

Opinion No. 111

**Hours of Labor—County Ferries—Independent Contractor—
County Employees.**

Held: 1. If a person engaged by a County to operate a County owned ferry has the status of an independent contractor the provisions of the Montana Constitution and Statutes pertaining to the eight hour day have no application to the contract insofar as the hours of labor of the person contracting are concerned and the individual so contracting may work in excess of eight hours per day. However, any persons employed by such independent contractor come under the provisions of the eight hour day law.

2. If the person engaged by the County to operate a County owned ferry is an employee of the County, the eight hour day provisions of the Montana Constitution and Statutes apply and it is unlawful for such person to work more than eight hours in any one day.

May 22nd, 1950.

Mr. Smith McNeil
County Attorney
Lincoln County
Libby, Montana

Dear Mr. McNeil:

I have your request for an opinion upon the following questions:

1. Can the operation of a county-owned ferry at all times necessary for the accommodation of the traveling public during a thirteen-hour period of each day be made the subject of a valid contract between a Board of County Commissioners and an individual, when such contract does not require by its terms the operation of such ferry to be by the contractor in person?

2. If such a contract is entered into, may the contractor elect to provide such necessary services during the entire period himself, and may he be permitted by the County to do so without violation of Montana's eight-hour law (Article XVIII, 4, Montana Constitution, and Section 41-1121, R.C.M., 1947) ?

Article XVIII, Section 4 of the Montana Constitution is as follows:

"A period of eight hours shall constitute a day's work in all industries, occupations, undertakings and employments, except farming and stock raising, provided, however, that the Legislative Assembly may by law reduce the number of hours constituting a day's work whenever in its opinion a reduction will better promote the general welfare, but it shall have no authority to increase the number of hours constituting a day's work beyond that herein provided."

Section 41-1121, Revised Codes of Montana, 1947, provides as follows in part:

"A period of eight hours shall constitute a day's work in all works and undertakings carried on or aided by any Municipal, County, or State government, first class school districts, and on all contracts let by them, and for all janitors, except in court houses of sixth and seventh class Counties, engineers, firemen, caretakers, custodians and laborers employed in or about any buildings, works, or grounds used or occupied for any purpose by any Municipal, County, or State governments, school districts of the first class, . . ."

Under the above quoted constitutional and statutory provisions there can be no doubt but that if the party, whom the contract in question is awarded to, has the status of an employee or a servant of the County the employment of such individual for a period of more than eight hours in any day would be a violation of the law.

Section 16-1119, Revised Codes of Montana, 1947, provides as follows:

"Any County of the State may own and establish and the Board of County Commissioners of any County of the State may operate and manage free or toll ferries and wharves for the use of the public and may employ one or more ferrymen to operate such free or toll ferries and wharves; and, while such ferry or wharves are so owned by any County and operated and managed by such Board of County Commissioners, such operation shall be and is hereby expressly declared to be a governmental function. The Board of County Commissioners may also lease any ferries or wharves owned by such County, to a company, firm, or individual to be operated for the use of the public; and said company, firm, or individual shall give bond in an amount deemed sufficient by the Board of County Commissioners, and conditioned for the careful and business-like operation of such ferry or wharf, in accordance with law and the regulations of said Board. While such ferry or wharf is so operated by lessee of said County, such operation is expressly declared to be the private function of such lessee."

Section 16-1119, above set forth, contemplates two separate and distinct methods of operation of a County owned ferry. The first method is operation by the County through the medium of County employees. The second method is where the County leases the ferry to a private operator and in this mode of operation the statute expressly states that the operation of the ferry is a private function of the lessee.

The facts you have presented in your request for an opinion do not disclose sufficient information as to the terms of the proposed contract for me to make a determination as to whether the party with whom the County contracts would be merely an employee or servant of the County as contemplated in the first portion of Section 16-1119, supra, or whether the contract is actually a lease of the operation of the ferry to an independent contractor as is proposed in the latter portion of Section 16-1119.

There is no absolute test that can be applied to determine whether an individual is acting as an independent contractor or as a servant. The Montana decisions on the subject are reviewed in the case of *Greening v. Gazette Printing Company*, 108 Mont. 158, 88 Pac. (2d) 862, and it is stated therein that the most important consideration to be weighed is the degree of control exercised or the degree of control which the employer might exercise over the person performing the work. On page 170 of the Montana Reporter the court quotes the following passage from the Restatement of the Law of Agency:

"Those rendering service but retaining control over the manner of doing it are not servants. An agent who is not subject to control as to the manner in which he performs the acts which constitute the execution of his agency is in effect an independent contractor."

You state that the contract does not require the operation of the ferry to be by the contractor in person. Such consideration would tend to support the position that the party contracting with the County is an independent contractor. It is however necessary to examine the entire agreement to ascertain the extent of control the employer retains, and since I am not in possession of the terms of the contract I cannot pass upon the employee-independent contractor question.

It is my opinion that if a person engaged by a County to operate a County-owned ferry has the status of an independent contractor the provisions of the Montana Constitution and Statutes pertaining to the eight-hour day have no application to the contract insofar as the hours of labor of the person contracting are concerned and the individual so contracting may work in excess of eight hours per day. However, any persons employed by such independent contractor come under the provisions of the eight-hour day law.

If the person engaged by the County to operate a County-owned ferry is an employee of the County, the eight-hour day provisions of the Montana Constitution and Statutes apply and it is unlawful for such person to work more than eight hours in any one day.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.