DWD 272 274

DWD 272 and 274 and DWD Policy

Relating to overtime pay for employees of companies who provide nonmedical home care.

The Department of Workforce Development will present testimony on their current policy.

Chapter DWD 274

HOURS OF WORK AND OVERTIME

History: Chapter Ind 74 as it existed on March 31, 1977 was repealed and a new chapter Ind 74 was created effective April 1, 1977. Chapter Ind 74 was renumbered chapter ILHR 274 under s. 13.93 (2m) (b) 1., Stats., Register, February, 1996, No. 482. Chapter ILHR 274 was renumbered chapter DWD 274 under s. 13.93 (2m) (b) 1., Stats., and corrections were made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, May, 1997, No. 497.

DWD 274.01 Definitions. (1) "Day" means a calendar day or a period of 24 consecutive hours.

(2) "Week" means a calendar week or a regular reoccurring period of 168 hours in the form of 7 consecutive 24 hour periods.

(3) "Regular" time means 40 hours of work per week.

(4) "Overtime" means hours in excess of 40 hours of work per week.

(5) "Mercantile" means "pertaining to merchants or trade," and is synonymous with the word commercial. Commercial is viewed with regard to profit or designed for profit; designed for mass appeal, emphasizing skill and subjects useful in business. "Trade" means the business or work in which one engages regularly, an occupation requiring manual or mechanical skill; the persons engaged in an occupation, business, or industry, dealings between persons or groups; the business of buying and selling or bartering commodities or services; to do business with, to have dealings, to give one thing in exchange for another.

History: Cr. Register, March, 1977, No. 255, eff. 4–1–77; am. (1) to (4) and cr. (5), Register, December, 1980, No. 300, eff. 1–1–81; correction in (3) and (4) made under s. 13.93 (2m) (b) 7., Stats., Register, February, 1996, No. 482; **CR 03–053: am. (3) and (4) Register November 2003 No. 575, eff. 12–1–2003.**

DWD 274.015 Applicability of chapter. Pursuant to s. 103.01 (1), Stats., employees employed in manufactories, mechanical or mercantile establishments, beauty parlors, laundries, restaurants, confectionary stores, telegraph or telephone offices or exchanges or express or transportation establishments, hotels, and by the state, its political subdivisions and any office, department, independent agency, authority, institution, association, society or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts, are covered by this chapter. Employees employed in domestic service in a household by a household are not subject to this chapter.

History: Cr. Register, December, 1980, No. 300, eff. 1–1–81; emerg. am. eff. 12–18–90; am. Register, August, 1991, No. 428, eff. 9–1–91; **CR 03–053: am. Register November 2003 No. 575, eff. 12–1–2003.**

DWD 274.02 Hours of work. (1) No person shall be employed or be permitted to work in any place of employment or at any employment for such period or periods of time during any day, night or week as shall be dangerous or prejudicial to the life, health, safety or welfare of such person.

(2) It is recommended that each employer allow each employee, 18 years of age or over, at least 30 minutes for each meal period reasonably close to the usual meal period time (6:00 a.m., 12:00 noon, 6:00 p.m. or 12:00 midnight) or near the middle of a shift. Shifts of more than 6 consecutive hours without a meal period should be avoided.

Note: The above meal period requirements are mandatory for minors under 18 years of age.

(3) The employer shall pay all employees for on–duty meal periods, which are to be counted as work time. An on–duty meal period is a meal period where the employer does not provide at least 30 minutes free from work. Any meal period where the employee is not free to leave the premises of the employer will also be considered an on–duty meal period.

History: Cr. Register, March, 1977, No. 255, eff. 4–1–77; cr. (3), Register, February, 1992, No. 434, eff. 3–1–92.

DWD 274.03 Overtime pay. Except as provided in s. DWD 274.08, each employer subject to this chapter shall pay to each employee time and one–half the regular rate of pay for all hours worked in excess of 40 hours per week.

History: Cr. Register, March, 1977, No. 255, eff. 4–1–77; reprinted to correct printing error, Register, April, 1977, No. 256; am. Register, December, 1980, No. 300, eff. 1–1–81; emerg. am. eff. 12–18–90; am. Register, August, 1991, No. 428, eff. 9–1–91.

DWD 274.04 Exemptions. Except as provided in s. DWD 274.08, each employer subject to ch. DWD 274 shall be exempt from the overtime pay requirements in s. DWD 274.03 and these exemptions shall be interpreted in such a manner as to be consistent with the Federal Fair Labor Standards Act and the Code of Federal Regulations as amended, relating to the application of that act to all issues of overtime in respect to the following employees:

(1) Persons whose primary duty consists of administrative, executive or professional work.

(a) "Executive" means an employee employed in a bona fide executive capacity who meets the following criteria:

1. Whose primary duty consists of the management of the enterprise in which they are employed or of a customarily recognized department of subdivision thereof; and

2. Who customarily and regularly directs the work of 2 or more other employees therein; and

3. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

4. Who customarily and regularly exercises discretionary powers; and

5. Who does not devote more than 20%, or in the case of an employee of a retail or service establishment who does not devote as much as 40%, of their hours of work in the workweek of activities which are not directly and closely related to the performance of the work described in subds. 1. through 4. provided, that this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20% interest in the enterprise in which he is employed; and

6. Who is compensated for their services on a salary basis at a rate of not less than $700 per month.

(b) "Administrative" means an employee employed in a bona fide administrative capacity who meets the following criteria:

1. Whose primary duty consists of the performance of office or nonmanual work directly related to management policies or

general business operations of their employer or their employer's customers, or

2. Who customarily and regularly exercises discretion and independent judgment; and

3. a. Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or

b. Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

c. Who executes under only general supervision special assignments and tasks; and

4. Who does not devote more than 20%, or in the case of an employee of a retail or service establishment who does not devote as much as 40%, of their hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in subds. 1. through 3.; and

5. Who is compensated for their services on a salary or fee basis at a rate of not less than $700 per month.

(c) "Professional" means an employee employed in a bona fide professional capacity who meets the following criteria:

1. Whose primary duty consists of the performance of:

a. Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

b. Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

2. Whose work requires the consistent exercise of discretion and judgment in its performance; and

3. Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

4. Who does not devote more than 20% of their hours worked in the workweek to activities which are not an essential part of and necessarily incidental to the work described in subs. (1) through (3); and

5. Who is compensated for services on a salary or fee basis at a rate of not less than $750 per month.

(2) Outside salespersons who spend 80% of their time away from the employer's place of business.

(3) Higher paid commission employees of retail and service establishments if a) 50% of earnings is from commission, and b) time and one–half of minimum wage is received for all hours worked.

(4) Drivers, driver's helpers, loaders or mechanics of a motor carrier or a private or contract carrier who are covered under the provisions of section 204 of the Motor Carrier Act 1935 as amended. Any employee of an employer engaged in the operation of a common carrier by rail and subject to the provision of Part I of the Interstate Commerce Act as amended and any employee of a carrier by air subject to the provision of the Railway Labor Act as amended.

(5) Drivers of taxi cabs.

(6) Time spent in related classroom instruction by indentured apprentices need not be counted as work time for the purpose of computing overtime.

(7) Parts persons, salespersons, service managers, service writers, or mechanics selling or servicing automobiles, trucks, farm implements, trailers, boats, motorcycles, snowmobiles, other recreational vehicles or aircraft, when employed by a nonmanufacturing establishment primarily engaged in selling such vehicles to ultimate purchasers.

(8) Any employee employed by an establishment which is an amusement or recreational establishment, if a) it does not operate for more than 7 months in any calendar year, or b) if during the preceding calendar year, its average receipts for any 6 months of such year were not more than $33^1/_3\%$ of its average receipts for the other 6 months of such year. This rule shall be construed in such manner as to be in conformity with any comparable federal statute or regulation.

(9) Persons employed in agriculture including farming in all its branches, including, among other things, the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, furbearing animals, or poultry, and any practices 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.

(10) Employees employed in any motion picture theater.

(11) Employees of a hospital or other institutions primarily engaged in the care of the sick, the aged, the mentally ill or persons with developmental disabilities who reside on the premises may have an agreement between the employer and the employee before performance of the work for the purpose of overtime computation. A work period of 14 consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation if time and one–half the regular rate of pay is paid for all hours worked in excess of eight hours per day and 80 hours within the 14 day period.

(12) Employees employed as a driver or driver's helper making local deliveries, who are compensated for such employment on the basis of trip rates or other delivery payment plan, if each plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them.

(13) Employees employed in any funeral establishment.

(14) Any employee employed in the following forestry or lumbering operations, if the number of employees employed by the employer in the operation does not exceed 8:

(a) Planting or tending trees, cruising, surveying or felling timber;

(b) Preparing logs or other forestry products; or

(c) Transporting logs or other forestry products to a mill, processing plant or railroad or other transportation terminal.

(15) Any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, 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, and whose primary duty is one of the following:

(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.

(d) A combination of the duties described in pars. (a), (b) and (c), the performance of which requires the same level of skills.

Note: This provision is intended to be interpreted in a manner consistent with 29 USC 213(a)(17).

History: Cr. Register, March, 1977, No. 255, eff. 4–1–77; cr. (9), Register, February, 1980, No. 290, eff. 3–1–80; emerg. cr. (10), eff. 6–27–80; am. (intro.), r. (7), renum. (8) and (9) to be (7) and (8) and am. (7), cr. (9) to (13), Register, December, 1980, No. 300, eff. 1–1–81; cr. (14), Register, March, 1983, No. 327, eff. 4–1–83; am.

(intro.), Register, August, 1991, No. 428, eff. 9–1–91; corrections made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482; cr. (15), Register, May, 1997, No. 497, eff. 6–1–97; **CR 03–053: r. and recr. (9) Register November 2003 No. 575, eff. 12–1–2003.**

DWD 274.045 Interpretation of hours worked. The provisions of s. DWD 272.12 apply to the interpretation of hours worked under this chapter.

History: Cr. Register, February, 1992, No. 434, eff. 3–1–92; correction made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482.

DWD 274.05 Waiver or modification. Except as provided in s. DWD 274.08, where a collectively bargained agreement exists, the department may consider the written application of labor and management for a waiver or modification to the requirements of this chapter based upon practical difficulties or unnecessary hardship in complying therewith. If the department determines that in the circumstances existing compliance with this chapter is unjust or unreasonable and that granting such waiver or modification will not be dangerous or prejudicial to the life, health, safety or welfare of the employees, the department may grant such waiver or modification as may be appropriate to the case.

History: Cr. Register, March, 1977, No. 255, eff. 4–1–77; am. Register, August, 1991, No. 428, eff. 9–1–91; am. Register, February, 1992, No. 434, eff. 3–1–92; correction made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482.

DWD 274.06 Records. Except as provided in s. DWD 274.08, each employer shall keep permanent records for at least 3 years, available for inspection and transcription by a duly authorized deputy of the department, showing the name and address of each employee, the hours of employment and wages of each and such other records as the department may require.

History: Cr. Register, March, 1977, No. 255, eff. 4–1–77; am. Register, August, 1991, No. 428, eff. 9–1–91; correction made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482.

DWD 274.07 Penalties. Any employer who violates order s. DWD 274.02, 274.03 or 274.06 shall be subject to the penalties provided in ss. 101.02 and 109.11, Stats. Each day of violation shall constitute a separate and distinct offense.

History: Cr. Register, March, 1977, No. 255, eff. 4–1–77; correction made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482.

DWD 274.08 Coverage of public employees. **(1)** This section applies to employees of the state, its political subdivisions, and any office, department, independent agency, authority, institution, association, society or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.

(2) The provisions of ss. DWD 274.03 through 274.06 regarding overtime pay, exemptions, and records shall not be applicable to employees identified in sub. (1). The provisions applicable to employees identified in sub. (1) shall be the provisions of the federal Fair Labor Standards Act, 29 CFR Part 553, the regulations of the U.S. department of labor relating to the application of the Act to employees of state and local governments, and other federal regulations relating to the application of the Act to overtime issues affecting employees of state and local governments.

(3) Where there is a valid collective bargaining agreement in effect as of December 18, 1990, the provisions of this chapter shall not become effective for employees identified in sub. (1) until one day after expiration of the collective bargaining agreement, unless it is otherwise modified prior to expiration.

History: Emerg. cr. eff. 12–18–90; cr. Register, August, 1991, No. 428, eff. 9–1–91; correction in (2) made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482.

JCRAR Hearing
January 21, 2004

Re: Sections 272 & 274 of the State Labor Code

1) Background Home Instead Senior Care

- started in 1997, largest non-medical homecare service in Northeast Wisconsin with offices in Green Bay, Appleton, and Oshkosh
- 13 other HISC offices in Wisconsin, plus more than 100 other non-medical homecare services in Wisconsin
- Mission: To help seniors stay "home instead" of having to move to a nursing home or other assisted living facility
- currently I employ @ 240 caregivers, serving @260 senior clients in N.E. WI (collectively all HISC franchises in WI currently employ over 900 caregivers, serving over 1000 seniors)
- in the last 7 years collectively we've served over 4000 seniors in the state of WI while employing more than 4000 caregivers
- collectively we contract with Brown, Outagamie, Winnebago, Milwaukee, Waukesha, Washington, Ozaukee, Racine, Kenosha, Sheboygan, Fond du lac, Portage, & Marathon counties through the Community Options Program for low-income seniors

2) Senior Trends in Wisconsin

- Two major issues: People are living much longer than they used to, & Baby Boomers begin to turn 65 in 7 years
- By 2005, eldercare is expected to replace childcare as the #1 dependent care issue in the U.S. (1999 Conference Board Report)
- See Judith Frye, Assoc. Administrator for Elder Services at Wisconsin Dept. of Health and Family Services

3) Current State Labor Code Does Not Help Caregivers

- Non-medical caregiving does not require any special training or skills. We help the elderly with meals, medication reminders, shopping, and light housekeeping, but most of our time is spent visiting, going for walks, playing cards, watching TV, and sleeping.
- The caregivers themselves decide how much or how little time they spend each week caregiving. Sometimes they "load up" on hours when they want to earn extra $, other times they'll back off completely and take time off. It's entirely up to them.
- Judy D., HISC CAREGiver: Judy wanted to work as many hours as she could with one of our clients. She wanted the extra income, and our client would not allow us to let a different caregiver into her home. The client only wanted Judy, but she also wouldn't pay for any overtime. Because we wouldn't be compensated for the overtime pay, I had to allow Judy and the client to break our employment and service agreements, so Judy could work 40 hours with us, and additional hours that the client paid for. However, Judy was also not covered by worker's comp, unemployment insurance, etc., and I don't believe the client made arrangements for payroll tax deductions.
- Benna Armstrong, experience as a caregiver.
- Caroline Nooyen (?)

4) Current State Labor Code Does Not Help Seniors

- overtime pay would drive up the cost of care to seniors - especially since many clients require round-the-clock care (168 hours per week)
- from Coke v. Long Island Care at Home (U. S. District Court), May 23, 2003: "...the Court notes that the reasoning behind the companionship services exemption (FLSA) is arguably to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same."
- Why not limit caregivers to 40 hours, and use more caregivers? 1) Senior clients and their families won't allow it. 2) There is a shortage of available caregivers that will only get worse when the Baby Boomers need care.
- Caroline Nooyen, Staff Coordinator: Client Story

5) Current State Labor Code Does Not Help Taxpayers

- overtime pay would drive up the cost to the counties when the Community Options Program funding is shrinking, and the # of elderly is growing
- Winnebago has a waiting list of more than 200 seniors (from Thursday's meeting), Door County dropped their COP program this year due to lack of funding
- Note: as a business, we lost money the last two years to the counties through the COP program - per their audit results.

6) Why are so many other jobs exempt from overtime?

- Since my first job in sales out of college, I was never eligible for overtime pay. How many people in this room have ever been eligible for overtime pay? Not many, probably.
- The State Labor Code has a long list of exemptions including drivers of taxi cabs, employees of any motion picture theatre, employees in any funeral establishment, and farm employees, among others.
- Non-medical homecare/companionship services should be exempt from overtime pay requirements as well.

Nobody seems to be winning with the current code - employees lose, seniors lose, taxpayers lose.

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January 21, 2004

Statement on Overtime Pay for Employees of Companies that Provide Non-medical Home Care

By: Attorney Micabil Díaz-Martínez
Administrator- Equal Rights Division
Department of Workforce Development, State of Wisconsin

Good morning, Mr. Chair and members of this committee. My name is Micabil Diaz-Martinez. I am an attorney and currently serve as the Administrator of the Equal Rights Division for the Department of Workforce Development. Thank you for allowing me an opportunity to address publicly on the regulations pertaining to overtime pay for employees of companies who provide non-medical home care.

As some of you may know, Wisconsin's overtime regulations are based upon §103.01-.02 of Wisconsin statutes. The limiting factor on coverage of the overtime regulations is based upon the definition of the term "place of employment" contained in §103.01(3). Only those types of places of employment specifically listed in the definition are covered by DWD's overtime regulations. You will note that conspicuously absent from this listing are individuals employed by an individual within the individual's household to perform work for that household not in connection with a place of employment as defined here.

The present language covers all mercantile establishments. A 1978 unpublished Attorney General's opinion helped the department clarify just what is meant by the term "mercantile establishment". The essence of this opinion was adopted by DWD into DWD 274.01(5) as the definition of "Mercantile". DWD 274.015 states in the last sentence of this paragraph the following:

> "Employees employed in domestic service in a household by a household are not subject to this chapter."

The language contained in DWD's rule simply clarifies the language in the statute. Individuals employed by private households to perform work for the household of a domestic nature are not eligible to receive overtime premium pay.

On the other hand individuals employed by a commercial business performing work in or around a private home are eligible to receive overtime premium pay when they work more than 40 hours in a pay week. Please note that DWD makes no distinction whether the employee is performing carpentry work, plumbing, maid service, carpet cleaning, house painting, lawn service, snow plowing or companionship services.

The attached federal regulations show that under FLSA the USDOL has adopted companionship regulations that are very similar to DWD's exemption contained within the minimum wage regulations. ***DWD, however, has no companionship services exemption within its overtime regulations***. DWD, however, does have a domestic services exemption. DWD specifically limits the domestic service exemption contained in DWD 274.015 (overtime regulations) to employees of the household. FLSA companionship exemption doesn't specifically state the exemption is limited to employees of the household. At various times over the years USDOL has taken various positions concerning whether employees of commercial businesses who perform companionship services in private households are exempt from federal overtime pay requirements. Currently their interpretation of that rule is that the exemption also applies to commercial workers.

I hope this information is helpful to the committee in its deliberations. I would be glad to answer any questions you may have.

SENATOR JOSEPH LEIBHAM
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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

~~Bill Introduction Motion Form~~

January 21, 2004
328 Northwest
State Capitol

Moved by Grothman, Seconded by Leibham

THAT, pursuant to s. 227.26(2)(b), stats., the Joint Committee for Review of Administrative Rules directs the Department of Workforce Development to promulgate a rule regarding their overtime policy for non medical home care companion employees of an agency as part of DWD 274. w/in 30 days.

emergency

COMMITTEE MEMBER	Aye	No	Absent
1. Senator LEIBHAM	✓		
2. Senator WELCH	✓		
3. Senator LAZICH	✓		
4. Senator ROBSON		✓	
5. Senator CARPENTER		✓	
6. Representative GROTHMAN	✓		
7. Representative SERATTI			
8. Representative GUNDERSON	✓		
9. Representative BLACK		✓	
10. Representative HEBL		✓	
Totals			

☐Motion Carried ☐Motion Failed

THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED
(29 U.S.C. 201, *et seq.*)

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938."

Finding and Declaration of Policy

SEC. 2. (a) The Congress hereby 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. ***The Congress further finds that the employment of persons in domestic service in households affects commerce.***

(b) It is hereby declared to be the policy of this Act, 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.[2]

Definitions

SEC. 3. As used in this Act —

(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.[3]

(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,[4] 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, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or 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, or

(v) in the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate 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,

[2] As amended by section 2 of the Fair Labor Standards Amendments of 1949.
[3] As amended by section 3(a) of the Fair Labor Standards Amendments of 1949.
[4] Public agencies were specifically excluded from the Act's coverage until the Fair Labor Standards Amendments of 1966, when Congress extended coverage to "employees of a State or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence * * *."

(III) is appointed by such an office holder 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)[5] 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), 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.[6]

(4)[7] (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 government 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.

(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 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, furbearing 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 Act 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.[8]

(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,[9] 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[10] shall find and by order

[5] As added by section 5 of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

[6] Similar language was added to the Act by the Fair Labor Standards Amendments of 1966. Those amendments also excluded from the definition of employee "any individual who is employed by an employer engaged in agriculture if such individual (A) 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, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year." These individuals are now included.

[7] As added by section 4(a) of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

[8] As amended by section 3(b) of the Fair Labor Standards Amendments of 1949.

[9] As amended by section 3(c) of the Fair Labor Standards Amendments of 1949.

[10] Reorganization Plan No. 2 of 1946 provided that the functions of the Children's Bureau and of the Chief of the Children's Bureau under the Act as originally enacted be transferred to the Secretary of Labor.

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[11] certifying that such person is above the oppressive child labor age. The Secretary of Labor[12] 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[13] 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 Secretary of Labor,[14] 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 the date of the enactment of this paragraph; 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 6(a)(1). The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding two 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.[15]

(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.[16]

(o) Hours worked. — In determining for the purposes of sections 6 and 7 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.[17]

(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**

[11] Reorganization Plan No. 2 of 1946 provided that the functions of the Children's Bureau and of the Chief of the Children's Bureau under the Act as originally enacted be transferred to the Secretary of Labor.

[12] Ibid.

[13] Ibid.

[14] As amended by Reorganization Plan No. 6 of 1950, set out under section 4(a).

[15] As amended by section 2105(b) of the Small Business Job Protection Act of 1996 (110 Stat. 1755). The required cash wage, $2.13, is 50% of the $4.25 minimum wage specified in section 6(a)(1) on the "date of enactment" of the paragraph, August 20, 1996. Tip credit was restricted to not more than 50% of the minimum wage between April 1, 1991 and October 1, 1996; 45% between April 1, 1990 and March 31, 1991; and 40% prior to April 1, 1990.

[16] Section 3(d) of the Fair Labor Standards Amendments of 1949. (The original language of section 3(n) was restored by the Fair Labor Standards Amendments of 1966.)

[17] Ibid.

(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,**[18] 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);[19]

(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.[20]

(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 Rate Commission), a State, or a political subdivision of a State, or any interstate governmental agency.

Administration[21]

SEC. 4. (a) There is hereby 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 Act

[18] "A preschool" was added by the Education Amendments of 1972.

[19] As amended by section 3(a) of the Fair Labor Standards Amendments of 1989. Prior to April 1, 1990, the dollar volume test for enterprise coverage (except in the case of an enterprise comprised exclusively of one or more retail or service establishments; or one engaged in construction or reconstruction; or one engaged in laundering, cleaning, or repairing clothing or fabrics; or one described in section 3(s)(1)(B) or (C)) was $250,000. For retail enterprises, the dollar volume test was $362,500. There was no dollar volume test for the other enterprises.

[20] As amended by section 3(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. Prior to January 1, 1978, the dollar amount was $20.

[21] Heading revised to reflect changes made by Reorganization Plan No. 6 of 1950.

referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $_____ [22] a year.

Excerpts From Reorganization Plan No. 6 of 1950, 64 Stat. 1263

"Except as otherwise provided [with respect to hearing examiners], there are hereby transferred to the Secretary of Labor all functions of all other officers of the Department of Labor and all functions of all agencies and employees of such Department* * *. The Secretary of Labor may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Labor of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan."

(b) The Secretary of Labor[23] may, subject to the civil service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1949[24] as amended. The Secretary[25] 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 Secretary[26] 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 Secretary,[27] 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) The principal office of the Secretary[28] 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) *(1)* The Secretary[29] shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act 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 Act, 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.[30] ***Such report shall also include a summary of the special certificates issued under section 14(b).***

(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 13 of this Act, 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 14 of this Act.

(e) Whenever the Secretary has reason to believe that in any industry under this Act 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 Act as he may determine to be pertinent to such report.

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[22] Pursuant to 5 U.S.C. 5316, the Administrator of the Wage and Hour Division is classified under Level V of the Executive Schedule, for which the annual rate of basic pay is determined under 2 U.S.C. Chapter 11, as adjusted by 5 U.S.C. 5318.

[23] As amended by section 404 of Reorganization Plan No. II of 1939 (53 Stat. 1436) and by Reorganization Plan No. 6 of 1959 (64 Stat. 1263).

[24] As amended by section 1104 of the Act of October 23, 1949 (63 Stat. 972).

[25] See footnote 23.

[26] Ibid.

[27] Ibid.

[28] As amended by Reorganization Plan No. 6 of 1950.

[29] Ibid.

[30] Section 2 of the Fair Labor Standards Amendments of 1955.

(f) 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 Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission[31] is authorized to administer the provisions of this Act 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 Rate 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 16(b) of this Act.

Special Industry Committees for *American Samoa*

SEC. 5.[32] (a) The Secretary of Labor[33] shall as soon as practicable appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to employees in ***American Samoa***[34] engaged in commerce or in the production of goods for commerce **or employed in any enterprise engaged in commerce or in the production of goods for commerce,** or the Secretary[35] may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce **or employed in any enterprise engaged in commerce or in the production of goods for commerce** in particular industries. An industry committee appointed under this subsection shall be composed of residents of ***American Samoa*** where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of ***American Samoa.*** In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees[36] shall be subject to the provisions of section 8.

(b) An industry committee shall be appointed by the Secretary[37] without any regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Secretary[38] shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Secretary[39] shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Secretary[40] shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Secretary[41] shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Secretary[42] shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Secretary[43] to furnish additional information to aid it in its deliberations.

Minimum Wages

SEC. 6. (a) 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 $4.25 an hour during the period ending on September 30, 1996, not less than $4.75 an hour during the year beginning on October 1, 1996, and not less than $5.15 an hour beginning September 1, 1997;[44]

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[31] The Civil Service Commission was renamed the Office of Personnel Management by Reorganization Plan No. 2 of 1978 (92 Stat. 3783).

[32] Section 5 as amended by section 3(c) of the Act of June 26, 1940 (54 Stat. 615); by section 5 of the Fair Labor Standards Amendments of 1949; by section 4 of the Fair Labor Standards Amendments of 1961; by section 5 of the Fair Labor Standards Amendments of 1974; by section 4(a) of the Fair Labor Standards Amendments of 1989; and as further amended as noted. Paragraphs (b), (c), and (d), (except for the substitution of "Secretary" for "Administrator") read as in the original Act.

[33] See footnote 28.

[34] As amended by section 4(a)(1) of the Fair Labor Standards Amendments of 1989. Prior to November 17, 1989, special industry committee procedures also applied to Puerto Rico and the Virgin Islands, until such time as the mainland minimum wage level was reached.

[35] See footnote 28.

[36] As amended by section 5(a) of the Fair Labor Standards Amendments of 1955.

[37] See footnote 28.

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] As amended by the Minimum Wage Increase Act of 1996 (Section 2104 of the Small Business Job Protection Act of 1996).

(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 Secretary of Labor,[45] 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;[46]

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint *pursuant to sections 5 and 8.* The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;[47]

(4) 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

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

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) 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 Act by the Fair Labor Standards Amendments of 1966, ***title IX of the Education Amendments of 1972, 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).

*(c) * * * (Repealed)*

[Note: Section 6(c), relating to minimum wage requirements in Puerto Rico, was phased out by section 4(b)(2) of the Fair Labor Standards Amendments of 1989 (103 Stat. 940), which raised the minimum wage rate for all covered employers in Puerto Rico up to the rate prescribed by section 6(a)(1), effective no later than April 1, 1996, and was stricken by the Minimum Wage Increase Act of 1996 (Section 2104(c) of the Small Business Job Protection Act of 1996).]

(d)[48](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

[45] See footnote 28.

[46] Section 3(f) of the Act of June 26, 1940 (54 Stat. 616).

[47] Section 2 of the American Samoa Labor Standards Amendments of 1956, as amended by section 5 of the Fair Labor Standards Amendments of 1961, and by section 4(b)(1)(A) of the Fair Labor Standards Amendments of 1989.

[48] Subsection (d) added by Equal Pay Act of 1963, 77 Stat. 56 (effective on and after June 11, 1964 except for employees covered by collective bargaining agreements in certain cases).

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 Act.

(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) (1) Notwithstanding the provisions of section 13 of this Act (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 the Service Contract Act of 1965 (41 U.S.C. 351–357) 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 13 of this Act (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965, 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), 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) 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 section 6(b) unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, 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 section 6(b).

(g)[49] (1) In lieu of the rate prescribed by subsection (a)(1), 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 15(a)(3).

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

Maximum Hours

SEC. 7.[50*] (a) (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 workweeks is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966 —

[49] Subsection (g) added by section 2105(c) of the Small Business Job Protection Act of 1996, effective August 20, 1996.

[50] Section 7 as amended by section 7 of the Fair Labor Standards Amendments of 1949, and as further amended as noted. Single asterisk (*) indicates provision amended by the 1949 Act; double asterisk (**) indicates provision added by the 1949 Act. Bold face type indicates amendment made by the Fair Labor Standards Amendments of 1961. Italic type indicates amendment made by the Fair Labor Standards Amendments of 1966. Bold face italic type indicates amendment made by the Fair Labor Standards Amendments of 1974. Helvetica boldface type indicates amendment made by the Fair Labor Standards Amendments of 1985. Helvetica boldface italic type indicates amendment made by the Fair Labor Standards Amendments of 1989.

(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) No employer shall be deemed to have violated subsection (a) 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)** 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)[51] *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 6,

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) * * * (Repealed)*

[Note: Section 7(c) (relating to employers employing employees in an industry found by the Secretary to be of a seasonal nature) was repealed by Section 19 of the Fair Labor Standards Amendments of 1974, effective December 31, 1976.]

*(d) * * * (Repealed)*

[Note: Section 7(d) (relating to employers who do not qualify for the exemption in subsection (c) who employ employees in an industry found by the Secretary "(A) to be characterized by marked annual recurring peaks of operation * * *, or (B) to be of a seasonal nature and engaged in the handling, packing, storing, preparing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw or natural state * * *") was repealed by Section 19 of the Fair Labor Standards Amendments of 1974, effective December 31, 1976.]

**(e) 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

[51] Section 212 of the Fair Labor Standards Amendments of 1966 substituted this provision for the complete exemption from overtime contained in former section 13(b)(10) enacted in the 1961 amendments. Former clause (3) of section 7(b) as enacted in the 1938 Act was replaced by new section 7(c) as enacted by section 204(c) of the Fair Labor Standards Amendments of 1966.

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) sums 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 Secretary of Labor[52] 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 Secretary[53]) 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) 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 time the rate established in good faith for like work performed in nonovertime hours on other days;[54] or

*(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)**), 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.[55]

(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of **the maximum workweek applicable to such employee under subsection (a) 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 6 (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) provided a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) No employer shall be deemed to have violated subsection (a) 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

[52] See footnote 28.
[53] Ibid.
[54] Paragraphs (6) and (7) together with section 7(h) continued in effect provisions of section 1 of the Act of July 20, 1949 (63 Stat. 446), which Act was repealed as of the effective date of the Fair Labor Standards Amendments of 1949.
[55] Ibid.

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 Secretary of Labor[56] 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) 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 paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.[57]

(i) **No employer shall be deemed to have violated subsection (a) 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 6, 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 commission, 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) 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) if, pursuant to an agreement or understanding arrived at between the employer and 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)[58] ***No public agency shall be deemed to have violated subsection (a) 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)[59] 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) 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).

(m) 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) 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.

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[56] See footnote 28.

[57] Amendment provided by section 7 of the Fair Labor Standards Amendments of 1949. See also footnote 54.

[58] Effective January 1, 1975, the complete overtime exemption provided by section 6(c)(2)(A) of the Fair Labor Standards Amendments of 1974 was replaced by the more limited exemption in section 7(k). The present overtime standard — the lesser of 216 hours or the average number of hours (as determined by the Secretary of Labor) in tours of duty of employees in work periods of 28 consecutive days — became effective January 1, 1978. During calendar year 1977 the overtime standard was 216 hours, during 1976 the overtime standard was 232 hours, and during 1975 the overtime standard was 240 hours. The complete overtime exemption remains applicable only to public agencies employing less than 5 employees in fire protection or law enforcement activities. See section 13(b)(20), infra.

[59] The results of the Secretary's study were published in the Federal Register on September 8, 1983. The Secretary determined hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 FR 40,518).

(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) 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) 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)[60](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 employees 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 higher.

[60] As added by section 2(a) of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

(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)[61] 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) 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)[62] 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)[63](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 an-

[61] As added by the Court Reporter Fair Labor Amendments of 1995, effective September 6, 1995 (109 Stat. 264).

[62] Redesignated as paragraph (7) of section 7 (o) by the Court Reporter Fair Labor Amendments of 1995.

[63] As added by section 3 of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

other 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)[64] 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) 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.

Wage Orders in American Samoa

SEC. 8[65] (a) The policy of this Act with respect to industries **or enterprises** in ***American Samoa*** engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the objective of ***the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c).***

The Secretary of Labor[66] shall from time to time convene an industry committee or committees, appointed pursuant to section 5, and any such industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers in ***American Samoa*** engaged 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** in any such industry or classification therein, ***and who but for section 6 (a)(3) would be subject to the minimum wage requirements of section 6 (a)(1).*** Minimum rates of wages established in accordance with this section which are not equal to ***the otherwise applicable minimum wage rate in effect under paragraph (1) or (5) or section 6(a)*** shall be reviewed by such a committee once during each biennial period, beginning with the biennial period commencing July 1, 1958, except that the Secretary,[67] in his discretion, may order an additional review during any such biennial period.[68]

(b) Upon the convening of any such industry committee, the Secretary[69] shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, shall after due notice hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act.[70] The committee shall recommend to the Secretary[71] the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, and will not give any industry in ***American Samoa*** a competitive advantage over any industry in the United States outside of ***American Samoa; except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(a)(3), unless there is evidence in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage due to such economic and competitive conditions.***[72]

(c) The industry committee shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of that ***in effect under paragraph (1) or (5) of section 6(a) (as the case may be)***) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classifications shall be

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[64] As added by section 7 of the Fair Labor Standards Amendments of 1989.

[65] Section 8 as amended by section 8 of the Fair Labor Standards Amendments of 1949; by section 7 of the Fair Labor Standards Amendments of 1961; by section 5(d) of the Fair Labor Standards Amendments of 1974; by section 2(d)(3) of the Fair Labor Standards Amendments of 1977; by section 4(c) of the Fair Labor Standards Amendments of 1989; and as further amended as noted. Prior to November 17, 1989, wage order procedures also applied to Puerto Rico and the Virgin Islands until such time as the mainland minimum wage level was reached. Paragraphs (b), (c), (d), (e), and (f) as amended by the 1949 Act read substantially the same as paragraphs (b) and (c) (except for the parenthetical reference to the minimum wage rate provided in section 6(a), (d), (f) and (g) in the original Act).

[66] See footnote 28.

[67] Act of August 25, 1958 (72 Stat. 844).

[68] As amended by Act of August 25, 1958 (72 Stat. 844).

[69] See footnote 28.

[70] As amended by section 5(b) of the Fair Labor Standards Amendments of 1955.

[71] See footnote 28.

[72] As amended by section 1 of the Act of November 15, 1990.

made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee[73] shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Secretary a report containing its findings of fact and recommendations with respect to the matters referred to it. Upon the filing of such report, the Secretary shall publish such recommendations in the Federal Register and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication.[74]

(e) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Secretary[75] finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.[76]

(f) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Secretary[77] deems reasonably calculated to give general notice to interested persons.

Attendance of Witnesses

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of section 9 and 10 (relating to the attendance of witnesses and the production of books, papers and documents) of the Federal Trade Commission Act of September 16, 1914 as amended (U.S.C., 1934 edition, title 15, sec. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary of Labor[78] and the industry committees.

[73] As amended by sections 5(c) and 5(d) of the Fair Labor Standards Amendments of 1955 (eliminating review by the Secretary of Labor of the recommendations of the industry committee).
[74] Ibid.
[75] See footnote 28.
[76] As amended by section 5(e) of the Fair Labor Standards Amendments of 1955.
[77] See footnote 28.
[78] Ibid.

Court Review

SEC. 10.[79] (a) Any person aggrieved by an order of the Secretary issued under section 8 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, United States Code. 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.[80] 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 of the United States Code.

(b) the commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Secretary's[81] order. The court shall not

[79] Section 10(a) as amended by section 5(f) of the Fair Labor Standards Amendments of 1955, and as further amended as noted.
[80] Section 22 of the Act of August 28, 1958 (72 Stat. 948).
[81] See footnote 28.

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.

Investigations, Inspections, Records, and Homework Regulations

SEC. 11. (a) The Secretary of Labor[82] 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 Act, 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 Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Secretary[83] 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 12, the Secretary[84] shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Secretary of Labor[85] may, for the purpose of carrying out his functions and duties under this Act, 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) Every employer subject to any provision of this Act or of any order issued under this Act 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 Secretary[86] as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder. **The employer of an employee who performs substitute work described in section 7(p)(3) may not be required under this subsection to keep a record of the hours of the substitute work.**[87]

(d) The Secretary 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 Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.[88]

Child Labor Provisions

SEC. 12. (a) 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.[89]

(b) The Secretary of Labor,[90] or any of his authorized representatives, shall make all investigations and inspections under section 11(a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 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 Act relating to oppressive child labor.

(c) 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.**[91]

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[82] See footnote 28.
[83] Ibid.
[84] Ibid.
[85] See footnotes 10 and 28.
[86] See footnote 28.
[87] Added by section 3(c)(2) of the Fair Labor Standards Amendments of 1985, effective April 15,1986.
[88] Section 9 of the Fair Labor Standards Amendments of 1949, as amended by Reorganization Plan No. 6 of 1950.
[89] As amended by section 10(a) of the Fair Labor Standards Amendments of 1949.
[90] See footnotes 10 and 28.
[91] Section 10(b) of the Fair Labor Standards Amendments of 1949 as amended by section 8 of the Fair Labor Standards Amendments of 1961.

(d) 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.

Exemptions

SEC. 13.[92] (a) The provisions of sections 6 *(except section 6(d) in the case of paragraph (1) of this subsection)*[93] and 7 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 the Administrative Procedure Act, 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)*

[Note: Section 13(a)(2) (relating to employees employed by certain retail or service establishments) was repealed, effective April 1, 1990, by section 3(c)(1) of the Fair Labor Standards Amendments of 1989.]

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center,[94] *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 1/3 per centum of its average receipts for the other six months of such year,* except that the exemption from sections 6 and 7 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 6, 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;[95] *or*

*(4) * * * (Repealed)*

[Note: Section 13(a)(4) (relating to employees employed by certain retail establishments) was repealed, effective April 1, 1990, by section 3(c)(1) of the Fair Labor Standards Amendments of 1989.]

(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;[96] *or*

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[92] Section 13 as amended by section 11 of the Fair Labor Standards Amendments of 1949; by Reorganization Plan no. 6 of 1950; and as further amended by the Fair Labor Standards Amendments of 1961, 1966, 1974, 1977, and 1989.

[93] As amended by the Education Amendments of 1972, 86 Stat. 235 at 375, effective July 1, 1972.

[94] Added by section 11 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977.

[95] The last clause of section 13(a)(3) of the Act was added by section 4(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. See also section 13(b)(29) of the Act, as added by the 1977 Amendments.

[96] Prior to the Fair Labor Standards Amendments of 1966, the section 13(a)(6) exemption was applicable to all agricultural employees.

(7) any employee to the extent that such employee is exempted by regulations, order, *or certificate* of the Secretary issued under section 14; or

(8)[97] any employee employed in connection with the publication of any weekly, semi-weekly, 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)*

[Note: Section 13(a)(9) (relating to motion picture theater employees) was repealed by section 23 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for such employees from the overtime provisions only in section 13(b)(27).]

(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)*

[Note: Section 13(a)(11) (relating to telegraph agency employees) was repealed by section 10 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption from the overtime provisions only in section 13(b)(23), which was repealed effective May 1, 1976.]

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

*(13) * * * (Repealed)*

[Note: Section 13(a)(13) (relating to small logging crews) was repealed by section 23 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for such employees from the overtime provisions only in Section 13(b)(28).]

*(14) * * * (Repealed)*

[Note: Section 13(a)(14) (relating to employees employed in growing and harvesting of shade grown tobacco) was repealed by section 9 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for certain tobacco producing employees from the overtime provisions only in section 13(b)(22). The section 13(b)(22) exemption was repealed, effective January 1, 1978, by section 5 of the Fair Labor Standards Amendments of 1977.]

(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)[98] a criminal investigator who is paid availability pay under section 5545a of Title 5, United States Code; or

(17)[99] 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) The provisions of section 7 shall not apply with respect to —

(1) any employee with respect to whom the Secretary of Transportation[100] has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935[101]; or

(2) any employee of an employer *engaged in the operation of a common carrier by rail and* subject to the provisions of part I of the Interstate Commerce Act; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or

[97] As amended by the Fair Labor Standards Amendments of 1966 (which deleted the words "printed and" which formerly preceded the word "published").

[98] Added by section 633(d) of Public Law 103–329 (108 Stat. 2428), effective September 30, 1994.

[99] Added by section 2105(a) of the Small Business Job Protection Act of 1996, effective August 20, 1996.

[100] As amended by the Department of Transportation Act, 80 Stat. 931, which substituted "Secretary of Transportation" for "Interstate Commerce Commission."

[101] Section 204 of the original Motor Carrier Act is now codified at 49 U.S.C. 3102.

*(4) * * * (Repealed)*

[Note: Section 13(b)(4) (relating to employees in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof) was repealed, effective May 1, 1976, by section 11 of the Fair Labor Standards Amendments of 1974.]

(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)*

[Note: Section 13(b)(7) (relating to any driver, operator, or conductor employed by an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier) was repealed, effective May 1, 1976, by section 21 of the Fair Labor Standards Amendments of 1974.[102]]

(8) * * * (Repealed)

[Note: Section 13(b)(8) (relating to any employee employed by a hotel, motel, or restaurant) was repealed, effective January 1, 1979, by section 14 of the Fair Labor Standards Amendments of 1977.]

(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 Bureau of the 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;[103] 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 7(a); *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 for agriculture purposes,[104] 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 6(a)(1);[105] 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;[106] or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup;[107] or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits and

[102] Prior to the Fair Labor Standards Amendments of 1966, employees of local transit companies were exempt from both the Act's minimum wage and overtime requirements.

[103] Boats were added by the Fair Labor Standards Amendments of 1974. Prior to these Amendments, the overtime exemption in subsection (B) also applied to partsmen and mechanics. An earlier minimum wage exemption for any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks or farm implements was repealed by the Fair Labor Standards Amendments of 1966.

[104] A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1966.

[105] Ibid.

[106] Ibid.

[107] The exemption applicable to the ginning of cotton and the processing of sugar beets and sugar cane was deleted from section 13(b)(15) by the Fair Labor Standards Amendments of 1974 and provision was made for such employees in sections 13(b)(25) and 13(b)(26). The exemptions in sections 13(b)(25) and 13(b)(26) were repealed, effective January 1, 1978, by the Fair Labor Standards Amendments of 1977, and provision was made for such employees in sections 13(i) and 13(j), which were added to the Act by those Amendments.

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;[108] *or*

(17) any driver employed by an employer engaged in the business of operating taxicabs;[109] *or*

(18) * * * (Repealed)

[Note: Section 13(b)(18) (relating to any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs) was repealed, effective May 1, 1976, by section 15 of the Fair Labor Standards Amendments of 1974.][110]

(19) * * * (Repealed)

[Note: Section 13(b)(19) (relating to any employee of a bowling establishment) was repealed, effective May 1, 1976, by section 16 of the Fair Labor Standards Amendments of 1974.]

(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;[111] ***or***

[Note: Section 6(c)(3) of the Fair Labor Standards Amendments of 1974 provided as follows: "The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register." The results of the Secretary's study were published in the Federal Register on September 8, 1983. The Secretary determined hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 FR 40,518).]

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

(22) * * * (Repealed)

[Note: Section 13(b)(22) (relating to employees employed in the growing and harvesting of shade grown tobacco[112]) was repealed, effective January 1, 1978, by section 5 of the Fair Labor Standards Amendments of 1977.]

(23) * * * (Repealed)

[Note: Section 13(b)(23) (relating to any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under section 13(a)(2), who is engaged in handling telegraphic messages for the public [113]***) was repealed, effective May 1, 1976, by section 10 of the Fair Labor Standards Amendments of 1974.]***

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

(A) who are orphans or one of whose natural parents is deceased, or [114]

(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) * * * (Repealed)

[Note: Section 13(b)(25) (relating to any employee engaged in ginning cotton for market in any place of

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[108] See footnote 104.

[109] Ibid.

[110] Ibid.

[111] Prior to January 1, 1975, section 13(b)(20) exempted "any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions)." A partial overtime exemption for public agencies having 5 or more such employees is provided by section 7(k) of the Act.

[112] A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1974.

[113] Ibid.

[114] 120 Cong. Rec. H8600 (March 28, 1974; statement of Congressman Dent) indicates that the word "and" was intended in place of "or."

employment located in a county where cotton is grown in commercial quantities[115]) was repealed by section 6(a) of the Fair Labor Standards Amendments of 1977, and is replaced by new section 13(i), added by section 6(b) of those Amendments, which provides a more limited overtime exemption for such employees. Both changes were effective January 1, 1978.]

(26) * * * (Repealed)

[Note: Section 13(b)(26) (relating to any employee who is engaged in the processing of sugar beets, sugar beet molasses, or sugarcane into sugar (other than refined sugar) or syrup was repealed by section 7(a) of the Fair Labor Standards Amendments of 1977, and is replaced by new section 13(j), added by section 7(b) of those Amendments, which provides a more limited overtime exemption for such employees. Both changes were effective January 1, 1978.]

(27) any employee employed by an establishment which is a motion picture theater;[116] 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;[117] or

(29)[118] 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)[119] a criminal investigator who is paid availability pay under section 5545a of Title 5, United States Code.

(c) (1) Except as provided in paragraphs (2) or (4), the provisions of section 12 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 section 13(a)(6)(A)) required to be paid at the wage rate prescribed by section 6(a)(5),

(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 12 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 12 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)[120] (A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 12 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 12 would cause severe

[115] A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1966.
[116] A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1974.
[117] Ibid.
[118] Added by section 4(b) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978.
[119] Added by section 633(d) of Public Law 103-329 (108 Stat. 2428), effective September 30, 1994.
[120] As added by section 8 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977.

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)[121] *(A) In the administration and enforcement of the child labor provisions of this Act, 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 Standard 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 the date of enactment of this paragraph 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

[121] Added by section 1 of Public Law 104–174, effective August 6, 1996 (110 Stat. 1553).

(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 12 relating to oppressive child labor or a regulation or order issued pursuant to section 12. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 12(b).

(vi) The reporting requirements of this subparagraph shall expire 2 years after the date of enactment of this subparagraph.

[Note: Subsection 13(c)(5) shall not be construed as affecting the exemption for apprentices and student learners published in section 570.63 of Title 29, Code of Federal Regulations.]

(d) The provisions of sections 6, 7, and 12 shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer **or to any homeworker 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) The provisions of section 7 shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 6(a)(3), 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 7 if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 6(a)(3), that economic conditions warrant such action.[122]

(f) The provisions of sections 6, 7, 11, and 12, 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); American Samoa; Guam; Wake Island; *Eniwetok Atoll, Kwajalein Atoll; and Johnston Island.*[123, 124]

(g) The exemption from section 6 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.)

[122] Section 3 of the American Samoa Labor Standards Amendments of 1956.

[123] Section 1(l) of the Act of August 30, 1957 (71 Stat. 514), as amended by section 21(b) of the Act of July 12, 1960 (74 Stat. 417), and by section 213 of the Fair Labor Standards Amendments of 1966, and by Section 1225 of the Panama Canal Act of 1979 (93 Stat. 468).

[124] Pursuant to Public Law 99-239, 99 Stat. 1770, the Fair Labor Standards Act no longer applies to Eniwetok Atoll and Kwajalein Atoll, effective October 21, 1986. Additionally, pursuant to Public Law 94-241, 90 Stat. 263 (48 U.S.C. 1681, note), effective March 24, 1976, the Fair Labor Standards Act, except for section 6, applies to the Northern Mariana Islands.

(h) The provisions of section 7 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 7.

(i)[125] The provisions of section 7 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)[126] The provisions of section 7 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.

Learners, Apprentices, Students, and Handicapped Workers

SEC. 14.[127] *(a) 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 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.*

(b) (1) (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

[125] Added by section 6(b) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978.

[126] Added by section 7(b) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978.

[127] As amended by section 24 of the Fair Labor Standards Amendments of 1974.

otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is 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 Act 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 6(a)(5) 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 6 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)[128] *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)[129] 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)[130] *(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 6,

(B) commensurate with those paid to nonhandicapped workers, employed in the vicinity in

[128] As amended by section 12 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977. The 1977 amendments substituted "six" for "four."

[129] Added by section 13 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977.

[130] As amended by the Act of October 16, 1986 (100 Stat. 1229).

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, United States Code. The administrative law judge shall conduct a hearing on the record in accordance with section 554 of title 5, United States Code, 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, United States Code. An action seeking such review shall be brought within thirty days of a final agency action described in subparagraph (F).

(d) The Secretary may by regulation or order provide that sections 6 and 7 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.

Prohibited Acts

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, 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 6 or section 7, or in violation of any regulation or order of the Secretary of Labor[131] issued under section 14; except that no provision of this Act 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 Act 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 the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;[132]

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary[133] issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any compliant or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;[134]

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11(d), 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.[135]

(b) For the purposes of subsection (a)(1) 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.

Penalties[136]

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 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) Any employer who violates the provisions of section 6 or section 7 of this Act 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 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), 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.[137] 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 17 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 6 or**

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[131] See footnote 28.
[132] As amended by section 13(a) of the Fair Labor Standards Amendments of 1949.
[133] See footnote 28.
[134] Section 8 of the Fair Labor Standards Amendments of 1985 contains special discrimination provisions applicable to public agencies.
[135] As amended by section 13(b) of the Fair Labor Standards Amendments of 1949.
[136] The Portal-to-Portal Act of 1947 relieves employers from certain liabilities and punishments under this Act in circumstances specified in that Act. See also section 2(c) of the Fair Labor Standards Amendments of 1985, which relieves certain public agencies of certain liabilities under this Act prior to April 15, 1986.
[137] Amendment provided by section 5(a) of the Portal-to-Portal Act of 1947.

section 7 of this Act 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 15(a)(3).[138]

(c) The Secretary[139] is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, 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 ***the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.***[140] ***The right provided by subsection (b) 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 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary.*** Any sums thus recovered by the Secretary 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, 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 under this subsection for the purposes of the *statutes*[141] of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, 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.[142]

(d) In any action or proceeding commenced prior to, on, or after the date of enactment of this subsection, no employer shall be subject to any liability or punishment under this Act of the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 13(f) 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 6(a)(3) at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.[143]

(e) Any person who violates the provisions of section 12 *or section 13(c)(5),*[144] ***relating to child labor, or any regulation issued under*** *section 12 or section 13(c)(5),*[145] ***shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such a violation. Any person who repeatedly or willfully violates section 6 or 7 shall be subject to a civil penalty of not to exceed $1,000 for each such violation.***[146] ***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 —***

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

(2) 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

(3) ordered by the court, in an action brought for a violation of section 15(a)(4) **or a repeated or willful violation of section 15(a)(2),**[147] ***to be paid to the Secretary.***

Any administrative determination by the Secretary of the amount of any penalty under this subsection shall

[138] The Fair Labor Standards Amendments of 1977 amended subsection 16(b), effective January 1, 1978, to authorize a private right of action for violations of subsection 15(a)(3) of the Act. Prior to this amendment, only the Secretary of Labor was authorized to bring an action for violations of subsection 15(a)(3).

[139] See footnote 28.

[140] The provision for liquidated damages was added by the Fair Labor Standards Amendments of 1974. These Amendments also deleted the prior requirements that section 16(c) suits be brought only on the written request of the employee and if the case did not involve any issue of law which had not been finally settled by the courts.

[141] Amended by section 601 of the Fair Labor Standards Amendments of 1966.

[142] Section 14 of the Fair Labor Standards Amendments of 1949, as amended by Reorganization Plan No. 6 of 1950 and the Fair Labor Standards Amendments of 1966.

[143] Section 4 of the American Samoa Labor Standards Amendments of 1956, as amended by section 1(2) of the Act of August 30, 1957 (71 Stat. 514), effective November 27, 1957.

[144] As amended by section 2 of Public Law 104–174 (110 Stat. 1554).

[145] Ibid.

[146] As added by section 9 of the Fair Labor Standards Amendments of 1989, and amended by section 3103 of the Omnibus Budget Reconciliation Act of 1990.

[147] As added by section 9 of the Fair Labor Standards Amendments of 1989.

be final, unless within fifteen 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, United States Code, and regulations to be promulgated by the Secretary. Except for civil penalties collected for violations of section 12, 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 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes" (29 U.S.C. 9a). Civil penalties collected for violations of section 12 shall be deposited in the general fund of the Treasury.[148]

Injunction Proceedings

SEC. 17. 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 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (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 6 of the Portal-to-Portal Act of 1947).[149]

Relation to Other Laws

SEC. 18. *(a)* No provisions of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minium wage higher than the minium wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act 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 Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

(b) Notwithstanding any other provision of this Act (other than section 13(f)) 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, United States Code, or[150]

(2) any employee employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,[151]

shall have his basic compensation fixed or adjusted at a wage rate which is not less than the appropriate wage rate provided for in section 6(a)(1) of this Act (except that the wage rate provided for in section 6(b) 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 7(a)(1) of this Act.

Separability of Provisions

SEC. 19. If any provision of this Act or the application of such provision to any persons or circumstances is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.[152]

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[148] As amended by section 3103 of the Omnibus Budget Reconciliation Act of 1990.
[149] As amended by section 12 of the Fair Labor Standards Amendments of 1961.

[150] Paragraph (1), as amended by Public Law 90–83, 81 Stat. 222, omits reference to other employees covered under paragraph (1) of this subsection as enacted in the Fair Labor Standards Amendments of 1966, section 306, whose compensation requirements under such Amendments are now incorporated in 5 U.S.C. 5341 and 5 U.S.C. 5544.
[151] Paragraph (2) was formerly paragraph (3) of subsection (b) as enacted in the Fair Labor Standards Amendments of 1966, section 306. It was renumbered in the amendment by Public Law 90–83, 81 Stat. 222, which omitted the former paragraph (2) referring to employees described in 10 U.S.C. 7474 because of repeal of the latter provision by Public Law 89–554, 80 Stat. 663.
[152] The Fair Labor Standards Amendments of 1949 were approved October 26, 1949; the Fair Labor Standards Amendments of 1955 were approved August 12, 1955; the American Samoa Labor Standards Amendments were approved August 8, 1956; the Fair Labor Standards Amendments of 1961 were approved May 5, 1961; the Fair Labor Standards Amendments of 1966 were approved September 23, 1966; the Fair Labor Standards Amendments of 1974 were approved April 8, 1974; the Fair Labor Standards Amendments of 1977 were approved November 1, 1977; the Fair Labor Standards Amendments of 1985 were approved November 13, 1985; the Fair Standards Amendments of 1989 were approved November 17, 1989; and the Small Business Job Protection Act of 1996, which included the Employee Commuting Flexibility Act of 1996, the Minimum Wage Increase Act of 1996, and Fair Labor Standards Act Amendments, was approved on August 20, 1996.

ADDITIONAL PROVISIONS OF THE SMALL BUSINESS JOB PROTECTION ACT OF 1996
(110 Stat. 1755)

[PUBLIC LAW 104–188]

[104TH CONGRESS] [SECOND SESSION]

AN ACT

To provide tax relief for small businesses, to protect jobs, to create opportunities, to increase the take home pay of workers, to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer owned vehicles, and to amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate and to prevent job loss by providing flexibility to employers in complying with minimum wage and overtime requirements under that Act.

SEC. 2101. SHORT TITLE.

This section and sections 2102 and 2103 may be cited as the "Employee Commuting Flexibility Act of 1996."

* * * * * *

SEC. 2103. EFFECTIVE DATE.

The amendment made by section 2102 shall take effect on the date of enactment of this Act and shall apply in determining the application of section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before such date of enactment but pending on such date.

LEGISLATIVE HISTORY — H.R. 3448:

HOUSE REPORTS: Nos. 104–586 (Comm. on Ways and Means) and 104–737 (Comm. of Conference).

SENATE REPORTS: No. 104–281 (Comm. on Finance).

CONGRESSIONAL RECORD, Vol 142 (1996):
May 22, considered and passed House.
July 8, 9, considered and passed Senate, amended.
Aug. 2, House and Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 32 (1996):
Aug. 20, Presidential remarks and statement.

ADDITIONAL PROVISIONS OF THE ACT OF NOVEMBER 15, 1990
(104 Stat. 2871)

[PUBLIC LAW 101–583]

[101ST CONGRESS] [FIRST SESSION]

AN ACT

To eliminate "substantial documentary evidence" requirement for minimum wage determination for American Samoa, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled.

[Section 1 of the Act of November 15, 1990 amends the Fair Labor Standards Act of 1938, and is incorporated in its proper place in the Act.]

SEC. 2. REGULATIONS CONCERNING CERTAIN EMPLOYEES

Not later than 90 days after the date of enactment of this Act, the Secretary of Labor shall promulgate regulations that permit computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers as defined in such regulations to qualify as exempt executive, administrative, or professional employees under section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)). Such regulations shall provide that if such employees are paid on an hourly basis they shall be exempt only if their hourly rate of pay is at least 6 1/2 times greater than the applicable minimum wage rate under section 6 of such Act (29 U.S.C. 206).

Approved November 15, 1990.

LEGISLATIVE HISTORY — S. 2930:

CONGRESSIONAL RECORD, Vol. 136 (1990):
Aug. 4, considered and passed Senate.
Oct. 18, considered and passed House, amended.
Oct. 27, Senate concurred in House amendments.

ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1989
(103 Stat. 938)

[PUBLIC LAW 101–157]

[101ST CONGRESS] [FIRST SESSION]

AN ACT

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That this Act may be cited as the "Fair Labor Standards Amendments of 1989."

[Sections 2; 3(a), (c), and (d); 4; 5; 7; and 9 of the Fair Labor Standards Amendments of 1989 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]

PRESERVATION OF COVERAGE

SEC. 3. * * *

(b) PRESERVATION OF COVERAGE. —

(1) IN GENERAL. — Any enterprise that on March 31, 1990, was subject to section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) and that because of the amendment made by subsection (a) is not subject to such section shall —

(A) pay its employees not less than the minimum wage in effect under such section on March 31, 1990;

(B) pay its employees in accordance with section 7 of such Act (29 U.S.C. 207); and

(C) remain subject to section 12 of such Act (29 U.S.C. 212).

(2) VIOLATIONS. — A violation of paragraph (1) shall be considered a violation of section 6, 7, or 12 of the Fair Labor Standards Act of 1938, as the case may be.

* * * * * *

(e) EFFECTIVE DATE. —The amendments made by this section shall become effective on April 1, 1990.

TRAINING WAGE

SEC. 6. TRAINING WAGE.

(a) IN GENERAL. —

(1) AUTHORITY. — Any employer may, in lieu of the minimum wage prescribed by section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206), pay an eligible employee the wage prescribed by paragraph (2) —

(A) while such employee is employed for the period authorized by subsection (g)(1)(B)(i), or

(B) while such employee is engaged in on-the-job training for the period authorized by subsection (g)(1)(B)(ii).

(2) WAGE RATE. — The wage referred to in paragraph (1) shall be a wage —

(A) of not less than $3.35 an hour during the year beginning April 1, 1990; and

(B) beginning April 1, 1991, of not less than $3.35 an hour or 85 percent of the wage prescribed by section 6 of such Act, whichever is greater.

(b) WAGE PERIOD. — An employer may pay an eligible employee the wage authorized by subsection (a) for a period that —

(1) begins on or after April 1, 1990;

(2) does not exceed the maximum period during which an employee may be paid such wage as determined under subsection (g)(1)(B); and

(3) ends before April 1, 1993.

(c) WAGE CONDITIONS. — No eligible employee may be paid the wage authorized by subsection (a) by an employer if —

(1) any other individual has been laid off by such employer from the position to be filled by such eligible employee or from any substantially equivalent position; or

(2) such employer has terminated the employment of any regular employee or otherwise reduced the number of employees with the intention of filling the vacancy so created by hiring an employee to be paid such wage.

(d) LIMITATIONS. —

(1) EMPLOYEE HOURS. — During any month in which employees are to be employed in an establishment under this section, the proportion of employee hours of employment to the total hours of employment of all employees in such establishment may not exceed a proportion equal to one-fourth of the total hours of employment of all employees in such establishment.

(2) DISPLACEMENT. —

(A) PROHIBITION. — 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 subsection (a).

(B) DISQUALIFICATION. — If the Secretary determines that an employer has taken an action in violation of subparagraph (A), the Secretary shall issue an order disqualifying such employer from employing any individual at such wage.

(e) NOTICE. — Each employer shall provide to any eligible employee who is to be paid the wage authorized by subsection (a) a written notice before the employee begins employment stating the requirements of this section and the remedies provided by subsection (f) for violations of this section. The Secretary shall provide to employers the text of the notice to be provided under this subsection.

(f) ENFORCEMENT. — Any employer who violates this section shall be considered to have violated section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)). Sections 16 and 17 of such Act (29 U.S.C. 216 and 217) shall apply with respect to the violation.

(g) DEFINITIONS. — For purposes of this section:

(1) ELIGIBLE EMPLOYEE. —

(A) IN GENERAL. — The term "eligible employee" means with respect to an employer an individual who —

(i) is not a migrant agricultural worker or a seasonal agricultural worker (as defined in paragraphs (8) and (10) of section 3 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1802 (8) and (10)) without regard to subparagraph (B) of such paragraphs and is not a nonimmigrant described in section 101(a)(15)(H)(ii)(a) of the immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(a));

(ii) has not attained the age of 20 years; and

(iii) is eligible to be paid the wage authorized by subsection (a) as determined under subparagraph (B).

(B) DURATION. —

(i) An employee shall initially be eligible to be paid the wage authorized by subsection (a) until the employee has been employed a cumulative total of 90 days at such wage.

(ii) An employee who has been employed by an employer at the wage authorized by subsection (a) for the period authorized by clause (i) may be employed by any other employer for an additional 90 days if the employer meets the requirements of subsection (h).

(iii) The total period, as authorized by clauses (i) and (ii), that an employee may be paid the wage authorized by subsection (a) may not exceed 180 days.

(iv) For purposes of this subparagraph, the term "employer" means with respect to an employee an employer who is required to withhold payroll taxes for such employee.

(C) PROOF. —

(i) IN GENERAL. — An individual is responsible for providing the requisite proof of previous period or periods of employment with other employers. An employer's good faith reliance on the proof presented to the employer by an individual shall constitute a complete defense to a charge that the employer has violated subsection (b)(2) with respect to such individual.

(ii) REGULATIONS. — The Secretary of Labor shall issue regulations defining the requisite proof required of an individual. Such regulations shall establish minimal requirements for requisite proof and may prescribe that an accurate list of the individual's employers and a statement of the

dates and duration of employment with each employer constitute requisite proof.

(2) ON-THE-JOB TRAINING. — The term "on-the-job training" means training that is offered to an individual while employed in productive work that provides training, technical and other related skills, and personal skills that are essential to the full and adequate performance of such employment.

(h) EMPLOYER REQUIREMENTS. — An employer who wants to employ employees at the wage authorized by subsection (a) for the period authorized by subsection (g)(1)(B)(ii) shall —

(1) notify the Secretary annually of the positions at which such employees are to be employed at such wage,

(2) provide on-the-job training to such employees which meets general criteria of the Secretary issued by regulation after consultation with the Committee on Labor and Human Resources of the Senate and the Committee on Education and Labor of the House of Representatives and other interested persons,

(3) keep on file a copy of the training program which the employer will provide such employees,

(4) provide a copy of the training program to the employees,

(5) post in a conspicuous place in places of employment a notice of the types of jobs for which the employer is providing on-the-job training, and

(6) send to the Secretary on an annual basis a copy of such notice.

The Secretary shall make available to the public upon request notices provided to the Secretary by employers in accordance with paragraph (6).

(i) REPORT. — The Secretary of Labor shall report to Congress not later than March 1, 1993, on the effectiveness of the wage authorized by subsection (a). The report shall include —

(1) an analysis of the impact of such wage on employment opportunities for inexperienced workers;

(2) any reduction in employment opportunities for experienced workers resulting from the employment of employees under such wage;

(3) the nature and duration of the training provided under such wage; and

(4) the degree to which employees used the authority to pay such wage.

APPLICATIONS OF FLSA TO CONGRESSIONAL AND ARCHITECT OF THE CAPITOL EMPLOYEES

SEC. 8. APPLICATION OF RIGHTS AND PROTECTIONS OF FAIR LABOR STANDARDS ACT OF 1938 TO CONGRESSIONAL AND ARCHITECT OF THE CAPITOL EMPLOYEES.

(a) HOUSE EMPLOYEES. —

(1) IN GENERAL. — Not later than 180 days after the date the minimum wage rate prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) is increased pursuant to the amendment made by section 2, the rights and protections under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) shall apply with respect to any employee in an employment position in the House of Representatives and to any employing authority of the House of Representatives.

(2) ADMINISTRATION. — In the administration of this subsection, the remedies and procedures under the Fair Employment Practices Resolution shall be applied. As used in this paragraph, the term "Fair Employment Practices Resolution" means House Resolution 558, One Hundredth Congress, agreed to October 4, 1988, as continued in effect by House Resolution 15, One Hundred First Congress, agreed to January 3, 1989.

(b) ARCHITECT OF THE CAPITOL EMPLOYEES. — Not later than 180 days after the date the minimum wage rate prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) is increased pursuant to the amendment made by section 2, the rights and protections under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) shall apply with respect to individuals employed under the Office of the Architect of the Capitol.

Approved November 17, 1989.

ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1985
(99 Stat. 787)

[PUBLIC LAW 99–150]

[99TH CONGRESS] [FIRST SESSION]

AN ACT

To amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That this Act may be cited as the "Fair Labor Standards Amendments of 1985."

[Sections 2(a), 3, 4(a) and 5 of the Fair Labor Standards Amendments of 1985 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]

COMPENSATORY TIME

SEC. 2. * * *

(b) EXISTING COLLECTIVE BARGAINING AGREEMENTS — A collective bargaining agreement which is in effect on April 15, 1986, and which permits compensatory time off in lieu of overtime compensation shall remain in effect until its expiration date unless otherwise modified, except that compensatory time shall be provided after April 14, 1986, in accordance with section 7(o) of the Fair Labor Standards Act of 1938 (as added by subsection (a)).

(c) LIABILITY AND DEFERRED PAYMENT — (1) No State, political subdivision of a State, or interstate governmental agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6 (in the case of a territory or possession of the United States), 7, or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Code of Federal Regulations.

(2) A State, political subdivision of a State, or interstate governmental agency may defer until August 1, 1986, the payment of monetary overtime compensation under section 7 of the Fair Labor Standards Act of 1938 for hours worked after April 14, 1986.

VOLUNTEERS

(b) REGULATIONS. — Not later than March 15, 1986, the Secretary of Labor shall issue regulations to carry out paragraph (4) of section 3(e) (as amended by subsection (a) of this section).

(c) CURRENT PRACTICE. — If, before April 15, 1986, the practice of a public agency was to treat certain individuals as volunteers, such individuals shall until April 15, 1986, be considered, for purposes of the Fair Labor Standards Act of 1938, as volunteers and not as employees. No public agency which is a State, a political subdivision of a State, or an interstate governmental agency shall be liable for a violation of section 6 occurring before April 15, 1986, with respect to services deemed by that agency to have been performed for it by an individual on a voluntary basis.

EFFECTIVE DATE

SEC. 6. The amendments made by this Act shall take effect April 15, 1986. The Secretary of Labor shall before such date promulgate such regulations as may be required to implement such amendments.

EFFECT OF AMENDMENTS

SEC. 7. The amendments made by this Act shall not affect whether a public agency which is a State, political subdivision of a State, or an interstate governmental agency is liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 5, 7, or 11 of such Act occurring before April 15, 1986, with respect to any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in section 775.3 of title 29 of the Code of Federal Regulations.

DISCRIMINATION

SEC. 8. A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 shall be held to have violated section 15(a)(3) of such Act. The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act.

Approved November 13, 1985.

The State of Wisconsin
Department of Justice
Madison
53702

Bronson C. La Follette
Attorney General

David J. Hanson
Deputy Attorney General

October 4, 1978

OAG 72-78

Mr. Zel S. Rice II, Secretary
Department of Industry, Labor and
Human Relations
201 East Washington Avenue
Madison, Wisconsin 53707

Dear Mr. Rice:

You ask whether the definition of a place of employment in sec. 103.01(1), Stats., covers:

1. A ski area and ski shop, which involves landscaping, lawn service, care of ski slopes including manufacture of snow, and operation of chairlifts, rental and sale of ski equipment, cafeteria, bar and garage. A charge is made for the use of facilities.

2. An amusement park featuring nursery rhyme attractions, with scenic train ride and merry-go-round, for which an admission fee is charged. The park also contains shops where merchandise is sold.

Sections 103.01 to 103.03 authorize your Department to make rules with respect to hours of labor in places of employment. As defined in sec. 103.01(1), Stats.:

> "'Place of employment' means any manufactory, mechanical or mercantile establishment, beauty parlor, laundry, restaurant, confectionery store, or telegraph or telephone office or exchange, any express or transportation establishment or any hotel."

This is the type of remedial enactment which the Wisconsin Supreme Court has regularly held should be liberally construed to accomplish its humane purposes. See, for example, Kiel v. Industrial Commission, 163 Wis. 441, 444-445, 158 N.W. 68 (1916), where the court commented:

> "We may as well say here, what has been, in terms, or effect, said many times before, that, the Workmen's Compensation Law is a humane

> remedial enactment, which was placed upon our statute books to give vitality to the idea that personal injury losses incident to employee service, are as much a part of the labor cost of such service as wages paid and should, in some practicable way, be so treated. Therefore the legislative language used in the act to that end should be as liberally construed to effect the beneficent purposes intended, as it reasonably can be. It is useless to try to minimize the scope of such language by confining the meaning of words to any technical signification. ..."

The fact that the Legislature used the term manufactory separately indicates that it intended the terms mechanical and mercantile establishments to mean something other than the production of a tangible product.

In Random House Dictionary of the English Language, the Unabridged Edition, the first definition of mercantile is: "Of or pertaining to merchants or trade." The synonym given for it is "commercial."

The court in In re U.S. Mercantile Rep. & Col. Ass'n, 4 N.Y.S. 916, 917, 52 Hun. 611 (1889), held there is no material distinction between the terms "mercantile" and "commercial." In People v. Luna Amusement Co., 178 App. Div. 797, 165 N.Y.S. 832 (1917), the court defined "mercantile establishment" as "any place where goods, wares and merchandise are offered for sale." Id. at 798. Thus, it included as a mercantile establishment a booth located within an amusement park where chewing gum was sold.

It seems clear from the various enumerations in sec. 103.01(1) that the Legislature did not intend to limit the application of the statute to sale of tangible objects.

Concededly, the same term may be construed differently in different statutes. Here, the statute is intended for the protection of employes; the terms are to be liberally construed to accomplish that objective.

In order to carry out the duties imposed upon your Department by the statute, it is necessary for you to make the initial interpretation of language which is flexible enough to permit of more than one meaning. While your interpretation is not binding upon a court, the supreme court has said:

"Where an ambiguity exists in a statute the interpretation by the administrative agency charged with the duty of applying such statute is given great weight by this court." Robinson v. Kunach, 76 Wis.2d 436, 446, 251 N.W.2d 449 (1977).

The enterprises you describe are in business for the purpose of making a profit by charging for the use and enjoyment of their facilities. I am of the opinion that they fall within the definition of sec. 103.01(1), so that they are subject to your rules respecting employment.

There are several types of business in the two enterprises you describe which would in themselves be included in other terms used in the definition of places of employment. For example, restaurants are specifically included. Many of the workers are employed in mechanical operations, particularly under the broad definitions of the term "mechanical" such as that given in Black's Law Dictionary, which includes "of, pertaining to, or concerned with manual labor." Random House Dictionary, referred to above, includes in its definition "pertaining to the use or comprehension of tools, machinery or the like."

Since I believe the term mercantile establishment includes all labor performed in its operation, it is not necessary to categorize each type of labor involved. The definition of employment in sec. 103.01(2) includes any occupation "for any place of employment," unless otherwise exempted.

Sincerely yours,

Bronson C. La Follette
Attorney General

BCL:BL:aag

CAPTION:

Public ski resorts and amusement parks which make a charge for enjoyment of their facilities are subject to rules relating to employment made under secs. 103.01 to 103.03, Stats.

29 CFR 552.106 - Companionship services for the aged infirm.

- **Section Number:** 552.106
- **Section Name:** Companionship services for the aged or infirm.

The term ``companionship services for the aged or infirm'' is defined in Sec. 552.6. Persons who provide care and protection for babies and young children, who are not physically or mentally infirm, are considered babysitters, not companions. The companion must perform the services with respect to the aged or infirm persons and not generally to other persons. The ``casual'' limitation does not apply to companion services.