

expenses, is such an employee as comes within the provisions of Section 3073.1 R.C.M., 1935.

October 4, 1948

Mr. Robert F. Swanberg
County Attorney
Missoula, Montana

Dear Mr. Swanberg:

You have submitted the following statement of facts and request an opinion as to whether one so employed comes within the provisions of Section 3073.1 R.C.M. 1935.

"A firm employs driver salesmen in a city or town having a population of Twenty-Five Hundred (2500) or over to deliver soft drinks bottled at the firm's plant, stored in their warehouse while awaiting delivery, and sent out on trucks to various retail stores for retail sale to the consuming public. Similar facts occur in the case of bakeries who manufacture bread and other such products, wholesale candy houses, wholesale groceries and wholesale drug firms. The driver salesman who operates the truck is employed on the basis of a guaranteed minimum wage with addition of commissions based on a percentage of the value of his sales. In all instances of course the firm sets the price at which the goods are sold to the retail outlet and appears in all respects to have definite control over the driver salesman as to what he shall sell, the manner in which his truck shall be operated. In addition to this, the firm also pays all expenses in the operation of the truck and furnishes the vehicle to each driver."

Under the state of facts thus given, I agree with your conclusion that a person so employed, in a city or town having a population of twenty-five hundred (2500) or over, comes within the provisions of Section 3073.1 R.C.M. 1935.

You state that it is contended that a person so working under the given facts, particularly the fact of payment on a commission basis, is not an employee as meant in said section.

One engaged in work as above noted, is either an employee or an in-

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**Labor—Employer, Employee—
Independent Contractor—
Hours of Labor.**

Held: An employee who receives regular wages plus commission on sales and who delivers goods to retail dealers from wholesale house where employer sets the price, furnishes the truck and pays all

dependent contractor. There are certain factors which the courts have recognized as distinguishing between the two.

In 14 R.C.L., 74, it is said that the mode of payment for the work to be done is an important element to be considered in determining whether the employee is an independent contractor, but is not controlling.

And in the annotation in 61 A.L.R. 223, it is stated: "Inasmuch as the determination of the relationship of independent contractor or servant must, in the last analysis, depend on the question whether the contract reserves to the proprietor the power of control over one engaged to perform certain work or services, the fact that a salesman's services are compensated for on a commission or percentage basis is not a decisive test by which to determine whether he is an independent contractor or servant, although in determining the relationship the courts have sometimes taken into consideration the manner payment."

In the case of *Riggs v. Standard Oil Co.* 130 Fed. 199, where one was so engaged in selling oil for a company in a certain territory on the commission basis, where his compensation depended on the amount of oil that he disposed of, it was held that he was an agent or employee and not an independent contractor.

In the case of *Dunbaden v. Castles Ice Cream Co.*, 103 N.J.L. 427, 135 Atl. 886, where one was employed to drive an ice cream truck over a fixed route daily to sell ice cream, the driver being paid a commission on each gallon sold in lieu of a definite wage, it was held that the driver was an employee. In that case the court said, "Making an employee's wages contingent upon the amount of business he does is a method frequently taken by an employer to increase trade. It does not affect the relation of master and servant."

The Supreme Court of Montana, in the case of *Greening v. Gazette Printing Co.*, 108 Mont. 158, 88 Pac. (2d) 862, discussed at some length the question of when one is an employee or servant and when an independent

contractor. It reviews the leading cases in Montana on the question and says (Page 170-171 of the Montana Report.)

"The determination of the question is often difficult and it is sometimes necessary to have recourse to a number of rules laid down by the courts to determine whether the actor is an independent contractor. Recourse to determine the degree of control exercised or the degree of control which the employer might exercise over the person performing the work."

In all of the cases on this subject the question hinges on the degree of control the employer exercises, or may exercise over the one performing the services or work.

Under the facts given above, the one employed uses the means of delivery furnished by the employer; the goods are delivered to regular customers; the price is set by the employer; traveling expenses and expenses of delivery are paid by the employer; regular salary plus commission are paid employees. Under such facts, as applied to the holding of our courts, it is clear that in the instant case the employee is an agent or servant rather than an independent contractor.

There can be no question as to the constitutionality of section 3073.1 R.C.M. 1935. Its constitutionality was decided in the case of *State v. Safeway Stores, Inc.*, 106 Mont. 182; 76 Pac. (2d) 81, 87.

It is, therefore, my opinion that under the facts given, the driver is an employee and not an independent contractor and as such comes within the provisions of Section 3073.1 R.C.M. 1935.

Sincerely yours,
R. V. BOTTOMLY
Attorney General