

Opinion No. 243.**Labor—Eight Hour Law—Employees,
Who Are.**

HELD: Stockholders of a corporation, partners, employees receiving a bonus or commission, truck drivers for wholesale houses, and clerks working for two separate employers are considered in relation to violations of the eight hour day law.

January 30, 1936.

Mr. A. P. Bruce
Commissioner, Department of
Agriculture, Labor and Industry
The Capitol

You have submitted the following:

"1. I want to know how Chapter 8 of the Laws of the Extraordinary Session 1933-34, applies to the following questions: .

"In a case where a corporation owns and operates either a wholesale or a retail business, and the president, vice president, secretary-treasurer and several stockholders are employed by the corporation in the actual operation of the business, say, in the following capacities: The president employed as general manager, vice president as assistant manager, secretary-treasurer as bookkeeper and other stockholders as clerks or salesmen, etc., does the eight hour provision of said law apply to such employees?

"2. In the case of a co-partnership, where an employer in a retail establishment, in order to evade the eight hour provision of the law, draws up articles of co-partnership with his employees, or some of them, giving them an interest in the business, and with or without an additional salary, bonus or commission, which amounts in the aggregate, in an average business year, not exceeding the employee's present salary, but would enable him to enter into collusion with his employer, as a nominal owner or partner in the business, to defeat the purposes of the Act, by working a greater number of hours than that stipulated in the Act, would such an arrangement be a violation of the law?

"3. In the case of a store that keeps open for business 10 or 12 hours a day and where the clerks are paid a bonus or commission on sales, there is an incentive provided, through said bonus or commission, for the clerks to work more than the stipulated 8 hours in order to increase their sales, and I am satisfied that they sometimes do so, with or without the knowledge of the employer, or because of his indifference, who is responsible in this case? Is the employer and employee jointly responsible?

"4. Does the law apply to truck drivers who take on a load of merchandise in one town of 2500 or more population and deliver it in another town of 2,500 or more population? As a concrete instance: A man in Bozeman takes his truck out at 4:00 A. M., takes on a load of bread, goes to Butte, delivers this load to about 13 retail stores; he picks up a load in Butte, usually at a wholesale warehouse, takes it to Bozeman and delivers it usually to another wholesale warehouse. I am informed that this is a daily occurrence, except when he is required to leave Butte and go to either Deer Lodge or Helena to pick up his return load. This job requires from 14 to 20 hours a day. The man who owns this trucking outfit is not, as far as I know, engaged in either the wholesale or retail business. Does this practice constitute a violation of the law?

"5. Supposing two merchants, each employing one clerk, want to work their clerks 10 hours a day, and the clerks may or may not be willing, but in order to evade the law, they exchange clerks in the middle of each day, so that each clerk works but 5 hours in each place of business, what could we do in a case of that sort?" (Numbers supplied.)

The questions propounded above are hypothetical and general. No facts of an actual case or alleged violation are presented. It should be understood that my opinions hereinafter expressed are directed to general questions and that they might be modified in part if all the facts of an actual case were presented. It should be understood that it is difficult, if

not impossible, to lay down a general rule which will apply to all facts and all cases.

1. Section 1 of Chapter 8, Laws of 1933-34, Extraordinary Session, reads: "A period of eight (8) hours shall constitute a day's work and a period of not to exceed forty-eight (48) hours shall constitute a week's work in all cities and towns having a population of twenty-five hundred (2500), or over, for all persons employed in retail stores, and in all leased businesses where the lessor dictates the price, also kind of merchandise that is sold, and the hours and conditions of operation of the business, all persons employed in delivering goods sold in such stores, all persons employed in wholesale warehouses used for supplying retail establishments with goods, and all persons employed in delivering goods to retail establishments from such wholesale warehouses." (Black-face type ours.)

Since the act is broad enough to cover "all persons employed in retail stores" and no exception is made for officers and stockholders of a corporation, it is my opinion that all officers and stockholders employed in any manner specified in Section 1 above quoted, come within its provisions; although they are officers and stockholders they are also employees of the corporation. The corporation is the legal entity and is the employer. It is my opinion, therefore, that the Act applies to the employment of officers and stockholders of the corporation.

2. Without knowing more of the facts, we would be unable to pass an opinion on this question. If a partnership in good faith is actually established by which all the persons employed are the actual partners and share the profits, as well as the losses, then it would seem that the relation of employer and employee does not exist. The law, however, will look beyond the form or name and consider the substance. If in fact the relation of employer and employee exists, and the partnership is one in form only and for the purpose of evading the law, then there would be a violation of the statute.

3. The fact that employees are paid in bonuses or commissions instead of,

or in addition to their wages or salary would not, in my opinion, take them without the law. The form and manner of payment is immaterial if the relation of employer and employee exists and the employer would be liable under the terms of the Act.

4. On the facts you have stated, the truck driver does not appear to be employed either in or by a retail store or wholesale establishment. He appears to be an independent contractor so far as the facts disclose, but as the act is worded, this does not seem to make any difference. The act covers "all persons employed in delivering goods sold in such stores" and "all persons employed in delivering goods to retail establishments from such wholesale warehouses." It does not cover persons employed in making deliveries between wholesale houses, and therefore time so spent could not be counted.

5. If these facts can be proved, it is possible that both merchants might be convicted of conspiring and acting together to violate the law. The facts are too meagre upon which to express a definite opinion. I suggest that all the facts in all of these cases be laid before the respective county attorneys for their investigation and determination.