

Opinion No. 63.**Hours of Labor—Restaurants—Retail Stores Female Employees.**

HELD: 1. Chapter 199, Laws 1939, does not modify or repeal Section 3076, Revised Codes of Montana, 1935.

2. The enactment of the amendment to Section 4, Article 18, of the Montana Constitution, repealed that part of section 3076 permitting employees to work ten hours a day on the week preceding Christmas.

3. Restaurants selling only meals to customers are not retail stores as that term is used in Section 3073.1, R. C. M., 1935.

4. Chapter 199, Laws 1939, is applicable to managers to the same extent as any other employee.

May 12, 1939.

Mr. E. C. Burris
Commissioner of Labor
State Capitol Building
Helena, Montana

My Dear Mr. Burris:

You have submitted a request for an opinion on the following questions:

1. Does Chapter 199, Laws of 1939, repeal that portion of Section 3076, Revised Codes of Montana, 1935, relating to restaurant employees?

Section 1 of Chapter 199, Laws of 1939, declares that "a period of not more than eight hours shall constitute a day's work and a period of not to exceed forty-eight hours shall constitute a week's work for persons employed in or about restaurants, cafes, lunch counters and other commercial eating establishments." Section 3076, Revised Codes of Montana, 1935, says in part, "No female shall be employed in any * * * restaurant in this state for more than eight hours in any one day."

These two statutes are not so conflicting that they cannot be reconciled. The legislature apparently regarded Section 3076 as a special regulation enacted to protect the public welfare by preventing working conditions detrimental to female employees. It is applicable to all female employees in all branches of industry. Similarly,

Chapter 199, Laws of 1939, was enacted to protect the public by regulating the hours of all persons employed in restaurants and commercial eating establishments. Then, anyone who compels a female employee to work longer than eight hours in any one day violates both Section 3076 and Section 1, Chapter 199, Laws of 1939, and the information or complaint could charge a violation of either section. If he were charged with a violation of Section 3076, the penalty imposed in case of conviction is prescribed by Section 3078, Revised Codes of Montana, 1935. Likewise, if the charge was a violation of Chapter 199, Laws of 1939, the penalty on conviction is prescribed by Section 2 of that act. Both section 3076 and Chapter 199 are in full force and effect.

2. Is that part of Section 3076, Revised Codes of Montana, 1935, that provides, "females may be employed in retail stores to work not to exceed ten hours in any one day for one week immediately preceding Christmas Day" in conflict with Section 4, Article XVIII of the Montana Constitution.

All statutes relating to hours of labor enacted prior to the passage of the Constitutional amendment to Section 5, Article XVIII of the Montana Constitution be construed in the light of the subsequent amendment. This office has held that the passage of the amendment to Section 5, Article XVIII, Montana Constitution, repealed all prior statutes in so far as they purported to permit an employer to require his employees to work for more than eight hours. (Vol. 18, Op. of Atty. Gen. No. 16.) Then, Section 3076 must now be read omitting the proviso quoted and females may not be employed for longer than eight hours a day at any time during the year.

3. Are restaurants, cafes, lunch counters, and other commercial eating establishments selling only prepared food to customers to be regarded as retail stores?

I concur with the answer to this question in Volume 15, Opinions of the Attorney General, page 406, where it was held that a restaurant where no

goods or merchandise are sold and that the only function was the sale of meals to consumer could not be classified as a retail store. Nor would the fact that cigars and cigarettes are sold as an incident to the restaurant business be sufficient to classify it as a store. But where other merchandise is sold, it becomes a store and subject to Section 3073.1, Revised Codes of Montana 1935.

4. Do the provisions of Chapter 199, Laws of 1939, apply to managers of such commercial eating establishments?

Managers are to be regarded as employees and are subject to the provisions of maximum hour regulation to the same extent as any other employee.