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When Does Overtime Start?

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WHEN DOES OVERTIME START?

Ten years ago there went into effect a law which was to become known as an economic charter for the lowest paid working men and women of America. This law, the Fair Labor Standards Act[1] which was passed by the 75th Congress in 1938 for the express purpose of eliminating in industry conditions detrimental to the health, efficiency, welfare and general well-being of workers,[2] is more commonly known as the Wage and Hour Law. The Act provides a floor under which wages for covered workers may not fall; it provides for the payment of time and one-half time for all hours over forty in a work-week, and it regulates the employment of child labor. These are the major provisions of the Act.

The purpose of this article is to illustrate when, for those entitled thereto, overtime is such within the provisions of the Wage and Hour Law. A discussion of the *modus operandi* involved in determining whether specific employees in certain types of industries are covered by the overtime provisions of the Act, is beyond the scope of this writing and reference to such persons must therefore be limited to general categories.

The benefits of the act do not attach to all workers in the nation, but only to those who are "covered" by its provisions, such as those engaged in interstate commerce—railroads, telephone, and telegraph companies, for example—and those engaged in the production of goods for interstate commerce, as in manufacturing, mining, and other business operations necessary to the production of goods for commerce.

Of those who are covered by the Act, Congress has exempted some from minimum wage provisions, and others from both the minimum wage and overtime provisions, with still others from only the overtime requirements. Those exempted from both the minimum wage and overtime provisions are:

(a) Employees engaged in *bona fide* executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman, as defined by the Administrator.[3]

(b) Employees engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce.[4]

(c) Certain persons in employment related to sea food.[5]
Seamen.[6]

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1 52 Stat. 1060 (1938), USCA, Title 29, Sect. 201-219.
2 *Id.* Sect. 202.
3 *Id.* Sect. 213 (a) (1).
4 *Id.* Sect. 213 (a) (2).
5 *Id.* Sect. 213 (a) (5).
6 *Id.* Sect. 213 (a) (3).

Agricultural workers.[7]

Switchboard operators of telephone exchanges with less than 500 stations.[8]

Certain employees of the following:

(1) Airlines.[9]

(2) Street, suburban or interurban electric railways, local trolleys, or local motor bus carriers.[10]

(3) Weekly or semi-weekly newspapers with a circulation of less than 3,000, the major part of which is in the county of printing and publication.[11]

(d) Persons employed within the area of production, as defined by the Administrator, engaged in handling, packing, storing, ginning, compressing, canning, pasteurizing, drying, or preparing in their raw or natural state agricultural or horticultural products for market or making dairy products.[12]

The following are exempt only from the overtime provisions of the Act:

(a) Employees of railway carriers and certain employees of motor carriers subject to regulation by the Interstate Commerce Commission.[13]

(b) Employees engaged in the first processing of milk, cream, skimmed milk, or whey into dairy products, in the ginning and compressing of cotton, in the processing of cottonseed, and in the processing of sugar beets, sugar beet molasses, sugar cane, or maple sap into sugar or syrup (but not the refining of sugar.)[14]

It is with those covered employees whose occupations do not fall within the exempt categories, *supra,* with whom this article is concerned. Section 7 (a) (3) of the Act provides:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce, or in the production of goods for commerce. . .for a work-week 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."

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7 *Id.* Sect. 213 (a) (6).
8 *Id.* Sect. 213 (a) (11).
9 *Id.* Sect. 213 (a) (4).
10 *Id.* Sect. 213 (a) (9).
11 *Id.* Sect. 213 (a) (8).
12 *Id.* Sect. 213 (a) (10).
13 *Id.* Sect. 213 (b) (1).
14 *Id.* Sect. 207 (c).

The overtime provision of this section is clear and unambiguous and calls for 150 per cent of the regular, not the minimum wage.[15] However, there is some misunderstanding as to what hours of work constitute overtime within the provisions of the Act for time and one-half time compensation purposes. There are those who believe that an employer violates the Act when he "lays off" certain of his employees during the week and then calls them to work on a later day and does not pay time and one-half time for the later day's work. Such practices are not in violation of the Act as long as the total hours of work do not amount to an excess of forty hours in the work-week.

There are others who are under the impression that work on Saturdays must be compensated for at time and one-half time pay. This impression does not result from a true application of the Act because there is no reference whatever to Saturday work in the Fair Labor Standards Act and Saturday work is compensable at time and one-half time wages if, and only if, such work constitutes the excess over forty hours in the normal work-week established by the employer. Only those Saturday hours which are in excess of forty for the week are overtime hours within the terms of the Act.

Still others believe that a work-week for overtime purposes is coincidental with the calendar work-week, i. e., beginning on Monday and ending on Saturday (or Sunday, as the case may be). Upon this belief is probably predicated the erroneous impression that the employer is legally bound to pay time and one-half time for those hours worked on Saturday. That an employer may establish his own work-week, beginning on any day of the week and on any hour of that day will be seen below. It will also be seen that all these impressions enumerated above are not well founded and are not based on a strict application of the Act itself, the decisions of the courts, nor the interpretations promulgated by the Administrator of the Wage and Hour Division.

It seems to be well settled that the rulings and interpretations of the Administrator under this Act, although not controlling on the courts, are entitled to much weight due to the fact that the directives from his office are issued for the guidance of both employer and employee alike.[16] One such bulletin[17] promulgated by the Administrator provided that the forty hour standard in Section 7 (a) is a limitation upon the number of hours that may be worked in any work-week free of time and one-half overtime compensation. A work-week consists of seven consecutive days. It need not coincide with the calendar week, but may begin on any day and at any time of any day. The beginning of the work-week may be changed if the change is intended to be permanent and not to evade the overtime requirements of the Act.

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15 Overnight Motor Trans. Co. v. Missel, 62 Sup. Ct. 1216, 316 U. S. 572 (1942).
16 Skidmore v. Swift & Co., 65 Sup. Ct. 161, 323 U. S. 134 (1944).
17 Paragraph 3, of Interpretative Bulletin No. 4 of 1938, 1942, Wages and Hours Manual 104.

In applying this construction to cases in issue, the courts have held that the wage hour provisions of the Fair Labor Standards Act take a single work-week consisting of seven consecutive days as a standard.[18] It has been further held that the words "work" or "employment" within the maximum hour provisions of this section mean physical or mental exertion, whether burdensome or not, *controlled or required by the employer*[19] and pursued necessarily and primarily for the benefit of the employer and his business.[20]

The facts of a recent case[21] indicate that defendant employer divided the employees into two groups to give each group part time work when business conditions did not permit full time employment for all employees. Group One worked the first three regular working days (Monday, Tuesday, and Wednesday) and Group Two worked the last three regular working days (Thursday, Friday, and Saturday) of the work-week. The employees in Group Two complained that they were working every Saturday and requested that the three day working periods be alternated so that all men would have off every other week end. The employer conceded the merit of this complaint and thereafter the working periods were alternated so that the men worked the last three working days in one week and the first three working days of the succeeding week.

Consequently, this suit was instituted to recover overtime compensation and liquidated damages under the provisions of Section 16 (b) of the Fair Labor Standards Act, based on a claim that the employer had changed the fixed and established work-week which had been recognized by long-standing custom, and the employer's payroll records, as running from Monday through Sunday (although none of the employees ever worked on Sundays.)

It was held here that "alternating the three-day-a-week work periods so that one period included the last three working days of one work-week and the next period the first three working days of the succeeding work-week did not change the regular work-week [as established by the employer] beginning with Monday in each calendar week. The provisions of the Fair Labor Standards Act of 1938 do not require that employees be employed on the same days or during the same periods in each work-week."

In *Texoma Natural Gas Co. v. Oil Workers International Union, Local No. 463*,[22] it was held that ". . .the Company has the right to determine the hours of work, subject *only*[23] to its obligation to pay time and one-half time for all time worked in excess of forty hours in any one week."

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18 Roland Electrical Co. v. Black, 163 F. 2nd 417 (C.C.A. 4 1947).
19 Italics supplied.
20 Tennessee Coal Iron & R. Co. v. Muscoda Local No. 123, 64 Sup. Ct. 698, 321 U. S. 590 (1944).
21 Sloat v. Davidson Ore Mining Co., 71 F. Supp. 1010 (D.C. Mich. 1947).
22 58 F. Supp. 132 (D.C. Texas 1943).
23 Italics supplied.

In *Harned v. Atlas Powder Co.*,[24] it was held that "before appellant is entitled to overtime he must labor forty hours during the work-week established by the [employer.]"

In *Ferrer v. Waterman S. S. Corp.*,[25] the court said that "overtime for which extra compensation is allowed under this section [7 (a) (3)] is properly considered as extraordinary hours, and means the hours worked *after*[26] forty during any work-week."

By way of summary, then, it may be seen that:

The employer may exercise his prerogative to order his employees to work any schedule he chooses to invoke and he will not become liable for overtime compensation within the provisions of the Fair Labor Standards Act as long as such schedule does not require the employee to work more than forty hours in the work-week established by the employer. It is therefore conceivable that an employee might work a continuous stretch of forty hours without a break and (in the absence of contractual coverage) the employer would not be legally liable for overtime compensation.

There is nothing in the Act which requires the payment of overtime compensation for hours in excess of eight per day. The provisions of the Act function on a work-week basis and do not provide for overtime pay on a daily basis.

An employer may "lay off" his employees on days choosen by him and work them on later days in the work-week so as not to incur the burden of paying time and one-half time for overtime by avoiding the overtime work. Such "lay offs" may be terminated by calling the employee to work on Saturday, or any other day, and the employer will not have violated the provisions of the Wage and Hour Law by paying "regular" rates for this day if the employee has not previously worked forty hours in his regularly scheduled work-week. In determining employees' coverage, the work-week is the standard.[27]

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[24] 301 Ky. 517, 192 S. W. 2nd 378 (1946).
[25] 70 F. Supp. 1 (D.C. Puerto Rico 1947).
[26] Italics supplied.
[27] Keen v. Mid-Continent Petroleum Corp., 63 F. Supp. 120 (D.C. Iowa 1945).