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STATE CAPITOL
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DEPARTMENT OF LAW OPINION NO. 74-10 (R-23)

REQUESTED BY: HAROLD C. BENNETT
Assistant Director
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- QUESTIONS:
1. Is the State of Arizona required to comply with the 1974 amendments to the Fair Labor Standards Act regarding payment of overtime and minimum wages to nonexempted employees?
 2. What state employees are included as covered under the provisions of the Fair Labor Standards Act as amended 1974?
 3. Can funds currently appropriated for personal services be used to raise an employee's rate of pay to meet the minimum wage requirements of the 1974 amendments to the Fair Labor Standards Act?
 4. Can funds currently appropriated for personal services be used to pay non-exempt employees for overtime work as is required by the Fair Labor Standards Act?

ANSWERS: See body of opinion.

1. In the case of State v. Boykin, 109 Ariz. 289, 508 P.2d 1151 (1973), the Arizona Supreme Court determined that, where the Legislature had not adopted legislation authorizing the implementation of salary plan which included overtime pay, the Department of Public Safety had no authority to pay overtime compensation to Department employees. The Court did recognize that to require employees to work overtime without any compensatory measure would constitute unjust enrichment to the state, and therefore authorized compensatory time off at regular salary for time worked in excess of an eight hour day. This decision is determinative of the question of overtime compensation for all state employees. The only exception

thereto is where overtime is specifically authorized by state statute or the employee is subject to the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219 (FLSA).

The Legislature has by the enactment of A.R.S. § 23-391.A authorized the payment of overtime compensation to state employees in certain limited and restricted instances. This section provides as follows:

A. Eight hours, and no more, shall constitute a lawful day's work for any person doing manual or mechanical labor, employed by or on behalf of the state or a political subdivision thereof, except in an extraordinary emergency, in time of war, or for the protection of property or human life, in which instance every person working in excess of eight hours in any day shall be paid time and one-half for all time in excess of eight hours.

This provision is self-explanatory and cannot be used as a vehicle to pay overtime compensation except in the specific designated circumstances. By enacting the Fair Labor Standards Act of 1938, Congress set up a comprehensive legislative scheme primarily to prevent the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions which, with respect to wage and hours, failed to conform to statutory standards. The pertinent portions of the statute are 29 U.S.C.A. § 206, which provides that every employer must pay covered employees certain designated minimum hourly wages, and 29 U.S.C.A. § 207, which provides in part:

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 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. . . .

Under the original enactment state and political subdivisions were completely exempted from the provisions of the Act by 29 U.S.C.A. § 203(d).

In 1961 the Fair Labor Standards Act was extended beyond employees individually connected to interstate commerce to include all employees of certain "enterprises" engaged in commerce or production for commerce.

In 1966 the Fair Labor Standards Act was again amended to include employees of certain hospitals, institutions or schools, including those designated employees who worked in state hospitals, institutions or schools.

The constitutionality of including state employees under the Fair Labor Standards Act was challenged in the case of Maryland v. Wirtz, 392 U.S. 183, 20 L.Ed.2d 1020, 88 S.Ct. 2017 (1968), in which the State of Arizona intervened as a party. The United States Supreme Court, in a decision written by Mr. Justice Harlan, determined that the Act was constitutional and binding on states. The Court reasoned that it was a legitimate exercise of congressional power to regulate commerce under an "enterprise concept" for the reasons that pay to employees who are not production workers affects competition, regulation of wages and hours will reduce labor disputes and the class of employers was not extended by the addition of the "enterprise concept". The Court also held that the commerce power provided a constitutional basis for the extension of the Fair Labor Standards Act to state operated schools, hospitals and institutions. In support of this conclusion, the Court reasoned as follows: (a) that congressional interference with state functions was only to the extent that the state was affecting commerce; (b) that labor conditions in schools and hospitals can affect commerce and are within reach of the commerce power; (c) that where a state is engaging in economic activities that are validly regulated by the federal government when engaged in by private persons the state may be forced to conform its activities to federal regulation. The Court declined to respond to questions relating to a state's sovereign immunity from suit and whether a particular state operated institution has employees handling goods in commerce until an actual case or controversy arose.

In 1974 Congress amended the Fair Labor Standards Act, effective May 1, 1974. The major amendments affecting the State of Arizona were to extend minimum wage, maximum hours and overtime compensation to nonexempted state employees and gradually phasing in overtime compensation coverage to law enforcement and fire protection employees beginning January 1, 1975. The extension of the Act to state employees was accomplished by amending the definition of employer to read as follows:

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

There may be compelling and cogent legal argument (which need not be set forth here) to challenge the validity and constitutionality of including all nonexempt state employees under the Fair Labor Standards Act. This is especially true when examining the dissent in Maryland v. Wirtz, supra, written by Mr. Justice Douglas, and when considering the recent changes in the membership of the United States Supreme Court. However, in light of the fact that Maryland v. Wirtz, supra, is still the controlling case on the issue, and taking into account the severe sanctions which may be imposed against an employer for noncompliance (even though the full extent to which remedial measure may be imposed against the state was not resolved in Maryland v. Wirtz), the state as an employer should comply with the provisions of the Fair Labor Standards Act as amended 1974 until subsequent judicial decision declares the 1974 amendment unconstitutional.

2. Inclusion of the state in the definition of "employer" under the 1974 Fair Labor Standards Act amendments does not subject all state employees to the operation of the Act. The definition of "employee" applicable to state agencies is contained in 29 U.S.C.A. § 203(e)(2)(c) as follows:

(2) In the case of an individual employed by a public agency such term means--
(employee)

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

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

(ii) who--

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

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

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

(IV) who is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office.

In addition to the limitation placed on the definition of employer, 29 U.S.C.A. § 213(a)(1) also provides exceptions of certain positions from application of the minimum wage and maximum hour provisions. While there are several exceptions set forth in the Act, the most general, far reaching exception applicable to state agencies provides as follows:

§ 213. Exemptions

(a) The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) 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); . . .

Any employee who is employed in a bona fide executive, administrative or professional capacity is exempt from the minimum wage and maximum hour requirements. Applicable definitions of executive, administrative and professional capacities are contained in 29 C.F.R. § 541.1, and are attached hereto as Appendix A.

Furthermore, the 1974 amendments under 29 U.S.C.A. § 213(b)(7) specifically provide that the maximum hours and overtime compensation shall not extend to law enforcement and fire protection employees until January 1, 1975, by the following language:

(b) The provisions of section 7 of this title shall not apply with respect to--

* * *

(20) any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions).

[Effective January 1, 1975, Section 13(b)(20) is amended to read as follows:

(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 five employees in fire protection or law enforcement activities, as the case may be; or. . . .]

On January 1, 1975, coverage is extended to law enforcement and fire protection personnel on a gradual phase-in under the provisions of 29 U.S.C.A. § 207(1). The phase-in procedures will be considered in a subsequent opinion upon request. There are other specific exceptions which may appear to a designated position or series of positions in state service (e.g., exceptions relating to agricultural or fishery workers); however, to avoid undue length in this opinion, these exemptions will be dealt with at a later time.

It should be pointed out that the minimum wage and overtime compensation requirements of the Fair Labor Standards Act of 1974 extend only to those employees covered under the Act. State employees who are exempt from the application of the Act are still precluded from receiving compensation for overtime except under the express provisions of A.R.S. § 23-391.A. Under the Boykin case those employees exempt from the Fair Labor Standards Act may only receive compensatory time off for overtime worked.

It would be virtually impossible to set forth in this opinion determinations on whether specific jobs in state employment are covered or exempt under the Fair Labor Standards Act. Within the guidelines set forth in the Act and the Code of Federal Regulations, agencies should make the initial determination of whether a position is covered or exempt. In cases where the decision is difficult the Personnel Division should be consulted. And when a determination cannot be reached there, the Personnel Division is advised to seek the help of this office.

3. Upon information furnished to this office by the Personnel Division, it appears that, with the exception of some positions at the Arizona Coliseum and Exposition Center and some positions at the state universities, all state positions meet minimum wage requirements. The Coliseum and the universities should out of currently appropriated funds meet minimum wage requirements for all positions. If funds are not available to fully meet payroll demands and maintain a constant level of employment, it will be necessary to reduce service and employment to the extent which will financially permit compliance with the minimum wage requirement.

4. The question of whether currently appropriated funds may be used to pay nonexempt employees overtime compensation poses more of an administrative problem than it does a legal problem. The salary plan for state service employees is based on an annual recommendation to the Legislature by the Personnel Division and the Personnel Board. The salary plan for the Department of Public Safety is based on recommendations from the Law Enforcement Merit System. The Board of Regents is responsible for proposing pay plans for university personnel. Other exempt agencies (e.g., the Court of Appeals and the Supreme Court) pursue salary policies that generally parallel the state service plan. No agency, however, has the authority to appropriate funds to implement a salary plan. The Legislature has the sole responsibility and authority to implement a salary plan by appropriation.

By letter to the Honorable Ruth Adams, Arizona State Representative, dated January 14, 1970, this office advised Mrs. Adams that salary recommendations made to the Legislature pursuant to statutory procedures neither limited the Legislature's budgetary considerations nor was intended to impose greater procedural restrictions on the appropriation process than existed prior to the enactment of the merit system. It was concluded therein that, when the Legislature appropriated sufficient money to permit implementation of a salary plan, such appropriation constituted acceptance of the plan. It was further concluded that an agency, within the limitation of its appropriation or the budgetary process could implement the new salary plan without other specific approval of the Legislature. The conclusion reached by that letter is equally applicable to the present situation.

There is no question of whether a nonexempt employee working in excess of forty hours per week must be paid overtime. The Fair Labor Standards Act unequivocally demands such overtime payment. The question is whether an agency may authorize an employee to work overtime. Applying the standard applied to the salary plan by our previous letter, there is no requirement that the Legislature specifically authorize payment of overtime; an agency within the limitations of its appropriation and the budgetary process may authorize an employee to work overtime and pay him therefor only if there are sufficient funds appropriated for personal services to accommodate such payment.

It should be pointed out that an agency, before authorizing overtime work, should be certain, by budget analysis, that regular payroll commitments for normal employee work hours will be met for the entire budget year before any excess personal service funds may be used for overtime compensation. Where analysis shows no excess fund after meeting regular payroll commitments, overtime may not be authorized.

This guideline for authorizing overtime should be the standard used by agencies for the remainder of the fiscal year 1973-74. Further, it appears that the appropriations process for fiscal year 1974-75 were so far advanced by the Legislature when the 1974 amendments to the Fair Labor Standards Act were enacted by Congress that any appropriation requests for overtime funds could not reasonably have been considered or acted upon.

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It appears, therefore, that the same guidelines for overtime authorization will continue through the 1974-75 fiscal year. Thereafter, within their ability to reasonably predict situations which will necessitate overtime work by employees covered under the Fair Labor Standards Act, an agency should include in its budget a request for sufficient additional monies to meet anticipated overtime compensation demands.

Respectfully submitted,

Gary K. Nelson
by F.S.

GARY K. NELSON
The Attorney General

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APPENDIX A

29 C.F.R. § 541.1

§ 541.1 Executive.

The term "employee employed in a bona fide executive * * * capacity" in section 13(a)(1) of the act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) 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

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: 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-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than \$125 per week (or \$115 per week, if employed in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: Provided, That an employee who is compensated on a salary basis at a rate of not less than \$200 per week (or \$150 per week, if employed in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or

other facilities, and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section.

§ 541.2 Administrative.

The term "employee employed in a bona fide * * * administrative * * * capacity" in section 13(a)(1) of the act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) (1) Who is compensated for his services on a salary or fee basis at a rate of not less than \$125 per week (or \$100 per week, if employed in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for his services as required by paragraph (e) (1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which he is employed: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$200 per week (or \$150 per week, if employed in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.

§ 541.3 Professional.

The term "employee employed in a bona fide * * * professional capacity" in section 13(a) (1) of the act shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) 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

(2) 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

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) 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

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than \$140 per week (or \$125 per week, if employed in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: Provided, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section; and Provided further, That an employee who is compensated on a salary or fee basis at a rate of not less than \$200 per week (or \$150 per week, if employed in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a)(1) or (3) of this section, which includes work requiring the consistent exercise of discretion and judgment or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.