘employees.’” The court did not analyze Section 34a or R.C. 4111.14(B); it merely noted that Section 34a and R.C. 4111.14(B) rely on the Fair Labor Standards Act’s definition of “employee.” Having concluded that the Deputy Clerk was not an employee (because he fell within the legislative employee exception) under 29 U.S.C. 203, the court likewise concluded that the Clerk was not an employee under Ohio law. *Ellington* is not controlling in considering the effect of the exemptions contained in 29 U.S.C. 213 on the Ohio definition of an employee.

{¶ 23} The briefs engage in extensive argument parsing and attempting to distinguish between “exemption” and “exception” and between “meaning” and “definition.” We appreciate these discussions. However, the Ohio Constitution (Section 34a) applies to

all "employees" as that term is used by the Fair Labor Standards Act, and the Fair Labor Standards Act defines "employee" as "any individual employed by an employer." Therefore, the Ohio Constitutional provisions cover any individual employed by an employer. The fact that the Fair Labor Standards Act goes on to exempt from *its* provisions employees who are employed by an employer as outside salespeople is not part of the definition and cannot reasonably be interpreted as such.

{¶ 24} We conclude that the legislature exceeded its authority to implement Section 34a when it defined "employee" differently, and more narrowly, than that term is defined in Section 34a or in the Fair Labor Standards Act.

{¶ 25} The assignments of error are sustained.

{¶ 26} The judgment of the trial court will be reversed, and the case will be remanded to the trial court.

.....

FAIN, J., concurs.

WELBAUM, J., dissenting:

{¶ 27} I very respectfully dissent. "In determining the constitutionality of an ordinance, we are mindful of the fundamental principle requiring courts to presume the constitutionality of lawfully enacted legislation. Further, the legislation being challenged will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt." (Citations omitted.) *Arnold v. Cleveland*, 67 Ohio St.3d 35, 38-39, 616 N.E.2d 163 (1993). I am not convinced beyond a reasonable doubt that R.C. 4111.14(B) unconstitutionally conflicts with Article II, Section 34a of the Ohio Constitution.

[Cite as *Haight v. Cheap Escape Co.*, 2014-Ohio-2447.]

{¶ 28} Article II, Section 34a and R.C. 4111.14(B) both state that the term “employee” has the same “meanings” as under the federal Fair Labor Standards Act (FLSA). I agree that 29 U.S.C. 203(e)(1) of the FLSA does provide a very broad definition of employee as “any individual employed by an employer.” However, I also conclude that the overarching meaning of employees under the FLSA, including its exclusions and exemptions from eligibility, must be applied.

{¶ 29} Notably, Article II, Section 34a of the Ohio Constitution uses the plural term “meanings,” which encompasses more than just a single definition. In addition, Section 34a does not confine itself only to the meaning of employee under 29 U.S.C. 203(e)(1). Instead, Section 34a states that “[a]s used in this section: ‘employer,’ ‘employee,’ ‘employ,’ ‘person’ and ‘independent contractor’ have the same meanings as under the federal Fair Labor Standards Act or its successor law * * *.” This reference includes the entirety of the act, not just a specific section. Under 29 U.S.C. 213(a)(1) of the FLSA, outside sales employees are excluded from eligibility to receive minimum wages, and they are properly excluded from coverage under Section 34a and R.C. 4111.14(B) as well.

{¶ 30} My conclusion is also buttressed by the fact that Article II, Section 34a of the Ohio Constitution includes a specific exemption for “employees of a solely family owned and operated business who are family members of an owner.” This exemption is not one that was included in the FLSA. Logically, the drafters of Ohio’s constitutional amendment would have specifically mentioned the existing exemptions and exclusions in the FLSA if they believed that these categories were not already excluded from the meaning of “employees” for purposes of Section 34a. Exempting one specific category of employees from Ohio’s coverage, while failing to exempt other previously-excluded categories, makes

no sense.

{¶ 31} The challengers have framed a debatable issue, but have not proved an invalidating conflict beyond a reasonable doubt. I am not convinced beyond a reasonable doubt that R.C. 4111.14(B) unconstitutionally conflicts with Article II, Section 34a of the Ohio Constitution. Therefore, I would uphold the constitutionality of R.C.4111.14(B) and affirm the judgment of the trial court.

{¶ 32} For the foregoing reasons, I very respectfully dissent.

.....

Copies mailed to:

Andrew Biller
Frederick M. Gittes
John P. Susany
Patrick G. O'Connor
Jennifer D. Brumby
Michael P. Brush
Neil E. Klingshirn
Lori Wiseman
Hon. Mary Katherine Huffman

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Montgomery County Common Pleas Court
General Division

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

JOHN HAIGHT, et. al,

CASE NO. 2012 CV 00946

Plaintiffs,

JUDGE MARY KATHERINE HUFFMAN

-vs-

CHEAP ESCAPE COMPANY, et. al,

DECISION, ORDER AND ENTRY
OF PLAINTIFFS' MOTION FOR
DECLARATORY JUDGMENT
REGARDING THE APPLICABILITY
AND CONSTITUTIONALITY OF OHIO
REVISED CODE SECTION 4111.14(B)(1)

Defendants.

This matter is before the court on Plaintiffs' Motion for Declaratory Judgment Regarding the Applicability and Constitutionality of Ohio Revised Code Section 4111.14(B)(1), filed on February 19, 2013. On March 4, 2013, State of Ohio filed its Memorandum of Amicus Curiae State of Ohio in Opposition to Plaintiffs' Motion for Declaratory Judgment Regarding the Applicability and Constitutionality of Ohio Revised Code Section 4111.14(B)(1). On March 5, 2013, Defendants filed their Opposition to Plaintiffs' Motion for Declaratory Judgment. Plaintiffs filed their Reply Memorandum in Support of Plaintiffs' Motion for Declaratory Judgment Regarding the Applicability and Constitutionality of Ohio Revised Code Section 4111.14(B)(1) on March 8, 2013. This matter is now ripe for decision.

I. PROCEDURAL HISTORY AND FACTS

Plaintiffs, John Haight and Chris Pence, on behalf of themselves and similarly situated individuals, bring this action against Defendants, The Cheap Escape Company d/b/a J.B. Dollar Stretcher Magazine, Robert Minchak, Joan Minchak, and Mark Kosir. Plaintiffs generally seek monetary, declaratory, and injunctive relief based on Defendants' alleged failure to compensate Plaintiffs and similarly situated individuals with minimum wages and to create and maintain employee records as required by the Ohio Constitution.

Cheap Escape published J.B. Dollar Stretcher Magazine and an "E-Coupon" website, and its services primarily consisted of selling advertising space in J.B. Dollar and on the E-Coupon website. Plaintiffs allegedly worked for Defendants, apparently as outside sales representatives, and solicited advertising business for J.B. Dollar by making sales phone calls, sending emails soliciting business, and meeting with customers. Plaintiffs alleged that, for five days per week, they were required to report to their designated office locations at 08:00 a.m. to start the work day and typically worked until approximately 06:00 p.m.

According to Plaintiffs, Defendants maintained a policy and pay schedule whereby sales representatives, including Plaintiffs, were paid either a combination of commissions with draw or commissions without draw. Starting sales representatives were allegedly entitled to receive a draw amount between \$100.00 and \$200.00 per week during weeks in which the sales representatives did not earn commissions. Sales representatives were required to pay back their draw before receiving any earned commissions, as draw was merely an advance on commissions, and the sales representatives ultimately received commissions less any previous draw amount received during the pay period. Defendants allegedly stopped paying or reduced the amount of draw paid to sales representatives who had been with the company for approximately five to six weeks or whom Defendants deemed to be underperforming. Once Defendants stopped paying the draw to sales

representatives, and if the sales representatives failed to earn commissions for the pay period, the sales representatives did not receive compensation for that pay period. Consequently, during those pay periods in which sales representatives failed to earn commissions, the sales representatives were consistently paid wages below the minimum wage mandated by Ohio Constitution Article II, Section 34a.

In general, Plaintiffs assert that they were "employees" as defined by Ohio Constitution Article II, Section 34a, and, thus, were entitled to minimum wages for hours worked. Plaintiffs seek to recover against Defendants under Article II, Section 34a, arguing that Defendants violated the Ohio Constitution by failing to pay Plaintiffs and other similarly situated individuals at least minimum wages for hours worked. Plaintiffs seek to proceed under a modified Civ.R. 23 opt-out class action on behalf of all similarly situated individuals, or, alternatively, if a Civ.R. 23 opt-out class action is not available in this matter under Ohio law, Plaintiffs seek to proceed under an opt-in collective action.

In their Complaint, filed on February 6, 2012, Plaintiffs assert that they were employed as sales representatives with Cheap Escape. During all relevant times, Plaintiffs assert that they were Defendants' "employees" within the meaning of that term as used in the federal Fair Labor Standards Act (FLSA) and in Ohio Constitution Article II, Section 34a and that Defendants were "employers" within the meaning of that term as used in the FLSA and in Section 34a. Plaintiffs allege, in summary, that all Defendants failed to pay minimum wages to Plaintiffs and similarly situated individuals, and now seek a declaratory judgment regarding the definition of "employee" under Ohio law.

At this juncture, Plaintiffs ask this court to enter a declaratory judgment that: (1) Ohio R.C. 4111.14(B)(1)'s inclusion of additional exemptions to the definition of "employee" is not compatible with Article II, Section 34a of the Ohio Constitution, and, as a result, is

unconstitutionally invalid; and (2) R.C. 4111.14(B)(1)'s additional exemptions to the definition of "employee" are not applicable to cases brought under Article II, Section 34a, as Section 34a is a self-executing constitutional provision not subject to the FLSA's or R.C. 4111.14's exemptions.

In support of their Motion for Declaratory Judgment, Plaintiffs assert that, in November 2006, Ohio voters approved Ohio Constitution Article II, Section 34a, which mandated that "every employer shall pay their employees a wage rate of not less than [minimum wage] beginning January 1, 2007." Plaintiffs argue that Section 34a explicitly forbids any law from "restricting any provision of the section." According to Plaintiffs, on January 2, 2007, Governor Taft signed House Bill 690 into law, thereby amending R.C. 4111.01-4111.10 and adding R.C. 4111.14. Plaintiffs assert that R.C. 4111.14(B)(1) effectively excludes outside salespeople from the definition of "employee" under Article II, Section 34a, thereby exempting outside sales representatives from minimum wage protection, and, thus, is unconstitutional. In the alternative, Plaintiffs seek to have the court find that Section 34a and R.C. 4111.14 exist independently of one another, arguing that Section 34a is a self-executing constitutional provision.

II. LAW AND ANALYSIS

Declaratory judgment actions are governed by Chapter 2721, Ohio Revised Code. R.C. 2721.02 refers to "rights, status, or other legal relations" as the subject of the court's declaratory powers. This right does not extend to anyone who is practically affected by the controversy involved, but only to those persons who are legally affected. *Schriber Sheet Metal & Roofers, Inc. v. Shook* (1940), 64 Ohio App. 276; *Shoemaker v. City of Piqua* (2000), 2000 Ohio App. LEXIS 4742. R.C. 2721.03 states in pertinent part, "any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the

Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.”

Ohio Courts have consistently held that, in order for declaratory relief to be considered an appropriate remedy, the plaintiff must establish the following three essential elements: (1) that a real controversy exists between the parties; (2) the controversy is justiciable in nature; and (3) the particular situation is one in which speedy relief is necessary to preserve the rights of the parties. See *Williams v. Akron* (1978), 54 Ohio St. 2d 136, 144, 374 N.E.2d 1378; *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128, 130, 339 N.E.2d 626; *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St. 2d 93, 296 N.E.2d 261; *Buckeye Quality Care Centers v. Fletcher* (1988), 48 Ohio App. 3d 150, 154, 548 N.E.2d 973. When determining if a “real controversy” exists, Ohio Courts have found that the controversy must be based upon legal rights and obligations. *Superior Dairy, Inc. v. Stark County Milk Producers’ Ass’n.* (1950), 89 Ohio App. 26, 31.

“It is a generally accepted premise that courts must interpret the Constitution broadly in order to accomplish the manifest purpose of an amendment.” *State, ex rel. Swetland v. Kinney* (1982), 69 Ohio St. 2d 567, citing *State, ex rel. Turner v. Fassig* (1916), 5 Ohio App. 479, 487.

Courts attempt to reconcile constitutional conflicts, while considering the following:

“In the interpretation of an amendment to the Constitution the object of the people in adopting it should be given effect; the polestar in the construction of the constitutional, as well as legislative, provisions is the intention of the makers and adopters thereof.”

Id., quoting *Castleberry v. Evatt* (1946), 147 Ohio St. 30. Additionally, “[c]onstitutional provisions are intentionally cast in very general terms. This generality allows the legislature to promulgate more specific legislation to carry out the intricacies of the constitutional enactment.” *State, ex rel.*

Swetland v. Kinney (1982), 69 Ohio St. 2d 567. "In making this determination our inquiry must include more than a mere analysis of the words found in the amendment at issue." *Id.* "The purpose of the amendment, and the reasons for, and this history of its adoption, are pertinent in determining the meaning of the language used, for when the language is obscure or of doubtful meaning the court may, with propriety, recur to the history of the time when it was passed, to the attending circumstances at the time of adoption, to the cause, occasion or necessity therefor, to the imperfections to be removed or the mischief sought to be avoided and the remedy intended to be afforded." *Id.*, quoting *Cleveland v. Bd of Tax Appeals* (1950), 153 Ohio St. 97, 103. The court must (1) ascertain the motive behind the subject constitutional amendment, and (2) explore the intent of the voters of Ohio in approving the amendment. See *id* generally.

The interaction between the Constitution and legislation was reviewed by the court in *State, ex rel. Jackman v. Court* (1967), 9 Ohio St. 2d 159, 161-162, in which the court stated:

"The legal duty imposed upon the judiciary was succinctly stated in paragraph one of the syllabus in *State ex rel. Dickman, v. Defenbacher, Dir.*, 164 Ohio St. 142 (1955):

"An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible."

"That duty applies both to the General Assembly of Ohio and to the federal Congress. However, it should be noted that the federal Constitution is a grant of power to the Congress, while the state Constitution is primarily a limitation on legislative power of the General Assembly. It follows that the General Assembly may pass any law unless it is specifically prohibited by the state or federal Constitutions***. [Citations omitted.]

"An excellent summary of these principles of law was made by the court in *State, ex rel., v. Jones, Auditor*, 51 Ohio St. 492, 503, 504 (1894):

"In determining whether an act of the Legislature is or is not in conflict with the Constitution, it is a settled rule, that the presumption is in favor of the validity of the law. The legislative power of the state is vested in the General Assembly, and whatever limitation is placed upon the exercise of that plenary grant of power must be found in clear prohibition by the Constitution. The legislative power will generally be deemed ample to authorize the enactment of a law, unless the legislative

discretion has been qualified or restricted by the Constitution in reference to the subject matter in question. If the constitutionality of the law is involved [sic] in doubt, that doubt must be resolved in favor of the legislative power. The power to legislate for all the requirements of civil government is the rule, while a restriction upon the exercise of that power in a particular case is the exception. (Emphasis added)."

The court in *State, ex rel. Swetland v. Kinney* (1982), 69 Ohio St. 2d 567, also explained this interaction by quoting *State, ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, 147, and *Williams v. Scudder*, 102 Ohio St., 305, respectively, stating:

"A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. This court has held enactments of the General Assembly to be constitutional unless such enactments are clearly unconstitutional beyond a reasonable doubt." (Emphasis added).

"The legislative judgment in this behalf will not be nullified except when it clearly appears that there has been a gross abuse of such discretion in undoubted violation of some state of [sic] federal constitutional provision." (Emphasis added).

In 1938, the federal Fair Labor Standards Act (FLSA) was enacted to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" and required employers to pay employees engaged in commerce with a wage consistent with the minimum wage established by law. *Blington v. City of East Cleveland* (2012), 689 F.3d 549, citing 29 U.S.C. 202(a). The Supreme Court has indicated that the FLSA is to be liberally construed, but, despite its expansive nature, the FLSA defines "employee" to exclude a number of working individuals from its provisions." *Id.* [citations omitted]. More specifically, *the FLSA broadly defines "employee" as "any individual employed by an employer" under 29 U.S.C. 203(e)(1), but then goes on to delineate exemptions to the minimum wage and maximum hour requirements under the law, specifically exempting from minimum wage protection any employee employed in the capacity of an outside salesman under 29 U.S.C. 213(a).* (Emphasis added).

Broadly, both the FLSA and the Ohio Minimum Fair Wage Standards Act (OMFWSA) under Ohio Revised Code Chapter 4111 require employers to pay a minimum wage to certain categories of employees. *Hurt v. Commerce Energy, Inc.* (2013), 2013 U.S. Dist. LEXIS 116383. The Ohio Constitution was amended under Article II, Section 34a to ensure minimum wages for Ohio workers, stating, in relevant part, “that Ohio employers must pay their employees working in the State a specified minimum wage and provides that ‘[l]aws may be passed to implement [the section’s] provisions and create additional remedies, increase the minimum wage rate and extend the coverage of that section.’” *Ellington v. City of East Cleveland* (2012), 689 F.3d 549. The OMFWSA was passed by the Ohio General Assembly to implement the provisions of Article II, Section 34a and to reaffirm the minimum wage rate established in the Ohio Constitution. *Id.* [citations omitted]. Like the FLSA, Section 34a and the OMFWSA limit the scope of the minimum wage provision to individuals who qualify as “employees,” expressly adopting the FLSA’s meaning of “employee.” *Id.*

More specifically, Ohio Constitution Article II, Section 34a establishes the state minimum wage for the State of Ohio, requiring every employer to pay its employees at a minimum wage rate as established by the legislature. As used in that section, “*‘employer,’ ‘employee,’ ‘employ,’ ‘person’ and ‘independent contractor’ have the same meanings as under the federal Fair Labor Standards Act or its successor law, except that ‘employer’ shall also include the state and every political subdivision and ‘employee’ shall not include an individual employed in or about the property of the employer or individual’s residence on a casual basis. Only the exemptions set forth in this section shall apply to this section.*” (Emphasis added) Ohio Const. Art. II, 34a. The same section provides provisions for bringing an action against an employer for failure to comply with the law, stating:

"An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction, including the common pleas court of an employee's county of residence, for any violation of this section or any law or regulation implementing its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later. There shall be no exhaustion requirement, no procedural, pleading or burden of proof requirements beyond those that apply generally to civil suits in order to maintain such action and no liability for costs or attorney's fees on an employee except upon a finding that such action was frivolous in accordance with the same standards that apply generally in civil suits. Where an employer is found by the state or a court to have violated any provision of this section, the employer shall within thirty days of the finding pay the employee back wages, damages, and the employee's costs and reasonable attorney's fees. Damages shall be calculated as an additional two times the amount of the back wages and in the case of a violation of an anti-retaliation provision an amount set by the state or court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued. Payment under this paragraph shall not be stayed pending any appeal."

Id.

Ohio Constitution Article II, Section 34a also provides that "[l]aws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section or the power of municipalities under Article XVIII of this constitution with respect to the same."

(Emphasis added) Id. Pursuant to this authorization contained in Section 34a, the General Assembly enacted R.C. 4111.14 to implement Section 34a. R.C. 4111.14(A). In implementing Section 34a, the General Assembly found that the purpose of Section 34a is (1) to ensure that Ohio employees, as defined in R.C. 4111.14(B)(1), are paid the wage rate required by Section 34a; (2) to ensure that covered Ohio employers maintain certain records that are directly related to the enforcement of the wage rate requirements under Section 34a; (3) to ensure that Ohio employees who are paid the wage rate required by Section 34a may enforce their right to receive that wage rate in the manner set forth in Section 34a; and (4) to protect the privacy of Ohio employees' pay and

personal information specified in Section 34a by restricting an employee's access, and access by a person acting on behalf of that employee, to the employee's own pay and personal information. *Id.* A review of the legislative history shows that the General Assembly, by enacting Article II, Section 34a of the Ohio Constitution, intended to implement the Ohio Fair Minimum Wage Amendment in the manner in which the proponents of the Amendment described it to Ohio voters during the campaigns for the General Election on November 7, 2006. The proponents of the Ohio Fair Minimum Wage Amendment issued campaign materials, one of which was entitled "Fact vs. Fiction: Minimum Wage Opponents Shamelessly Distort Facts to Deny Low-Wage Workers a Raise," published by Ohioans for a Fair Minimum Wage, that stated all of the following upon which Ohio voters relied to be honest and accurate:

- (1) The Amendment defines "employer," "employee," and "employ" as having the same meanings as under the federal Fair Labor Standards Act. Clear definitions for terms such as "employ" and "casual basis" will not necessitate litigation to clarify their meanings because those terms have been established by federal regulations, well settled case law, or both.
- (2) By referencing the federal minimum wage law directly, the Amendment ensures that the Ohio law tracks the federal minimum wage requirements with respect to individuals who volunteer their time.
- (3) The Amendment does not threaten employees' privacy because employees may seek access only to their own payroll records.
- (4) The Amendment allows an employer to take reasonable steps to verify that a person does in fact represent the employee.
- (5) Employment law experts explain that state authorities in Ohio will undoubtedly interpret the parallel language in the Amendment in the same manner as the federal Department of Labor, clarifying that employers need not keep irrelevant records for non-hourly employees.

The General Assembly enacted R.C. 4111.14 while considering the proponents' campaign materials and its authority under Section 34a of Article II, Ohio Constitution, which states that "laws may be passed to implement its provisions ..."

R.C. 4111.14(B) states, in part:

In accordance with Section 34a of Article II, Ohio Constitution, the terms "employer," and "employee," "employ," "person," and "independent contractor" have the same meanings as in the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 203, as amended. In construing the meaning of these terms, due consideration and great weight shall be given to the United States department of labor's and federal courts' interpretations of those terms under the Fair Labor Standards Act and its regulations. As used in division (B) of this section:

(1) *"Employee" means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of "employee" under 29 U.S.C. 203(e) or individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213 and from the definition of "employee" in this chapter. (Emphasis added).*

R.C. 4111.14(K) further provides an action for equitable and monetary relief as in Section 34a, stating:

In accordance with Section 34a of Article II, Ohio Constitution, an action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction, including the court of common pleas of an employee's county of residence, for any violation of Section 34a of Article II, Ohio Constitution or any law or regulation implementing its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later.

Plaintiffs ask this court to grant a declaratory judgment that (1) R.C. 4111.14(B)(1) is unconstitutional because the limiting definition of "employee" within R.C. 4111.14(B)(1) and the FLSA is not compatible with Article II, Section 34a of the Ohio Constitution; or (2) R.C. 4111.14(B)(1) is not applicable to cases brought under Article II, Section 34a because that provision of the Ohio Constitution is self-executing, providing Plaintiffs with a choice to bring action either under Section 34a or R.C. 4111.14.

In short, Plaintiffs allege that they were sales representatives for Cheap Escape and were entitled to minimum wage payments, which Defendants failed to pay. Defendants deny that they were required to pay Plaintiffs minimum wage because Plaintiffs as outside salespeople were

exempted from the minimum wage protection and were paid earned commissions. Plaintiffs admit that they are "outside salespeople" but assert that they are still "employees" for purposes of minimum wage protection under Section 34a. Plaintiffs argue that R.C. 4111.14's attempt to limit the definition of "employee" and prevent recovery of minimum wages for certain "employees" under Section 34a is an unconstitutional infringement on Plaintiffs' rights under the Constitution.

In this case, Plaintiffs first argue that the exemptions from the minimum wage requirements set forth in R.C. 4111.14 and also in the FLSA, including that for outside salespeople, do not apply under the Ohio Constitution. Yet, in *Ellington v. City of E. Cleveland* (2012), 2012 U.S. App. LEXIS 16265, the court held that the definition of employee under Ohio Constitution Article II, Section 34a and R.C. 4111.14(B) expressly adopted the FLSA definition. In that case, a city council deputy clerk was found to be subject to the FLSA legislative employee exclusion, and, thus, he necessarily was not an employee under Ohio law, thereby excluding him from the minimum wage protection. *Ellington v. City of E. Cleveland* (2012), 2012 U.S. App. LEXIS 16265. There, the court explained:

Ellington's state-law claim fails because he is excluded from the wage and overtime protections afforded by the Ohio Constitution and the OMFWSA. Article II, section 34a of the Ohio Constitution states, in relevant part, that Ohio employers must pay their employees working in the State a specified minimum wage and provides that "[l]aws may be passed to implement [the section's] provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section." The OMFWSA is one such law the state legislature has passed to implement the provisions of § 34a. The OMFWSA reaffirms the minimum wage rate established in the Ohio Constitution, Ohio Rev. Code § 4111.02, and further guarantees employees overtime pay, Ohio Rev. Code § 4111.03. Like the FLSA, both § 34a and the OMFWSA limit the scope of the minimum wage and overtime provisions to individuals who qualify as "employees." They also both expressly adopt the FLSA's definition of "employee." Ohio Const. Art. II, § 34a ("As used in this section . . . 'employee' . . . [has] the same meaning as under the federal Fair Labor Standards Act. . . ."); Ohio Rev. Code § 4111.14(B) ("In accordance with Section 34a of Article II, Ohio Constitution, the term . . . 'employee' . . . [has] the same meaning[] as in the 'Fair Labor Standards Act of 1938' As used in division (B) of this section . . . '[e]mployee' means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of 'employee' under 29 U.S.C. 203(e) . . ." (emphasis added)). Accordingly, this court having already determined that Ellington was not an "employee" under the FLSA,

he also does not qualify as an employee subject to the benefits of § 34a and the OMFWSA. *Ellington v. City of E. Cleveland* (2012), 2012 U.S. App. LEXIS 16265.

Relevant to this case is the exemption of employees as outside salespeople under FLSA from the minimum wage protection. Plaintiffs argue that they are "employees" under Article II, Section 34a's definition, asserting that the plain language of the provision allows only for exemptions set forth in that section. Plaintiffs argue that the exemptions of certain employees, including outside salespeople as delineated under FLSA, are inapplicable to Plaintiffs in this case. Plaintiffs argue that the consequential narrower definition of "employee" under R.C. 4111.14(B) and (B)(1) is an unconstitutional limitation on the broad definition of "employee" found in Article II, Section 34a. Plaintiffs argue that, when a statute clearly conflicts with the plain language of the Constitution, the statute must be held unconstitutional. Plaintiffs also argue that the General Assembly exceeded its authority in passing laws regarding Section 34a's subject matter. Plaintiffs argue that, although "outside salespeople" are exempt from the minimum wage requirements under FLSA, "outside salespeople" still fall under the definition of "employee" for purposes of minimum wage recovery under Ohio Constitution Article II, Section 34a. Conversely, Defendants argue that (1) the General Assembly had the authority to pass laws implementing Section 34a's provisions under R.C. 4111.14 and (2) the meaning of "employee" under Section 34a and R.C. 4111.14 broadly incorporates the FLSA's definition of "employee," the exceptions thereto, and the applicable exemptions therein.

The first issue to be decided herein is whether the meaning of "employee" under R.C. 4111.14(B)(1) conflicts with the meaning of "employee" under Article II, Section 34a, thus rendering R.C. 4111.14(B)(1) unconstitutional. After considering the relevant facts, the court finds that R.C. 4111.14(B)(1) is instrumental in effectuating the intent of Article II, Section 34a, and the court fails to find that the meaning of "employee" found in R.C. 4111.14 or in the federal FLSA

conflicts or is inconsistent with the meaning of "employee" under Article II, Section 34a. First, although Article II, Section 34a stated that only exemptions set forth therein shall apply to that section, Section 34a also specifically granted the General Assembly with the authority to implement the constitutional provisions, including the authority that the General Assembly exercised in passing the OMWFSa under Revised Code Chapter 4111. Moreover, the plain language of Article II, Section 34a provides that "employee" shall have the same meaning as under FLSA, which includes not only the definition of "employee", but also includes the exceptions and exemptions detailed therein. (Emphasis added) Like the FLSA, both Section 34a and the OMWFSa under Revised Code Chapter 4111 limit the scope of the minimum wage provisions to individuals who qualify, and they also both expressly adopt the FLSA's meaning of "employee." Accordingly, the court fails to find that R.C. 4111.14(B)(1) contradicts or restricts the meaning of "employee" as described in Section 34a.

The court also fails to find that Article II, Section 34a contains anything that could be construed as a prohibition on the power of the General Assembly to legislate and implement R.C. 4111.14(B)(1), and, accordingly, the court finds that the General Assembly acted within its authority in promulgating the legislation. Finally, the court also finds that Plaintiffs have failed to show, beyond a reasonable doubt, that Article II, Section 34a of the Ohio Constitution and R.C. 4111.14(B)(1) are clearly incompatible or that there was a gross abuse of the General Assembly's discretion in undoubted violation of some state or federal constitutional provision. Therefore, the court finds that R.C. 4111.14(B)(1) does not conflict with Article II, Section 34a of the Ohio Constitution, and, thus, is constitutionally valid.

Alternatively, Plaintiffs also argue that, if the court determines that Section 34a and R.C. 4111.14 are two separate and parallel laws, Section 34a is self-executing, and, thus, no legislative

action is needed to implement and enforce Section 34a's provisions. Put differently, Plaintiffs argue that aggrieved workers could proceed under whichever law they choose.

"A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation. A provision is not self-executing if its terms duly construed indicate that it is not to become operative without supplemental or enabling legislation." *State ex rel. Russell v. Bliss* (1951), 156 Ohio St. 147, quoting 16 *Corpus Juris Secundum*, 98, Section 48. A constitutional provision "must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action." *Id.* Put differently, "[a] clause in a constitution is self-executing if it contains more than a mere framework, and specifically provides for carrying into immediate effect the enjoyment of the rights established therein without legislative action." *In re Protest Filed with Franklin County Bd. of Elections* (1990), 49 Ohio St. 3d 102, citing see *Yenter v. Baker* (1952), 126 Colo. 232. "However, laws may be passed to facilitate its operation, as long as they do not restrict or limit the provision or the powers therein reserved." *Id.*, citing see *Daggett v. Hudson* (1885), 43 Ohio St. 548. Put differently, although power authorized by a self-executing constitutional grant exists without the aid of legislation, the provisions may still be limited by relevant charter, statutory, or constitutional provisions. See *State ex rel. Vickers v. Summit County Council* (2002), 97 Ohio St. 3d 204, citing see *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections* (1991), 62 Ohio St.3d 17, 20.

Here, the court fails to find that Article II, Section 34a is self-executing. Section 34a was referred to the General Assembly for action as evidenced by its plain language therein, stating "laws may be passed to implement its provisions..." Moreover, the court fails to find that Plaintiffs have pointed to binding authority illustrating that Section 34a is a self-executing provision. Thus, the

court finds that R.C. 4111.14 was enacted to effectuate Article II, Section 34a of the Ohio Constitution, and, therefore, R.C. 4111.14(B)(1)'s additional exemptions to the definition of "employee" is applicable to actions brought under Ohio Constitution Article II, Section 34a by way of R.C. 4111.14.

III. CONCLUSION

For the foregoing reasons, the court hereby declares that:

- (1) R.C. 4111.14(B)(1) is constitutionally valid; and
- (2) R.C. 4111.14(B)(1)'s additional exemptions to the definition of "employee" is applicable to actions brought under Ohio Constitution Article II, Section 34a.

SO ORDERED:

JUDGE MARY KATHERINE HUFFMAN

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST CAUSE FOR DELAY FOR PURPOSES OF CIV.R. 54. PURSUANT TO APP.R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED.

JUDGE MARY KATHERINE HUFFMAN

To the Clerk of Courts:

Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

JUDGE MARY KATHERINE HUFFMAN

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

ANDREW BILLER
(614) 604-8759
Attorney for Plaintiff, John Haight

ANDREW BILLER
(614) 604-8759
Attorney for Plaintiff, Christopher Pence

SCOTT J. ROBINSON
(216) 696-4200
Attorney for Defendant, Cheap Escape Company

PATRICK O'CONNOR
(330) 572-1302
Attorney for Defendant, Cheap Escape Company

PATRICK O'CONNOR
(330) 572-1302
Attorney for Defendant, Robert Minchak

PATRICK O'CONNOR
(330) 572-1302
Attorney for Defendant, Joan Minchak

JENNIFER D. BRIMBY
(937) 222-2424
Attorney for Defendant, Mark Kosir

MICHAEL P. BRUSH
(937) 222-2424
Attorney for Defendant, Mark Kosir

Copies of this document were sent to all parties listed below by ordinary mail:

LORI WEISMAN
ASSISTANT ATTORNEY GENERAL
30 EAST BROAD STREET, 16TH FLOOR
COLUMBUS, OH 43125
(614) 644-8462
Attorney for Defendant, State of Ohio

Ryan Colvin, Bailiff (937) 496-7955 Colvinr@montcourt.org



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision
Case Number: 2012 CV 00946
Case Title: JOHN HAIGHT vs CHEAP ESCAPE COMPANY

So Ordered

Maury H. Huffman

Electronically signed by mhuffman on 2/1/2012 10:06:01 AM page 18 of 18

4111.14 Implementing constitutional minimum wage authority.

(A) Pursuant to the general assembly's authority to establish a minimum wage under Section 34 of Article II, Ohio Constitution, this section is in implementation of Section 34a of Article II, Ohio Constitution. In implementing Section 34a of Article II, Ohio Constitution, the general assembly hereby finds that the purpose of Section 34a of Article II, Ohio Constitution is to:

- (1) Ensure that Ohio employees, as defined in division (B)(1) of this section, are paid the wage rate required by Section 34a of Article II, Ohio Constitution;
- (2) Ensure that covered Ohio employers maintain certain records that are directly related to the enforcement of the wage rate requirements in Section 34a of Article II, Ohio Constitution;
- (3) Ensure that Ohio employees who are paid the wage rate required by Section 34a of Article II, Ohio Constitution may enforce their right to receive that wage rate in the manner set forth in Section 34a of Article II, Ohio Constitution; and
- (4) Protect the privacy of Ohio employees' pay and personal information specified in Section 34a of Article II, Ohio Constitution by restricting an employee's access, and access by a person acting on behalf of that employee, to the employee's own pay and personal information.

(B) In accordance with Section 34a of Article II, Ohio Constitution, the terms "employer," "employee," "employ," "person," and "independent contractor" have the same meanings as in the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 203 , as amended. In construing the meaning of these terms, due consideration and great weight shall be given to the United States department of labor's and federal courts' interpretations of those terms under the Fair Labor Standards Act and its regulations. As used in division (B) of this section:

- (1) "Employee" means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of "employee" under 29 U.S.C. 203(e) or individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213 and from the definition of "employee" in this chapter.
- (2) "Employ" and "employee" do not include any person acting as a volunteer. In construing who is a volunteer, "volunteer" shall have the same meaning as in sections 553.101 to 553.106 of Title 29 of the Code of Federal Regulations, as amended, and due consideration and great weight shall be given to the United States department of labor's and federal courts' interpretations of the term "volunteer" under the Fair Labor Standards Act and its regulations.

(C) In accordance with Section 34a of Article II, Ohio Constitution, the state may issue licenses to employers authorizing payment of a wage below that required by Section 34a of Article II, Ohio Constitution to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment. In issuing such licenses, the state shall abide by the rules adopted pursuant to section 4111.06 of the Revised Code.

(D)

(1) In accordance with Section 34a of Article II, Ohio Constitution, individuals employed in or about the property of an employer or an individual's residence on a casual basis are not included within the coverage of Section 34a of Article II, Ohio Constitution. As used in division (D) of this section:

- (a) "Casual basis" means employment that is irregular or intermittent and that is not performed by an

individual whose vocation is to be employed in or about the property of the employer or individual's residence. In construing who is employed on a "casual basis," due consideration and great weight shall be given to the United States department of labor's and federal courts' interpretations of the term "casual basis" under the Fair Labor Standards Act and its regulations.

(b) "An individual employed in or about the property of an employer or individual's residence" means an individual employed on a casual basis or an individual employed in or about a residence on a casual basis, respectively.

(2) In accordance with Section 34a of Article II, Ohio Constitution, employees of a solely family-owned and operated business who are family members of an owner are not included within the coverage of Section 34a of Article II, Ohio Constitution. As used in division (D)(2) of this section, "family member" means a parent, spouse, child, stepchild, sibling, grandparent, grandchild, or other member of an owner's immediate family.

(E) In accordance with Section 34a of Article II, Ohio Constitution, an employer shall at the time of hire provide an employee with the employer's name, address, telephone number, and other contact information and update such information when it changes. As used in division (E) of this section:

(1) "Other contact information" may include, where applicable, the address of the employer's internet site on the world wide web, the employer's electronic mail address, fax number, or the name, address, and telephone number of the employer's statutory agent. "Other contact information" does not include the name, address, telephone number, fax number, internet site address, or electronic mail address of any employee, shareholder, officer, director, supervisor, manager, or other individual employed by or associated with an employer.

(2) "When it changes" means that the employer shall provide its employees with the change in its name, address, telephone number, or other contact information within sixty business days after the change occurs. The employer shall provide the changed information by using any of its usual methods of communicating with its employees, including, but not limited to, listing the change on the employer's internet site on the world wide web, internal computer network, or a bulletin board where it commonly posts employee communications or by insertion or inclusion with employees' paychecks or pay stubs.

(F) In accordance with Section 34a of Article II, Ohio Constitution, an employer shall maintain a record of the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid an employee for a period of not less than three years following the last date the employee was employed by that employer. As used in division (F) of this section:

(1) "Address" means an employee's home address as maintained in the employer's personnel file or personnel database for that employee.

(2)

(a) With respect to employees who are not exempt from the overtime pay requirements of the Fair Labor Standards Act or this chapter, "pay rate" means an employee's base rate of pay.

(b) With respect to employees who are exempt from the overtime pay requirements of the Fair Labor Standards Act or this chapter, "pay rate" means an employee's annual base salary or other rate of pay by which the particular employee qualifies for that exemption under the Fair Labor Standards Act or this chapter, but does not include bonuses, stock options, incentives, deferred compensation, or any other similar form of compensation.

(3) "Record" means the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid an employee in one or more documents, databases, or other paper or electronic forms of record-keeping maintained by an employer. No one particular method or form of maintaining such a record or records is required under this division. An employer is not required to create or maintain a single record containing only the employee's name, address, occupation, pay rate, hours worked for each day worked, and each amount paid an employee. An employer shall maintain a record or records from which the employee or person acting on behalf of that employee could reasonably review the information requested by the employee or person.

An employer is not required to maintain the records specified in division (F)(3) of this section for any period before January 1, 2007. On and after January 1, 2007, the employer shall maintain the records required by division (F)(3) of this section for three years from the date the hours were worked by the employee and for three years after the date the employee's employment ends.

(4)

(a) Except for individuals specified in division (F)(4)(b) of this section, "hours worked for each day worked" means the total amount of time worked by an employee in whatever increments the employer uses for its payroll purposes during a day worked by the employee. An employer is not required to keep a record of the time of day an employee begins and ends work on any given day. As used in division (F)(4) of this section, "day" means a fixed period of twenty-four consecutive hours during which an employee performs work for an employer.

(b) An employer is not required to keep records of "hours worked for each day worked" for individuals for whom the employer is not required to keep those records under the Fair Labor Standards Act and its regulations or individuals who are not subject to the overtime pay requirements specified in section 4111.03 of the Revised Code.

(5) "Each amount paid an employee" means the total gross wages paid to an employee for each pay period. As used in division (F)(5) of this section, "pay period" means the period of time designated by an employer to pay an employee the employee's gross wages in accordance with the employer's payroll practices under section 4113.15 of the Revised Code.

(G) In accordance with Section 34a of Article II, Ohio Constitution, an employer must provide such information without charge to an employee or person acting on behalf of an employee upon request. As used in division (G) of this section:

(1) "Such information" means the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid for the specific employee who has requested that specific employee's own information and does not include the name, address, occupation, pay rate, hours worked for each day worked, or each amount paid of any other employee of the employer. "Such information" does not include hours worked for each day worked by individuals for whom an employer is not required to keep that information under the Fair Labor Standards Act and its regulations or individuals who are not subject to the overtime pay requirements specified in section 4111.03 of the Revised Code.

(2) "Acting on behalf of an employee" means a person acting on behalf of an employee as any of the following:

(a) The certified or legally recognized collective bargaining representative for that employee under the applicable federal law or Chapter 4117. of the Revised Code;

(b) The employee's attorney;

(c) The employee's parent, guardian, or legal custodian.

A person "acting on behalf of an employee" must be specifically authorized by an employee in order to make a request for that employee's own name, address, occupation, pay rate, hours worked for each day worked, and each amount paid to that employee.

(3) "Provide" means that an employer shall provide the requested information within thirty business days after the date the employer receives the request, unless either of the following occurs:

(a) The employer and the employee or person acting on behalf of the employee agree to some alternative time period for providing the information.

(b) The thirty-day period would cause a hardship on the employer under the circumstances, in which case the employer must provide the requested information as soon as practicable.

(4) A "request" made by an employee or a person acting on behalf of an employee means a request by an employee or a person acting on behalf of an employee for the employee's own information. The employer may require that the employee provide the employer with a written request that has been signed by the employee and notarized and that reasonably specifies the particular information being requested. The employer may require that the person acting on behalf of an employee provide the employer with a written request that has been signed by the employee whose information is being requested and notarized and that reasonably specifies the particular information being requested.

(H) In accordance with Section 34a of Article II, Ohio Constitution, an employee, person acting on behalf of one or more employees, and any other interested party may file a complaint with the state for a violation of any provision of Section 34a of Article II, Ohio Constitution or any law or regulation implementing its provisions. Such complaint shall be promptly investigated and resolved by the state. The employee's name shall be kept confidential unless disclosure is necessary to resolution of a complaint and the employee consents to disclosure. As used in division (H) of this section:

(1) "Complaint" means a complaint of an alleged violation pertaining to harm suffered by the employee filing the complaint, by a person acting on behalf of one or more employees, or by an interested party.

(2) "Acting on behalf of one or more employees" has the same meaning as "acting on behalf of an employee" in division (G)(2) of this section. Each employee must provide a separate written and notarized authorization before the person acting on that employee's or those employees' behalf may request the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid for the particular employee.

(3) "Interested party" means a party who alleges to be injured by the alleged violation and who has standing to file a complaint under common law principles of standing.

(4) "Resolved by the state" means that the complaint has been resolved to the satisfaction of the state.

(5) "Shall be kept confidential" means that the state shall keep the name of the employee confidential as required by division (H) of this section.

(I) In accordance with Section 34a of Article II, Ohio Constitution, the state may on its own initiative investigate an employer's compliance with Section 34a of Article II, Ohio Constitution and any law or regulation implementing Section 34a of Article II, Ohio Constitution. The employer shall make available to

the state any records related to such investigation and other information required for enforcement of Section 34a of Article II, Ohio Constitution or any law or regulation implementing Section 34a of Article II, Ohio Constitution. The state shall investigate an employer's compliance with this section in accordance with the procedures described in section 4111.04 of the Revised Code. All records and information related to investigations by the state are confidential and are not a public record subject to section 149.43 of the Revised Code. This division does not prevent the state from releasing to or exchanging with other state and federal wage and hour regulatory authorities information related to investigations.

(J) In accordance with Section 34a of Article II, Ohio Constitution, damages shall be calculated as an additional two times the amount of the back wages and in the case of a violation of an anti-retaliation provision an amount set by the state or court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued. The "not less than one hundred fifty dollar" penalty specified in division (J) of this section shall be imposed only for violations of the anti-retaliation provision in Section 34a of Article II, Ohio Constitution.

(K) In accordance with Section 34a of Article II, Ohio Constitution, an action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction, including the court of common pleas of an employee's county of residence, for any violation of Section 34a of Article II, Ohio Constitution or any law or regulation implementing its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later.

(1) As used in division (K) of this section, "notification" means the date on which the notice was sent to the employee by the state.

(2) No employee shall join as a party plaintiff in any civil action that is brought under division (K) of this section by an employee, person acting on behalf of an employee, or person acting on behalf of all similarly situated employees unless that employee first gives written consent to become such a party plaintiff and that consent is filed with the court in which the action is brought.

(3) A civil action regarding an alleged violation of this section shall be maintained only under division (K) of this section. This division does not preclude the joinder in a single civil action of an action under this division and an action under section 4111.10 of the Revised Code.

(4) Any agreement between an employee and employer to work for less than the wage rate specified in Section 34a of Article II, Ohio Constitution, is no defense to an action under this section.

(L) In accordance with Section 34a of Article II, Ohio Constitution, there shall be no exhaustion requirement, no procedural, pleading, or burden of proof requirements beyond those that apply generally to civil suits in order to maintain such action and no liability for costs or attorney's fees on an employee except upon a finding that such action was frivolous in accordance with the same standards that apply generally in civil suits. Nothing in division (L) of this section affects the right of an employer and employee to agree to submit a dispute under this section to alternative dispute resolution, including, but not limited to, arbitration, in lieu of maintaining the civil suit specified in division (K) of this section. Nothing in this division limits the state's ability to investigate or enforce this section.

(M) An employer who provides such information specified in Section 34a of Article II, Ohio Constitution, shall be immune from any civil liability for injury, death, or loss to person or property that otherwise might

be incurred or imposed as a result of providing that information to an employee or person acting on behalf of an employee in response to a request by the employee or person, and the employer shall not be subject to the provisions of Chapters 1347. and 1349. of the Revised Code to the extent that such provisions would otherwise apply. As used in division (M) of this section, "such information," "acting on behalf of an employee," and "request" have the same meanings as in division (G) of this section.

(N) As used in this section, "the state" means the director of commerce.

Effective Date: 04-04-2007

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio (Refs & Annos)
Article II. Legislative (Refs & Annos)

OH Const. Art. II, § 34a

O Const II Sec. 34a Fair minimum wage

Currentness

Except as provided in this section, every employer shall pay their employees a wage rate of not less than six dollars and eighty-five cents per hour beginning January 1, 2007. On the thirtieth day of each September, beginning in 2007, this state minimum wage rate shall be increased effective the first day of the following January by the rate of inflation for the twelve month period prior to that September according to the consumer price index or its successor index for all urban wage earners and clerical workers for all items as calculated by the federal government rounded to the nearest five cents. Employees under the age of sixteen and employees of businesses with annual gross receipts of two hundred fifty thousand dollars or less for the preceding calendar year shall be paid a wage rate of not less than that established under the federal Fair Labor Standards Act or its successor law. This gross revenue figure shall be increased each year beginning January 1, 2008 by the change in the consumer price index or its successor index in the same manner as the required annual adjustment in the minimum wage rate set forth above rounded to the nearest one thousand dollars. An employer may pay an employee less than, but not less than half, the minimum wage rate required by this section if the employer is able to demonstrate that the employee receives tips that combined with the wages paid by the employer are equal to or greater than the minimum wage rate for all hours worked. The provisions of this section shall not apply to employees of a solely family owned and operated business who are family members of an owner. The state may issue licenses to employers authorizing payment of a wage rate below that required by this section to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment.

As used in this section: "employer," "employee," "employ," "person" and "independent contractor" have the same meanings as under the federal Fair Labor Standards Act or its successor law, except that "employer" shall also include the state and every political subdivision and "employee" shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Only the exemptions set forth in this section shall apply to this section.

An employer shall at the time of hire provide an employee the employer's name, address, telephone number, and other contact information and update such information when it changes. An employer shall maintain a record of the name, address, occupation, pay rate, hours worked for each day worked and each amount paid an employee for a period of not less than three years following the last date the employee was employed. Such information shall be provided without charge to an employee or person acting on behalf of an employee upon request. An employee, person acting on behalf of one or more employees and/or any other interested party may file a complaint with the state for a violation of any provision of this section or any law or regulation implementing its provisions. Such complaint shall be promptly investigated and resolved by the state. The employee's name shall be kept confidential unless disclosure is necessary to resolution of a complaint and the employee consents to disclosure. The state may on its own initiative investigate an employer's compliance with this section and any law or regulation implementing its provisions. The employer shall make available to the state any records related to such investigation and other information required for enforcement of this section or any law or regulation implementing its provisions. No employer shall discharge or in any other manner discriminate or retaliate against an employee for exercising any right under this section or any law or regulation implementing its provisions or against any person for providing assistance to an employee or information regarding the same.

An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction, including the common pleas court of an employee's county of residence, for any violation of this section or any law or regulation implementing

its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later. There shall be no exhaustion requirement, no procedural, pleading or burden of proof requirements beyond those that apply generally to civil suits in order to maintain such action and no liability for costs or attorney's fees on an employee except upon a finding that such action was frivolous in accordance with the same standards that apply generally in civil suits. Where an employer is found by the state or a court to have violated any provision of this section, the employer shall within thirty days of the finding pay the employee back wages, damages, and the employee's costs and reasonable attorney's fees. Damages shall be calculated as an additional two times the amount of the back wages and in the case of a violation of an anti-retaliation provision an amount set by the state or court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued. Payment under this paragraph shall not be stayed pending any appeal.

This section shall be liberally construed in favor of its purposes. Laws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section or the power of municipalities under Article XVIII of this constitution with respect to the same.

If any part of this section is held invalid, the remainder of the section shall not be affected by such holding and shall continue in full force and effect.

CREDIT(S)

(Adopted by initiative petition, eff. 12-8-06)

Const. Art. II, § 34a, OH CONST Art. II, § 34a

Current through Files 1 to 140 and Statewide Issue 1 of the 130th GA (2013-2014).

United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 201

§ 201. Short title

[Currentness](#)

This chapter may be cited as the “Fair Labor Standards Act of 1938”.

CREDIT(S)

(June 25, 1938, c. 676, § 1, 52 Stat. 1060.)

[Notes of Decisions \(244\)](#)

29 U.S.C.A. § 201, 29 USCA § 201

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 202

§ 202. Congressional finding and declaration of policy

Currentness

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

CREDIT(S)

(June 25, 1938, c. 676, § 2, 52 Stat. 1060; Oct. 26, 1949, c. 736, § 2, 63 Stat. 910; Apr. 8, 1974, [Pub.L. 93-259, § 7\(a\)](#), [88 Stat. 62.](#))

[Notes of Decisions \(89\)](#)

29 U.S.C.A. § 202, 29 USCA § 202

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 203

§ 203. Definitions

Effective: December 20, 2006

[Currentness](#)

As used in this chapter--

- (a) “Person” means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.
- (b) “Commerce” means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
- (c) “State” means any State of the United States or the District of Columbia or any Territory or possession of the United States.
- (d) “Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
- (e)(1) Except as provided in paragraphs (2), (3), and (4), the term “employee” means any individual employed by an employer.
- (2) In the case of an individual employed by a public agency, such term means--
- (A) any individual employed by the Government of the United States--
- (i) as a civilian in the military departments (as defined in [section 102 of Title 5](#)),
- (ii) in any executive agency (as defined in section 105 of such title),
- (iii) in any unit of the judicial branch of the Government which has positions in the competitive service,
- (iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the ¹ Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual--

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who--

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u) of this section, such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if--

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including

a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term “employee” does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

(f) “Agriculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in [section 1141j\(g\) of Title 12](#)), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) “Employ” includes to suffer or permit to work.

(h) “Industry” means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) “Goods” means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) “Produced” means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) “Sale” or “sell” includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) “Oppressive child labor” means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) “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: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to--

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under [section 206\(a\)\(1\)](#) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(n) “Resale” shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked.--In determining for the purposes of [sections 206](#) and [207](#) of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) “American vessel” includes any vessel which is documented or numbered under the laws of the United States.

(q) “Secretary” means the Secretary of Labor.

(r)(1) “Enterprise” means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the

purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons--

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that--

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.

(u) “Man-day” means any day during which an employee performs any agricultural labor for not less than one hour.

(v) “Elementary school” means a day or residential school which provides elementary education, as determined under State law.

(w) “Secondary school” means a day or residential school which provides secondary education, as determined under State law.

(x) “Public agency” means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

(y) “Employee in fire protection activities” means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who--

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

CREDIT(S)

(June 25, 1938, c. 676, § 3, 52 Stat. 1060; 1946 Reorg.Plan No. 2, § 1(b), eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Oct. 26, 1949, c. 736, § 3, 63 Stat. 911; May 5, 1961, Pub.L. 87-30, § 2, 75 Stat. 65; Sept. 23, 1966, Pub.L. 89-601, Title I, §§ 101-103, Title II, § 215(a), 80 Stat. 830-832, 837; June 23, 1972, Pub.L. 92-318, Title IX, § 906(b)(2), (3), 86 Stat. 375; Apr. 8, 1974, [Pub.L. 93-259](#), §§ 6(a), 13(e), 88 Stat. 58, 64; Nov. 1, 1977, [Pub.L. 95-151](#), §§ 3(a), (b), 9(a)-(c), 91 Stat. 1249, 1251; Nov. 13, 1985, [Pub.L. 99-150](#), §§ 4(a), 5, 99 Stat. 790; Nov. 17, 1989, [Pub.L. 101-157](#), §§ 3(a), (d), 5, 103 Stat. 938, 939, 941; Jan. 23, 1995, [Pub.L. 104-1, Title II, § 203\(d\)](#), 109 Stat. 10; Aug. 20, 1996, [Pub.L. 104-188](#), [Title II], § 2105(b), 110 Stat. 1929; Aug. 7, 1998, [Pub.L. 105-221, § 2, 112 Stat. 1248](#); Dec. 9, 1999, [Pub.L. 106-151, § 1, 113 Stat. 1731](#); Dec. 20, 2006, [Pub.L. 109-435, Title VI, § 604\(f\)](#), 120 Stat. 3242.)

VALIDITY

<The United States Supreme Court has held certain provisions of the Fair Labor Standards Amendments of 1974 ([Pub. L. 93-259](#), § 6(a) and (d)(1), 29 U.S.C. §§ 203(x) and 216(b)), purporting to authorize private actions against states in state courts without their consent an unconstitutional abrogation of state sovereign immunity. [Alden v. Maine, U.S.Me.1999, 119 S.Ct. 2240, 527 U.S. 706, 144 L.Ed.2d 636.](#) >

[Notes of Decisions \(3131\)](#)

Footnotes

1 So in original. Probably should be preceded by “in”.

29 U.S.C.A. § 203, 29 USCA § 203

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 204

§ 204. Administration

Effective: December 20, 2006

[Currentness](#)

(a) Creation of Wage and Hour Division in Department of Labor; Administrator

There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this chapter referred to as the “Administrator”). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

(b) Appointment, selection, classification, and promotion of employees by Administrator

The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this chapter and shall fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of Title 5. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) Principal office of Administrator; jurisdiction

The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) Biennial report to Congress; studies of exemptions to hour and wage provisions and means to prevent curtailment of employment opportunities

(1) The Secretary shall submit biennially in January a report to the Congress covering his activities for the preceding two years and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages and overtime coverage established by this chapter, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent. Such report shall also include a summary of the special certificates issued under [section 214\(b\)](#) of this title.

(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in [section 213](#) of this title, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under [section 214](#) of this title.

(e) Study of effects of foreign production on unemployment; report to President and Congress

Whenever the Secretary has reason to believe that in any industry under this chapter the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: *Provided*, That he may also include in such report information on the increased employment resulting from additional exports in any industry under this chapter as he may determine to be pertinent to such report.

(f) Employees of Library of Congress; administration of provisions by Office of Personnel Management

The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this chapter with respect to such individuals. Notwithstanding any other provision of this chapter, or any other law, the Director of the Office of Personnel Management is authorized to administer the provisions of this chapter with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Regulatory Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under [section 216\(b\)](#) of this title.

CREDIT(S)

(June 25, 1938, c. 676, § 4, 52 Stat. 1061; Oct. 26, 1949, c. 736, § 4, 63 Stat. 911; Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972; Aug. 12, 1955, c. 867, § 2, 69 Stat. 711; May 5, 1961, Pub.L. 87-30, § 3, 75 Stat. 66; Apr. 8, 1974, [Pub.L. 93-259](#), §§ 6(b), 24(c), 27, 88 Stat. 60, 72, 73; 1978 Reorg. Plan No. 2, § 102, eff. Jan. 1, 1979, 43 F.R. 36037, 92 Stat. 3783; Dec. 21, 1995, [Pub.L. 104-66, Title I, § 1102\(a\)](#), 109 Stat. 722; Dec. 20, 2006, [Pub.L. 109-435, Title VI, § 604\(f\)](#), 120 Stat. 3242.)

[Notes of Decisions \(79\)](#)

29 U.S.C.A. § 204, 29 USCA § 204

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United States Code Annotated

Title 29. Labor

Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 206

§ 206. Minimum wage

Effective: August 25, 2007

[Currentness](#)

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than--

(A) \$5.85 an hour, beginning on the 60th day after May 25, 2007;

(B) \$6.55 an hour, beginning 12 months after that 60th day; and

(C) \$7.25 an hour, beginning 24 months after that 60th day;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(4) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(5) Redesignated (4)

(b) Additional applicability to employees pursuant to subsequent amendatory provisions

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

(c) Repealed. Pub.L. 104-188, [Title III], § 2104(c), Aug. 20, 1996, 110 Stat. 1929

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) Employees of employers providing contract services to United States

(1) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by chapter 67 of Title 41 or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of [section 213](#) of this title (except subsections (a)(1) and (f) thereof) and the provisions of chapter 67 of Title 41, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b) of this section, except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) Employees in domestic service

Any employee--

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act [[42 U.S.C.A. § 409\(a\)\(6\)](#)] constitute wages for the purposes of title II of such Act [[42 U.S.C.A. § 401 et seq.](#)], or

(2) who in any workweek--

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section.

(g) Newly hired employees who are less than 20 years old

(1) In lieu of the rate prescribed by subsection (a)(1) of this section, any employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than \$4.25 an hour.

(2) No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in paragraph (1).

(3) Any employer who violates this subsection shall be considered to have violated [section 215\(a\)\(3\)](#) of this title.

(4) This subsection shall only apply to an employee who has not attained the age of 20 years.

CREDIT(S)

(June 25, 1938, c. 676, § 6, 52 Stat. 1062; June 26, 1940, c. 432, § 3(e), (f), 54 Stat. 616; Oct. 26, 1949, c. 736, § 6, 63 Stat. 912; Aug. 12, 1955, c. 867, § 3, 69 Stat. 711; Aug. 8, 1956, c. 1035, § 2, 70 Stat. 1118; May 5, 1961, Pub.L. 87-30, § 5, 75 Stat. 67; June 10, 1963, Pub.L. 88-38, § 3, 77 Stat. 56; Sept. 23, 1966, Pub.L. 89-601, Title III, §§ 301 to 305, 80 Stat. 838, 839,

841; Apr. 8, 1974, [Pub.L. 93-259](#), §§ 2 to 4, 5(b), 7(b)(1), 88 Stat. 55, 56, 62; Nov. 1, 1977, [Pub.L. 95-151](#), § 2(a) to (d)(2), 91 Stat. 1245, 1246; Nov. 17, 1989, [Pub.L. 101-157](#), §§ 2, 4(b), 103 Stat. 938, 940; Dec. 19, 1989, [Pub.L. 101-239, Title X, § 10208\(d\)\(2\)\(B\)\(i\)](#), 103 Stat. 2481; Aug. 20, 1996, [Pub.L. 104-188](#), [Title II], §§ 2104(b), (c), 2105(c), 110 Stat. 1928, 1929; May 25, 2007, [Pub.L. 110-28, Title VIII, §§ 8102\(a\)](#), 8103(c)(1)(B), 121 Stat. 188, 189.)

[Notes of Decisions \(1557\)](#)

29 U.S.C.A. § 206, 29 USCA § 206

Current through P.L. 113-209 approved 12-16-2014

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 207

§ 207. Maximum hours

Effective: March 23, 2010

[Currentness](#)

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours 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.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

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.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed--

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if--

(A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under [section 206](#) of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. [Pub.L. 93-259](#), § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums¹ paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,² where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if--

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death,

disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are--

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in [subsection \(a\)](#) or [\(b\) of section 206](#) of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection--

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall

be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Extra compensation creditable toward overtime compensation

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under [section 6](#) or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under [section 206](#) of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to [section 6\(c\)\(3\)](#) of the

Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if such employee--

(1) is employed by such employer--

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,

whichever is higher³

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) of this section if--

(A) such employee is paid at a per-page rate which is not less than--

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection--

(A) the term “overtime compensation” means the compensation required by subsection (a), and

(B) the terms “compensatory time” and “compensatory time off” mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is--

- (1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;
 - (2) designed to provide reading and other basic skills at an eighth grade level or below; and
 - (3) does not include job specific training.
- (r)(1) An employer shall provide--
- (A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and
 - (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
- (2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.
- (3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.
- (4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

CREDIT(S)

(June 25, 1938, c. 676, § 7, 52 Stat. 1063; Oct. 29, 1941, c. 461, 55 Stat. 756; July 20, 1949, c. 352, § 1, 63 Stat. 446; Oct. 26, 1949, c. 736, § 7, 63 Stat. 912; May 5, 1961, Pub.L. 87-30, § 6, 75 Stat. 69; Sept. 23, 1966, Pub.L. 89-601, Title II, §§ 204(c), (d), 212(b), Title IV, §§ 401 to 403, 80 Stat. 835, 837, 841, 842; Apr. 8, 1974, [Pub.L. 93-259](#), §§ 6(c)(1), 7(b)(2), 9(a), 12(b), 19, 21(a), 88 Stat. 60, 62, 64, 66, 68; Nov. 13, 1985, [Pub.L. 99-150](#), §§ 2(a), 3(a) to (c)(1), 99 Stat. 787, 789; Nov. 17, 1989, [Pub.L. 101-157](#), § 7, 103 Stat. 944; Sept. 6, 1995, [Pub.L. 104-26](#), § 2, 109 Stat. 264; May 18, 2000, [Pub.L. 106-202](#), § 2(a), (b), 114 Stat. 308; Mar. 23, 2010, [Pub.L. 111-148](#), Title IV, § 4207, 124 Stat. 577.)

[Notes of Decisions \(2310\)](#)

Footnotes

- 1 So in original. Probably should not be capitalized.
 - 2 So in original. Probably should have closed parentheses.
 - 3 So in original. Probably should be followed by a period.
- 29 U.S.C.A. § 207, 29 USCA § 207

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 209

§ 209. Attendance of witnesses

Currentness

For the purpose of any hearing or investigation provided for in this chapter, the provisions of [sections 49](#) and [50 of Title 15](#) (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

CREDIT(S)

(June 25, 1938, c. 676, § 9, 52 Stat. 1065; 1946 Reorg. Plan No. 2, § 1(b), eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095.)

[Notes of Decisions \(65\)](#)

29 U.S.C.A. § 209, 29 USCA § 209

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 210

§ 210. Court review of wage orders in Puerto Rico and the Virgin Islands

Currentness

(a) Any person aggrieved by an order of the Secretary issued under [section 208](#) of this title may obtain a review of such order in the United States Court of Appeals for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in [section 2112 of Title 28](#). Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify (including provision for the payment of an appropriate minimum wage rate), or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by such industry committee when supported by substantial evidence shall be conclusive. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceedings before such industry committee, the court may order such additional evidence to be taken before an industry committee and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. Such industry committee may modify the initial findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [section 1254 of Title 28](#).

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

CREDIT(S)

(June 25, 1938, c. 676, § 10, 52 Stat. 1065; Aug. 12, 1955, c. 867, § 5(f), 69 Stat. 712; Aug. 28, 1958, Pub.L. 85-791, § 22, 72 Stat. 948; Apr. 8, 1974, [Pub.L. 93-259](#), § 5(c)(2), 88 Stat. 58.)

[Notes of Decisions \(66\)](#)

29 U.S.C.A. § 210, 29 USCA § 210

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 211

§ 211. Collection of data

Currentness

(a) Investigations and inspections

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in [section 212](#) of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in [section 212](#) of this title, the Administrator shall bring all actions under [section 217](#) of this title to restrain violations of this chapter.

(b) State and local agencies and employees

With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in [section 207\(p\)\(3\)](#) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

(d) Homework regulations

The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.

CREDIT(S)

(June 25, 1938, c. 676, § 11, 52 Stat. 1066; 1946 Reorg. Plan No. 2, § 1(b), eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Oct. 26, 1949, c. 736, § 9, 63 Stat. 916; Nov. 13, 1985, [Pub.L. 99-150](#), § 3(c)(2), 99 Stat. 789.)

[Notes of Decisions \(267\)](#)

29 U.S.C.A. § 211, 29 USCA § 211

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 212

§ 212. Child labor provisions

Currentness

(a) Restrictions on shipment of goods; prosecution; conviction

No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: *And provided further*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) Investigations and inspections

The Secretary of Labor or any of his authorized representatives, shall make all investigations and inspections under [section 211\(a\)](#) of this title with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under [section 217](#) of this title to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this chapter relating to oppressive child labor.

(c) Oppressive child labor

No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

(d) Proof of age

In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age.

CREDIT(S)

(June 25, 1938, c. 676, § 12, 52 Stat. 1067; 1946 Reorg. Plan No. 2, § 1(b), eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Oct. 26, 1949, c. 736, § 10, 63 Stat. 917; May 5, 1961, Pub.L. 87-30, § 8, 75 Stat. 70; Apr. 8, 1974, [Pub.L. 93-259, § 25\(a\)](#), [88 Stat. 72.](#))

[Notes of Decisions \(32\)](#)

29 U.S.C.A. § 212, 29 USCA § 212

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 213

§ 213. Exemptions

Effective: January 23, 2004

[Currentness](#)

(a) Minimum wage and maximum hour requirements

The provisions of [section 206](#) (except subsection (d) in the case of paragraph (1) of this subsection) and [section 207](#) of this title shall not apply with respect to--

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. [Pub.L. 101-157, § 3\(c\)\(1\)](#), Nov. 17, 1989, 103 Stat. 939

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 # per centum of its average receipts for the other six months of such year, except that the exemption from [sections 206](#) and [207](#) of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from [section 206](#) of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. [Pub.L. 101-157, § 3\(c\)\(1\)](#), Nov. 17, 1989, 103 Stat. 939

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under [section 214](#) of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. [Pub.L. 93-259](#), § 23(a)(1), Apr. 8, 1974, 88 Stat. 69

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. [Pub.L. 93-259](#), § 10(a), Apr. 8, 1974, 88 Stat. 63

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. [Pub.L. 93-259](#), §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under [section 5545a of Title 5](#); or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is--

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour.

(b) Maximum hour requirements

The provisions of [section 207](#) of this title shall not apply with respect to--

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of [section 31502 of Title 49](#); or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of Title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [[45 U.S.C.A. § 181 et seq.](#)]; or

(4) Repealed. [Pub.L. 93-259, § 11\(c\)](#), Apr. 8, 1974, 88 Stat. 64

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. [Pub.L. 93-259, § 21\(b\)\(3\)](#), Apr. 8, 1974, 88 Stat. 68

(8) Repealed. [Pub.L. 95-151, § 14\(b\)](#), Nov. 1, 1977, 91 Stat. 1252

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan

statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under [section 207\(a\)](#) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by [section 206\(a\)\(1\)](#) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. [Pub.L. 93-259, §§ 15\(c\), 16\(b\)](#), Apr. 8, 1974, 88 Stat. 65

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. [Pub.L. 95-151, § 5](#), Nov. 1, 1977, 91 Stat. 1249

(23) Repealed. [Pub.L. 93-259, § 10\(b\)\(3\)](#), Apr. 8, 1974, 88 Stat. 64

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children--

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than \$10,000; or

(25), (26) Repealed. [Pub.L. 95-151, §§ 6\(a\), 7\(a\)](#), Nov. 1, 1977, 91 Stat. 1249, 1250

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under [section 5545a of Title 5](#).

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of [section 212](#) of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee--

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by [section 206\(a\)\(5\)](#) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of [section 212](#) of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of [section 212](#) of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)(A) An employer or group of employers may apply to the Secretary for a waiver of the application of [section 212](#) of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that--

(i) the crop to be harvested is one with a particularly short harvesting season and the application of [section 212](#) of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that--

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)(A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors--

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if--

(i)(I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5-1990 for scrap paper balers and Standard ANSI Z245.2-1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that--

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)(i) Employers shall prepare and submit to the Secretary reports--

(I) on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide--

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of [section 212](#) of this title relating to oppressive child labor or a regulation or order issued pursuant to [section 212](#) of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with [section 212\(b\)](#) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August 6, 1996.

(6) In the administration and enforcement of the child labor provisions of this chapter, employees who are under 17 years of age may not drive automobiles or trucks on public roadways. Employees who are 17 years of age may drive automobiles or trucks on public roadways only if--

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve--

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term “occasional and incidental” is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(7)(A)(i) Subject to subparagraph (B), in the administration and enforcement of the child labor provisions of this chapter, it shall not be considered oppressive child labor for a new entrant into the workforce to be employed inside or outside places of business where machinery is used to process wood products.

(ii) In this paragraph, the term “new entrant into the workforce” means an individual who

(I) is under the age of 18 and at least the age of 14, and

(II) by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade.

(B) The employment of a new entrant into the workforce under subparagraph (A) shall be permitted

(i) if the entrant is supervised by an adult relative of the entrant or is supervised by an adult member of the same religious sect or division as the entrant;

(ii) if the entrant does not operate or assist in the operation of power-driven woodworking machines;

(iii) if the entrant is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) if the entrant is required to use personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(d) Delivery of newspapers and wreathmaking

The provisions of [sections 206, 207, and 212](#) of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homemaker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees

The provisions of [section 207](#) of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in [section 206\(a\)\(3\)](#) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of [section 207](#) of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in [section 206\(a\)\(3\)](#) of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories

The provisions of [sections 206, 207, 211, and 212](#) of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [[43 U.S.C.A. § 1331 et seq.](#)]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture

The exemption from [section 206](#) of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds \$10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen workweek limitation

The provisions of [section 207](#) of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who--

(1) is employed by such employer--

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or [section 207](#) of this title.

(i) Cotton ginning

The provisions of [section 207](#) of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who--

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks--

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane

The provisions of [section 207](#) of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who--

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks--

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

CREDIT(S)

(June 25, 1938, c. 676, § 13, 52 Stat. 1067; Aug. 9, 1939, c. 605, 53 Stat. 1266; Oct. 26, 1949, c. 736, § 11, 63 Stat. 917; Aug. 8, 1956, c. 1035, § 3, 70 Stat. 1118; Aug. 30, 1957, Pub.L. 85-231, § 1(1), 71 Stat. 514; July 12, 1960, Pub.L. 86-624, § 21(b), 74 Stat. 417; May 5, 1961, Pub.L. 87-30, §§ 9, 10, 75 Stat. 71, 74; Sept. 23, 1966, Pub.L. 89-601, Title II, §§ 201 to 204(a), (b), 205 to 212(a), 213 to 215(b), (c), 80 Stat. 833 to 838; Oct. 15, 1966, Pub.L. 89-670, § 8(e), 80 Stat. 943; 1970 Reorg. Plan No. 2, § 102, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; June 23, 1972, Pub.L. 92-318, Title IX, § 906(b)(1), 86 Stat. 375; Apr. 8, 1974, Pub.L. 93-259, §§ 6(c)(2), 7(b)(3), (4), 8, 9(b), 10, 11, 12(a), 13(a) to (d), 14 to 18, 20(a) to (c), 21(b), 22, 23, 25(b), 88 Stat. 61 to 69, 72; Nov. 1, 1977, Pub.L. 95-151, §§ 4 to 8, 9(d), 11, 14, 91 Stat. 1249, 1250 to 1252; Sept. 27, 1979, Pub.L. 96-70, Title I, § 1225(a), 93 Stat. 468; Nov. 17, 1989, Pub.L. 101-157, § 3(c), 103 Stat. 939; Sept. 30, 1994, Pub.L. 103-329, Title VI, § 633(d), 108 Stat. 2428; Dec. 29, 1995, Pub.L. 104-88, Title III, § 340, 109 Stat. 955; Aug. 6, 1996, Pub.L. 104-174, § 1, 110 Stat. 1553; Aug. 20, 1996, Pub.L. 104-188, § 2105(a), 110 Stat. 1929; Oct. 11, 1996, Pub.L. 104-287, § 7(5), 110 Stat. 3400; Nov. 13, 1997, Pub.L. 105-78, Title I, § 105, 111 Stat. 1477; Oct. 31, 1998, Pub.L. 105-334, § 2(a), 112 Stat. 3137; Jan. 23, 2004, Pub.L. 108-199, Div. E, Title I, § 108, 118 Stat. 236.)

[Notes of Decisions \(2221\)](#)

29 U.S.C.A. § 213, 29 USCA § 213

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End of Document

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 214

§ 214. Employment under special certificates

Currentness

(a) Learners, apprentices, messengers

The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under [section 206](#) of this title and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

(b) Students

(I)(A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under [section 206](#) of this title or not less than \$1.60 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed--

(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this chapter before the effective date of the Fair Labor Standards Amendments of 1974--

(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer, or

(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater;

(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974--

(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,

(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or

(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater; or

(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establishment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.

For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term “student hours of employment” means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under [section 206\(a\)\(5\)](#) of this title or not less than \$1.30 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under [section 206](#) of this title or not less than \$1.60 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

(4)(A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

(B) If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed six, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed six--

(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing students under certificates issued under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate.

(D) To minimize paperwork for, and to encourage, small businesses to employ students under special certificates issued under paragraphs (1) and (2), the Secretary shall, by regulation or order, prescribe a simplified application form to be used by employers in applying for such a certificate for the employment of not more than six full-time students. Such an application shall require only--

(i) a listing of the name, address, and business of the applicant employer,

(ii) a listing of the date the applicant began business, and

(iii) the certification that the employment of such full-time students will not reduce the full-time employment opportunities of persons other than persons employed under special certificates.

(c) Handicapped workers

(1) The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are--

(A) lower than the minimum wage applicable under [section 206](#) of this title,

(B) commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and

(C) related to the individual's productivity.

(2) The Secretary shall not issue a certificate under paragraph (1) unless the employer provides written assurances to the Secretary that--

(A) in the case of individuals paid on an hourly rate basis, wages paid in accordance with paragraph (1) will be reviewed by the employer at periodic intervals at least once every six months, and

(B) wages paid in accordance with paragraph (1) will be adjusted by the employer at periodic intervals, at least once each year, to reflect changes in the prevailing wage paid to experienced nonhandicapped individuals employed in the locality for essentially the same type of work.

(3) Notwithstanding paragraph (1), no employer shall be permitted to reduce the hourly wage rate prescribed by certificate under this subsection in effect on June 1, 1986, of any handicapped individual for a period of two years from such date without prior authorization of the Secretary.

(4) Nothing in this subsection shall be construed to prohibit an employer from maintaining or establishing work activities centers to provide therapeutic activities for handicapped clients.

(5)(A) Notwithstanding any other provision of this subsection, any employee receiving a special minimum wage at a rate specified pursuant to this subsection or the parent or guardian of such an employee may petition the Secretary to obtain a review of such special minimum wage rate. An employee or the employee's parent or guardian may file such a petition for and in behalf of the employee or in behalf of the employee and other employees similarly situated. No employee may be a party to any such action unless the employee or the employee's parent or guardian gives consent in writing to become such a party and such consent is filed with the Secretary.

(B) Upon receipt of a petition filed in accordance with subparagraph (A), the Secretary within ten days shall assign the petition to an administrative law judge appointed pursuant to [section 3105 of Title 5](#). The administrative law judge shall conduct a hearing on the record in accordance with [section 554 of Title 5](#) with respect to such petition within thirty days after assignment.

(C) In any such proceeding, the employer shall have the burden of demonstrating that the special minimum wage rate is justified as necessary in order to prevent curtailment of opportunities for employment.

(D) In determining whether any special minimum wage rate is justified pursuant to subparagraph (C), the administrative law judge shall consider--

(i) the productivity of the employee or employees identified in the petition and the conditions under which such productivity was measured; and

(ii) the productivity of other employees performing work of essentially the same type and quality for other employers in the same vicinity.

(E) The administrative law judge shall issue a decision within thirty days after the hearing provided for in subparagraph (B). Such action shall be deemed to be a final agency action unless within thirty days the Secretary grants a request to review the decision of the administrative law judge. Either the petitioner or the employer may request review by the Secretary within fifteen days of the date of issuance of the decision by the administrative law judge.

(F) The Secretary, within thirty days after receiving a request for review, shall review the record and either adopt the decision of the administrative law judge or issue exceptions. The decision of the administrative law judge, together with any exceptions, shall be deemed to be a final agency action.

(G) A final agency action shall be subject to judicial review pursuant to chapter 7 of Title 5. An action seeking such review shall be brought within thirty days of a final agency action described in subparagraph (F).

(d) Employment by schools

The Secretary may by regulation or order provide that [sections 206](#) and [207](#) of this title shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws.

CREDIT(S)

(June 25, 1938, c. 676, § 14, 52 Stat. 1068; Oct. 26, 1949, c. 736, § 12, 63 Stat. 918; May 5, 1961, Pub.L. 87-30, § 11, 75 Stat. 74; Sept. 23, 1966, Pub.L. 89-601, Title V, § 501, 80 Stat. 842; Apr. 8, 1974, [Pub.L. 93-259](#), § 24(a), (b), 88 Stat. 69, 72; Nov. 1, 1977, [Pub.L. 95-151](#), §§ 12, 13, 91 Stat. 1252; Oct. 16, 1986, [Pub.L. 99-486](#), [100 Stat. 1229](#); Nov. 17, 1989, [Pub.L. 101-157](#), § 4(d), [103 Stat. 941](#).)

[Notes of Decisions \(10\)](#)

29 U.S.C.A. § 214, 29 USCA § 214

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United States Code Annotated

Title 29. Labor

Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 215

§ 215. Prohibited acts; prima facie evidence

Currentness

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of [section 206](#) or [section 207](#) of this title, or in violation of any regulation or order of the Secretary issued under [section 214](#) of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of [section 206](#) or [section 207](#) of this title, or any of the provisions of any regulation or order of the Secretary issued under [section 214](#) of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of [section 212](#) of this title;

(5) to violate any of the provisions of [section 211\(c\)](#) of this title, or any regulation or order made or continued in effect under the provisions of [section 211\(d\)](#) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a)(1) of this section proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

CREDIT(S)

(June 25, 1938, c. 676, § 15, 52 Stat. 1068; Oct. 26, 1949, c. 736, § 13, 63 Stat. 919; 1950 Reorg. Plan No. 6, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263.)

[Notes of Decisions \(429\)](#)

29 U.S.C.A. § 215, 29 USCA § 215

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 216

§ 216. Penalties

Effective: May 21, 2008

Currentness

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of [section 215](#) of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of [section 206](#) or [section 207](#) of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of [section 215\(a\)\(3\)](#) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of [section 215\(a\)\(3\)](#) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under [section 217](#) of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under [section 206](#) or [section 207](#) of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of [section 215\(a\)\(3\)](#) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under [section 206](#) or [section 207](#) of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary

in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under [sections 206](#) and [207](#) of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in [section 255\(a\)](#) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [[29 U.S.C.A. § 251 et seq.](#)] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in [section 213\(f\)](#) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in [section 206\(a\)\(3\)](#) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e)(1)(A) Any person who violates the provisions of [sections 212](#) or [213\(c\)](#) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed--

(i) \$11,000 for each employee who was the subject of such a violation; or

(ii) \$50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term “serious injury” means--

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates [section 206](#) or [207](#), relating to wages, shall be subject to a civil penalty not to exceed \$1,100 for each such violation.

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be--

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of [section 215\(a\)\(4\)](#) of this title or a repeated or willful violation of [section 215\(a\)\(2\)](#) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with [section 554 of Title 5](#), and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of [section 212](#) of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of [section 9a](#) of this title. Civil penalties collected for violations of [section 212](#) of this title shall be deposited in the general fund of the Treasury.

CREDIT(S)

(June 25, 1938, c. 676, § 16, 52 Stat. 1069; May 14, 1947, c. 52, § 5(a), 61 Stat. 87; Oct. 26, 1949, c. 736, § 14, 63 Stat. 919; 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F.R. 3174, 64 Stat. 1263; Aug. 8, 1956, c. 1035, § 4, 70 Stat. 1118; Aug. 30, 1957, Pub.L. 85-231, § 1(2), 71 Stat. 514; May 5, 1961, Pub.L. 87-30, § 12(a), 75 Stat. 74; Sept. 23, 1966, Pub.L. 89-601, Title VI, § 601(a), 80 Stat. 844; Apr. 8, 1974, [Pub.L. 93-259](#), §§ 6(d)(1), 25(c), 26, 88 Stat. 61, 72, 73; Nov. 1, 1977, [Pub.L. 95-151](#), § 10, 91 Stat. 1252; Nov. 17, 1989, [Pub.L. 101-157](#), § 9, 103 Stat. 945; Nov. 5, 1990, [Pub.L. 101-508](#), Title III, § 3103, 104 Stat. 1388-29; Aug. 6, 1996, [Pub.L. 104-174](#), § 2, 110 Stat. 1554; May 21, 2008, [Pub.L. 110-233](#), Title III, § 302(a), 122 Stat. 920.)

VALIDITY OF SUBSEC. (B)

<The United States Supreme Court, in [Alden v. Maine](#), 119 S.Ct. 2240, 144 L.Ed.2d 636, June 23, 1999, found that the powers delegated to Congress under Article I of the Constitution did not include the power to subject nonconsenting states to private suits for damages in state courts, as authorized by subsec. (b) of this section.>

<The United States Supreme Court has held that the ADEA did not validly abrogate states' Eleventh Amendment immunity from suit by private individuals; although ADEA contained clear statement of Congress' intent to abrogate states' immunity, the abrogation exceeded Congress' authority under enforcement clause of Fourteenth Amendment. [Kimel v. Florida Bd. of Regents](#), U.S.Fla.2000, 120 S.Ct. 631, 528 U.S. 62, 145 L.Ed.2d 522. >

[Notes of Decisions \(5232\)](#)

29 U.S.C.A. § 216, 29 USCA § 216

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29 U.S.C.A. § 216b

§ 216b. Liability for overtime work performed prior to July 20, 1949

Currentness

No employer shall be subject to any liability or punishment under this chapter (in any action or proceeding commenced prior to or on or after January 24, 1950), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949, for such work was at least equal to the compensation which would have been payable for such work had [subsections \(d\)\(6\), \(7\) and \(g\) of section 207](#) of this title been in effect at the time of such payment.

CREDIT(S)

(Oct. 26, 1949, c. 736, § 16(e), 63 Stat. 920.)

29 U.S.C.A. § 216b, 29 USCA § 216b

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29 U.S.C.A. § 217

§ 217. Injunction proceedings

Currentness

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of [section 215](#) of this title, including in the case of violations of [section 215\(a\)\(2\)](#) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of [section 255](#) of this title).

CREDIT(S)

(June 25, 1938, c. 676, § 17, 52 Stat. 1069; Oct. 26, 1949, c. 736, § 15, 63 Stat. 919; Aug. 30, 1957, Pub.L. 85-231, § 1(3), 71 Stat. 514; July 12, 1960, Pub.L. 86-624, § 21(c), 74 Stat. 417; May 5, 1961, Pub.L. 87-30, § 12(b), 75 Stat. 74.)

[Notes of Decisions \(901\)](#)

29 U.S.C.A. § 217, 29 USCA § 217

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29 U.S.C.A. § 218

§ 218. Relation to other laws

Currentness

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

(b) Notwithstanding any other provision of this chapter (other than [section 213\(f\)](#) of this title) or any other law--

(1) any Federal employee in the Canal Zone engaged in employment of the kind described in [section 5102\(c\)\(7\)](#) of Title 5, or

(2) any employee employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in [section 206\(a\)\(1\)](#) of this title (except that the wage rate provided for in [section 206\(b\)](#) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in [section 207\(a\)\(1\)](#) of this title.

CREDIT(S)

(June 25, 1938, c. 676, § 18, 52 Stat. 1069; Sept. 23, 1966, Pub.L. 89-601, Title III, § 306, 80 Stat. 841; Sept. 11, 1967, Pub.L. 90-83, § 8, 81 Stat. 222.)

[Notes of Decisions \(57\)](#)

29 U.S.C.A. § 218, 29 USCA § 218

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United States Code Annotated
Title 29. Labor
Chapter 8. Fair Labor Standards (Refs & Annos)

29 U.S.C.A. § 218a

§ 218a. Automatic enrollment for employees of large employers

Effective: March 23, 2010

[Currentness](#)

In accordance with regulations promulgated by the Secretary, an employer to which this chapter applies that has more than 200 full-time employees and that offers employees enrollment in 1 or more health benefits plans shall automatically enroll new full-time employees in one of the plans offered (subject to any waiting period authorized by law) and to continue the enrollment of current employees in a health benefits plan offered through the employer. Any automatic enrollment program shall include adequate notice and the opportunity for an employee to opt out of any coverage the individual or employee were automatically enrolled in. Nothing in this section shall be construed to supersede any State law which establishes, implements, or continues in effect any standard or requirement relating to employers in connection with payroll except to the extent that such standard or requirement prevents an employer from instituting the automatic enrollment program under this section.

CREDIT(S)

(June 25, 1938, c. 676, § 18A, as added Mar. 23, 2010, [Pub.L. 111-148, Title I, § 1511](#), 124 Stat. 252.)

29 U.S.C.A. § 218a, 29 USCA § 218a

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29 U.S.C.A. § 218b

§ 218b. Notice to employees

Effective: April 15, 2011

[Currentness](#)

(a) In general

In accordance with regulations promulgated by the Secretary, an employer to which this chapter applies, shall provide to each employee at the time of hiring (or with respect to current employees, not later than March 1, 2013), written notice--

- (1) informing the employee of the existence of an Exchange, including a description of the services provided by such Exchange, and the manner in which the employee may contact the Exchange to request assistance;
- (2) if the employer plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs, that the employee may be eligible for a premium tax credit under section 36B of the Title 26 and a cost sharing reduction under [section 18071 of Title 42](#) if the employee purchases a qualified health plan through the Exchange; and
- (3) if the employee purchases a qualified health plan through the Exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes.

(b) Effective date

Subsection (a) shall take effect with respect to employers in a State beginning on March 1, 2013.

CREDIT(S)

(June 25, 1938, c. 676, § 18B, as added and amended Mar. 23, 2010, [Pub.L. 111-148, Title I, § 1512, Title X, § 10108\(i\)\(2\)](#), 124 Stat. 252, 914; Apr. 15, 2011, [Pub.L. 112-10, Div. B, Title VIII, § 1858\(c\)](#), 125 Stat. 169.)

29 U.S.C.A. § 218b, 29 USCA § 218b

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29 U.S.C.A. § 218c

§ 218c. Protections for employees

Effective: March 23, 2010

[Currentness](#)

(a) Prohibition

No employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee) has--

- (1) received a credit under [section 36B of Title 26](#) or a subsidy under [section 18071 of Title 42](#);
- (2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or an amendment made by this title);
- (3) testified or is about to testify in a proceeding concerning such violation;
- (4) assisted or participated, or is about to assist or participate, in such a proceeding; or
- (5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this title (or amendment), or any order, rule, regulation, standard, or ban under this title (or amendment).

(b) Complaint procedure

(1) In general

An employee who believes that he or she has been discharged or otherwise discriminated against by any employer in violation of this section may seek relief in accordance with the procedures, notifications, burdens of proof, remedies, and statutes of limitation set forth in [section 2087\(b\) of Title 15](#).

(2) No limitation on rights

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

CREDIT(S)

(June 25, 1938, c. 676, § 18C, as added Mar. 23, 2010, [Pub.L. 111-148, Title I, § 1558](#), 124 Stat. 261.)

29 U.S.C.A. § 218c, 29 USCA § 218c
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29 U.S.C.A. § 219

§ 219. Separability

[Currentness](#)

If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

CREDIT(S)

(June 25, 1938, c. 676, § 19, 52 Stat. 1069.)

[Notes of Decisions \(7\)](#)

29 U.S.C.A. § 219, 29 USCA § 219

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