

Opinion No. 89**Hours of Labor—Fair Labor Standards Act, Does Not Apply If State Labor Standards Are Higher—Labor, Division of**

Held: 1. Employees in industries designated as seasonal and employees of employers engaged in the first processing of certain products are within the contemplation of the Montana Eight Hour Day Constitutional provision and statutes enacted pursuant thereto and such Montana Law supersedes and takes precedence over a provision of the Federal Fair Labor Standards Act which sets a higher maximum hours standard.

February 8th, 1950.

Mr. Robert C. Brown
Chief, Division of Labor
Department of Agriculture, Labor and Industry
Helena, Montana

Dear Mr. Brown:

You have requested my opinion upon a question of law that has arisen with regard to the hours of labor in certain specified industries in the State of Montana. The facts as you have presented them are that representatives of certain Seed Processing and Sugar Refining Companies have taken the position that the Federal Fair Labor Standards Act supersedes the Montana Eight Hour Constitutional provision and allows employees to work 56 hours a week for an aggregate of fourteen weeks per calendar year in designated seasonal employments and also in the first processing of certain enumerated products. You desire to know if such firms may disregard the provisions of the Montana Constitution and the statutes enacted pursuant thereto for periods not to exceed fourteen weeks as specified above.

The Federal Fair Labor Standards Act of 1938 undertook to regulate the maximum hours and minimum wages to be paid to employees engaged in Interstate Commerce. The provision with respect to maximum hours is contained Section 207 of Title 29, U.S.C.A. Section 207 provides that employees engaged in commerce may not work more than 40 hours per week unless overtime is compensated for at one and one-half times the regular rate. Exceptions to this provision are industries which the Administrator of the Wage and Hour Division of the Department of Labor has designated as seasonal and also industries engaged in the first processing of certain enumerated agricultural products including sugar beets. These exceptions apply for periods of not to exceed an aggregate of 14 weeks in any calendar year.

Section 4 of Article XVIII of the Montana Constitution established the eight hour day and 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 when ever 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."

The above constitutional provision was considered by this office in Opinion No. 77, Volume 23, Report and Official Opinions of Attorney General and it was held therein that such provision was self-executing and that it established an enforceable eight hour day without the aid of additional legislation.

In the case of employees engaged in the refining of sugar beets the legislature has enacted law which provides that a period of eight hours shall constitute a day's work for all persons employed in or about sugar refineries. The act further provides that any violation thereof shall constitute a misdemeanor. Sections 41-1128 and 41-1129, Revised Codes of Montana, 1947. (Formerly Sections 3083.3 and 3083.4, Revised Codes of Montana, 1935).

It is not disputed that under the Montana Law eight hours shall constitute a day's work in the industries considered in this opinion and it is also not disputed that the Fair Labor Standards Act provides that certain employees engaged in commerce or production of goods for commerce may work 56 hours a week for an aggregate of fourteen weeks in any calendar year. The only question is which law takes precedence, the State Law or the Federal Law.

In this connection Section 218 of Title 29, U.S.C.A. is enlightening. Section 218 is as follows:

"No provision of Sections 201-219 of this title or of an order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under such sections or a maximum work week lower than the maximum workweek established under such section, and no provision of sections 201-219 of this title relating to the emploment of child labor shall justify non-compliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under such section. No provision of Sections 201-219 of this title shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under Sections 201-219 of this title, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under such section."

The above quoted Section clearly states that the Act shall not apply when it is in conflict with a Federal, or State Law or Municipal ordinance which establishes a minimum wage higher than or a maximum work day lower than those established by the Federal Fair Labor

Standards Act. This interpretation was also placed upon Section 218 by a Federal District Court for the western district of Louisiana in the case of *Divine v. Levy*, 36 Fed. Supplement, 55, wherein the court ruled as follows:

"From a reading of Section 18 of the Fair Labor Standards Act, 29 U.S.C.A. Section 218, we believe it to be the clearly expressed intention of the Act not to lower any of the labor standards existing in the several states when they happen to be higher than the minimum standards established by the Act for all of the states."

Since the Montana Constitution and statutes enacted pursuant thereto set a low maximum hour standard than does the Federal Act it follows as a matter of course that the Montana Eight Hour Law takes precedence and must be complied with regardless of the provisions of the Fair Labor Standards Act.

It is my opinion that employees in industries designated as seasonal and employees of employers engaged in the first processing of certain products are within the contemplation of the Montana Eight Hour Day Constitutional provision and statutes enacted pursuant thereto and that such Montana Law supersedes and takes precedence over a provision of the Fair Labor Standards Act which sets a higher maximum hours standard.

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