

2D

U.S. DEPARTMENT OF LABOR  
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS  
WASHINGTON, D.C. 20210

DEC 27 1967

REFERENCE COPY

DO NOT REMOVE FROM BINDER

LAW LIBRARY

ROOM 4424

DEPT. OF LABOR

21 AB 805.1  
BA 750

This is in further reply to your letter of May 2, 1967, concerning the application of the amended Fair Labor Standards Act to school food service employees. The answers to the questions you raised are set forth below and are keyed to the question numbers in your letter.

(1 and 2) The sole fact that a student helps in a school lunchroom or cafeteria for periods of 30 minutes to an hour per day in exchange for his lunch is not considered to be sufficient to make him an employee of the school, regardless of whether he performs such work regularly or only on occasion. However, if there are other indicia of employment or the student normally devotes more than an hour each day or equivalent to such work, the circumstances of the arrangement will have to be reviewed carefully before a definite determination of the employment relationship can be made.

(3 and 4) Supervisory personnel (such as the school lunch manager) are covered by the Fair Labor Standards Act. However, they may be exempt from the act's minimum wage and overtime pay requirements as executive employees under section 13(a)(1) provided they meet the tests spelled out in Regulations, Part 541.

(5 and 6) A maximum workweek of less than that specified in section 7(s)(2) of the act is a matter of agreement between the parties involved. Under the Fair Labor Standards Act the payment of overtime pay for newly covered employees, including school food service employees, is currently required only for hours worked in excess of 44 in a workweek. The Fair Labor Standards Act does not generally require the payment of daily overtime pay.

(7) Work performed at home by an employee generally would be compensable hours under the act. However, the "manager" may be exempt under section 13(a)(1) as previously indicated.

12/27/67

rV

- (8) Where the annual salary earned during the duty months (for example, 9 months) is paid in twelve equal monthly installments, the annual salary is considered in relation to the duty months rather than in relation to the entire year in determining whether the statutory minimum wage has been paid.
- (9) The act does not prohibit payment to an employee on a monthly salary basis. However, the salary when converted to its weekly equivalent must yield at least the applicable minimum wage for each workweek standing alone. The workweek for a particular employee need not coincide with the calendar week, as discussed in section 778.105 of Interpretative Bulletin, Part 778.
- (10 and 11) Generally, if an employment relationship exists, the employee must be paid as provided by the act. However, persons such as nuns, priests, lay brothers, and other members of religious orders who serve pursuant to their religious obligations in the schools operated by their church or religious order shall not be considered as "employees". In addition, individuals may volunteer their services, usually on a part-time basis, not as employees or with expectation of pay for their services. For example, mothers may assist in a school cafeteria as a public duty to maintain effective services for their children. The furnishing of a free meal to such persons would not be sufficient to create an employer-employee relationship.
- (12) Section 14(d) of the act provides for the employment, under special certificates, of employees whose productive capacity is impaired by age or physical or mental deficiency or injury. This is discussed further in Regulations, Part 524.
- (13) Part-time adult employees in a school must be paid the applicable minimum wage, unless specifically exempt.
- (14 and 15) Catering done by food service employees whose services are made available to a third party (such as a civic group, P.T. A., etc.) are considered to be jointly employed by the school and the third party if the school itself contracts for the use of such employees. Therefore, the total time spent in work for the joint employers would have to be counted and paid for in compliance with the minimum wage and overtime pay provisions of the act. Joint employment is discussed in more detail in the enclosed Interpretative Bulletin, Part 791. Since the Fair Labor Standards Act does not generally require the payment of daily overtime, hours worked in the evening would be overtime hours only if they are in excess of the statutory workweek (currently 44 hours).

On the other hand, if the school does not require that its employees be utilized by nonschool organizations when using school facilities, but such employees are hired merely for the convenience of the outside group and are paid directly by them, the hours worked and compensation paid to such employees for this time need not be included in determining compensation due the employees for their employment by the school.

(16) We would not assert that the Fair Labor Standards Act is applicable to time spent by school food service employees feeding victims during a natural disaster (flood, tornado, earthquake, etc.) or a man made disaster (fire, explosion, riot, etc.) where such disaster relief requires the immediate use of school facilities and employees and where such work would promptly cease as soon as the immediate needs are met. Such activities are not related to the school's function as an educational institution.

(17) The value of a lunch received by a school food service employee should be the "reasonable cost" to the employer of furnishing such a meal. This is discussed in sections 531.29 through 531.33 of Regulations, Part 531.

(18) Generally, a person contracting with a school to perform labor in connection with providing lunches for children would be considered an employee rather than an independent contractor. In such case the school would be responsible for compliance with the monetary provisions of the Fair Labor Standards Act.

(19) The employment of learners at less than the applicable minimum wage is discussed in Regulations, Part 522. However, certificates for a special minimum wage are issued only for those occupations involving a sufficient degree of skill to necessitate an appreciable period of training.

(20) Responsibility for the purchase, laundering, and repair of employee uniforms is a matter for agreement between the parties. If the Board of Instruction requires employees to wear such uniforms it is considered to be primarily for the benefit or convenience of the employer, and any cost incurred by the employer may not be included in computing wages. This is discussed further in sections 531.3 and 531.32 of Regulations, Part 531.

(21) Where the Fair Labor Standards Act and a similar State law are both applicable, the employer would generally be responsible for compliance with the law having the higher standards.

(22) The 1966 amendments to the Fair Labor Standards Act extended coverage on an enterprise basis to all schools regardless of size, dollar volume, population or number of employees, provided there are in the enterprise some employees engaged in interstate commerce or in the production of goods for interstate commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce.

Please note that some employees of private schools may have been covered by the act even prior to the amendments on the basis of their individual duties, and must be paid the higher minimum wage prescribed by the act for previously covered employment.

(23) If a school food service employee, during the summer months, voluntarily attends a National Convention relating to his job and does not perform any productive work during such attendance, the time spent need not be counted as hours worked even though the employer pays the employee's expenses. The status under the act of time spent attending lectures, meetings, training programs and similar activities is discussed in sections 785.27 through 785.32 of Interpretative Bulletin, Part 785.

If you have further questions, you may find it more convenient to communicate with the WHPC Divisions' Field Office at 379 New Customs House, 721-19th Street, Denver, Colorado 80202. That office will be pleased to assist you in any way possible.

Sincerely yours,

WILLIAM T. BROWN

Administrator