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Fair Labor Standards Act of 1938

The Recent Congressional Enactment Pertaining to Wages, Hours and Child Labor

By S. Harold Shefelman of the Seattle Bar

The Fair Labor Standards Act of 1938, approved by the President on June 25, 1938, is one of the most far-reaching social and economic measures ever enacted by the Congress of the United States. Its popular designation as the "Wages and Hours Law" overlooks the very important provisions of the Act aimed at the restriction of child labor. Acting under the power to "regulate commerce with foreign nations and among the several states and with the Indian tribes," and in the guise of protecting and preventing interference with interstate commerce, the law was enacted for the real purpose of improving the economic condition of workers by increasing wages and decreasing hours. Becoming effective on October 24, 1938, the Fair Labor Standards Act is too fresh and untried to warrant any appraisal of its effects. Varying estimates of the number of persons to be affected by the minimum wage provisions have been made. In general, it can be safely stated that the minimum wage provisions will be felt largely in the South, where wage standards have been lowest. The hours provision, however, which requires the payment of time and a half for overtime in excess of the maximum hour week fixed in the Act is already being felt generally throughout the country.

It is interesting to note that affected industry, while somewhat bewildered by the difficulty in construing certain of the provisions of the Act and applying them to their own situations, has nevertheless adopted a cooperative attitude. The Administrator appointed by the President, Mr. Elmer F. Andrews, has on his part adopted a similar attitude of cooperation with affected industries and employers. The American Bar Association has recently, by formal action of the House of Delegates, expressed its opinion that employers, labor organizations, and lawyers for either, should cooperate in a fair trial of the Act. Thus it would appear that a

1Public Act No. 718, 75th Congress.
2U. S. Constitution, Article 1, Section 8.
3Recently N. Y. State Industrial Commissioner.
4On January 10, 1939, the House of Delegates of the American Bar Association, at its meeting in Chicago, adopted the following resolution recommended by the "Committee on Labor, Employment and Social Security":

"That the Association is of the opinion that employers, labor organizations, and lawyers for either, should cooperate in a fair trial of the labor standards prescribed by the Fair Labor Standards Act of 1938, without waiver of rights, and that suitable amendments to clarify the Act along lines consistent with its basic purposes should be drafted and acted upon by the Congress at the earliest practicable time."
measure which would but a few short years ago have been received with general hostility by industry, is now accepted without particular shock and with all prospects of a fair trial.

It was, of course, inevitable that ambiguities and uncertainties would be discovered in so novel a bit of legislation when put into practice. Although it is but in its crawling infancy, the Administrator has already recommended three immediate changes in the Fair Labor Standards Act. These recommendations, made on his own initiative without awaiting public pressure for change, augur rather well for the administration of the Act.

Space will not permit of a comprehensive enumeration of the provisions of the Act or of the problems which have already arisen in its application, but an attempt will be made to briefly state and discuss its salient features and the more important problems which have arisen to date, and in conclusion reference will be made to the problem of constitutionality which is ever present in pioneering social and economic legislation.

Declaration of Policy

It has become common in recent years for both the national and state legislatures to preface legislation aimed at the correction of economic evils with findings that such evils exist, because of the effect of such findings upon judicial determinations under the Act. This pattern is followed here, and it is definitely found that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers, harms and interferes with interstate commerce in its various phases. It is therefore declared to be the policy of the Act to correct and eliminate such conditions by the exercise of Congressional power over interstate commerce without substantially curtailing employment or earning power. While it has been stated that the primary purpose of the Act is to improve the health and living conditions of workers, the continued reiteration throughout the Act of the provision that

*The Seattle Times* of January 19, 1939, reported that Mr. Andrews suggested these amendments to the Act in testimony before a House appropriations subcommittee:

1. Simplification of the law without change in its fundamental principles.

2. Provisions relieving an employer from retroactive penalties if he follows Andrews' advice and later finds the advice bad by virtue of court decisions.

3. Congressional definition of the area of agricultural production, in which workers are partly exempt from the Act.

*Sec. 2 (a).*

*Sec. 2 (b).*

*Sec. 2 (b); Sec. 8 (a), (b), (c), (e); Sec. 14.*
nothing shall be done which shall substantially curtail employment indicates the further hope that increasing wages and decreasing hours will result in more widespread employment.

**Definitions**

The intent of Congress to make the Fair Labor Standards Act comprehensive and broad in its application is plainly evident in the definitions given the essential words or expressions of the Act.

"Commerce" is defined as trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof, and would necessarily cover the transportation, radio, telegraph, telephone and similar industries.

"Industry" is defined as a trade, business, industry or branch thereof, or group of industries in which individuals are gainfully employed.

Perhaps the most important and at the same time broadest definition is that of the word "produced". It will be remembered that the Act is directed at the correction of conditions existing in industries engaged in commerce or in the production of goods for commerce. It is important, therefore, to know what "produced" means, and produced is here stated to mean produced, manufactured, mined, handled, or in any other manner worked on in any state. Further, an employee is deemed to have been engaged in the production of goods if he was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof."

Obviously, the effect of the Act is not limited to the persons who actually perform labor upon the goods. It is generally believed that persons employed in an establishment which produces goods for interstate commerce will come within the purview of the Act if their services are a necessary part of the ordinary operation of the establishment, and such employees as stenographers, clerks, and maintenance workers will therefore no doubt be included.

Having determined when one is engaged in the production of goods, it would naturally be expected that the Act would then contain a definition which would enable one to determine when the production is for interstate commerce, but there is no such definition. However, the following interpretation has been placed upon the Act by the office of the general counsel for the Administrator:"

"The wage and hour provisions of the Act are applica-

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Sec. 3 (b).
Sec. 3 (h).
Sec. 3 (j).
able to employees 'engaged in (interstate) commerce or in the production of goods for (interstate) commerce.' Employees are engaged in the production of goods for commerce where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. If, however, the employer does not intend or hope or have reason to believe that the goods in production will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the Act. The facts at the time that the goods are being produced determine whether an employee is engaged in the production of goods for commerce and not any subsequent act of his employer or of some third party. Of course, the fact that the goods do move in interstate commerce is strong evidence that the employer intended, hoped, or had reason to believe that the goods would move in interstate commerce.

"As indicated above, whether the employees are engaged 'in the production of goods for (interstate) commerce' depends upon circumstances as they exist at the time the goods are being produced, not upon some subsequent event that may or may not be in the control of the producer."

It would thus appear that in some respects the Fair Labor Standards Act goes farther in its application than the Wagner Act, although in other respects it does not go as far.

If the employees are not engaged in the production of goods for commerce as defined by general counsel, or as it may otherwise be defined, then it would seem that the mere fact that the goods "come in competition" with other products moving in interstate commerce would not bring the employees under the Act.

"Agriculture" is defined to include not only farming, but also dairying, raising of livestock, bees, fur bearing animals, or poultry and other practices performed by a farmer as an incident to his farming operations, including lumbering.13

"Wage" is defined to include the reasonable cost of furnishing an employee with board, lodging, or other facilities if they are customarily furnished.14

"Oppressive child labor" is defined at length,15 but will be discussed in this paper in a subsequent section covering that general problem.

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13 Sec. 3 (f).
14 Sec. 3 (m).
15 Sec. 3 (l).
There is specifically excluded from the definition of "employer" the United States or any state or political subdivision of a state, or any labor organization (other than when acting as an employer).\textsuperscript{16}

\textbf{Administration}

The Wage and Hour Division is created in the Department of Labor to administer the Act under the direction of an Administrator to be appointed by the President, with the advice and consent of the Senate.\textsuperscript{17} The Administrator is authorized to appoint the necessary employees, \textit{subject to the civil service laws}.\textsuperscript{18} The provision italicized, together with the later provision that in the appointment and promotion of employees of the administration \textit{no political test or qualification shall be permitted or given consideration} but they shall be made on the basis of merit and efficiency, indicate a desire by the enactors of this statute to obtain a fair administration of this Act. The presence of these admonitions or restraints is in accordance with the thought of many who are interested in the proper development of administrative law in this country.

The Administrator is authorized to establish regional agencies and to utilize voluntary services, the bureaus of the Department of Labor, and state and local agencies.\textsuperscript{19} The Administrator and his representatives are given the necessary investigatory power.\textsuperscript{20} Employers are required to make and preserve records of employment and to make such reports therefrom to the Administrator as he may prescribe by regulation.\textsuperscript{21}

Unlike the N. R. A., no compliance stamps or certificates are required by the Act. While it may be deemed advisable for sellers of goods to issue such certificates to reassure purchasers, their issuance will not serve as protection to the purchasers.

The authority of the Administrator to issue binding interpretations under the Act is quite limited, and in interpretations here-tofore rendered he has been careful to caution against the acceptance of such interpretations as protective to the persons relying upon them except in those specific instances where the statute directs the Administrator to make regulations.\textsuperscript{22} The Adminis-

\textsuperscript{Sec. 4 (d).}
\textsuperscript{Sec. 4 (a).}
\textsuperscript{Sec. 4 (b).}
\textsuperscript{Sec. 4 (b); Sec. 11 (b).}
\textsuperscript{Sec. 11 (a).}
\textsuperscript{Sec. 11 (c).}
\textsuperscript{In Interpretative Bulletin No. 5 (See Note 12, supra), the following statement is made:}
"The caution must again be stated that interpretations announced by the Administrator, except in certain specific instances where the statute directs the Administrator to make various regulations and definitions, serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties unless he is directed otherwise by the authoritative ruling of the courts or unless he shall subsequently decide that his prior interpretation is incorrect."
FAIR LABOR STANDARDS ACT

The Administrator has no authority to make a binding determination of the all important question whether an employer or employee comes within the purview of the Act, and an employer acting pursuant to the Administrator's advisory opinion in that respect may still find himself subject to liability to his employees under the pertinent provisions of the Act. It is expected, however, that the Administrator would not attempt to invoke any of the penalties of the Act against an employer following such an advisory opinion.

The administration of the child labor provisions is placed with the chief of the Children's Bureau in the Department of Labor. [28]

Minimum Wages

Every employer is required to pay to each employee engaged in commerce or in the production of goods for commerce not less than twenty-five cents an hour for the first year after October 24, 1938; not less than thirty cents an hour for the six years following, ending October 24, 1945; and not less than forty cents an hour thereafter, except that following October 24, 1945, the Administrator may by appropriate order permit the payment of a wage less than forty cents but not less than thirty cents if he finds it necessary so to do in order to prevent substantial curtailment of employment in the industry. [24]

It is the express policy of the Act, however, to reach the objective of a universal minimum wage of forty cents an hour as rapidly as is economically feasible without substantially curtailing employment, [25] and it is not only possible but decidedly likely that wages in excess of the minima referred to above, but not to exceed forty cents per hour, will be established in various industries in the near future, and in any event, long before October 24, 1945.

For the purpose of recommending the minimum rate of wages to be paid, the Act provides for the appointment of an "Industry Committee" for each industry engaged in commerce or in the production of goods for commerce. [26] (Industry committees have been appointed for the textile, apparel and wool industries.) The committee shall consist of three groups—a number of disinterested persons representing the public, a like number representing employees in the industry, and a like number representing the employers. A member of the public group must act as chairman, and in appointing each group the Administrator must give due regard to the geographical regions in which the industry is carried on. [27]

Provisions are made for a reasonable per diem compensation, and the Committee is given authority to summon witnesses. The Administrator is required to submit data to the Industry Committee from time to time for the purpose of enabling it to arrive at a recommendation with reference to the minimum wages to be paid in the industry. [28]

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[25] Sec. 12 (b).
[24] Sec. 6 (a).
[26] Sec. 8 (a).
[27] Sec. 5 (a).
[28] Sec. 5 (b).
[29] Sec. 5 (d).
The Industry Committee, after investigating conditions in the industry, hearing witnesses, and receiving evidence, must recommend to the Administrator the highest minimum wage rates for the industry which it deems will not substantially curtail employment in the industry. Such minimum wage shall, of course, not exceed forty cents an hour.

Certain guide posts are established for the conduct of the Committee. The Committee may make reasonable classifications within an industry and shall recommend the highest minimum wage for each classification which will not substantially curtail employment and will not give a competitive advantage to any group in the industry. No classification may be made solely on a regional basis, but the Industry Committee shall consider certain relevant factors, including competitive conditions as affected by living and other costs, wages established for similar work by collective labor agreements, and wages paid for similar work by employers who voluntarily maintain minimum wage standards in the industry. It is forbidden to make any classification on the basis of age or sex. It should be noted that while classifications on a regional basis are forbidden, since competitive conditions "as affected by transportation, living and production costs" may be considered in fixing the minimum wage in the various classifications, there will be geographical differences in minimum wages resulting from the fact that living costs are lower in some sections of the country than in others.

The Industry Committee must file its report with the Administrator, after which due notice must be given to interested persons and they must have an opportunity to be heard. After such hearing the Administrator, if he approves the recommendations of the Industry Committee, must make an order establishing the recommended minimum wage. If he disapproves of the recommendation he shall refer the matter back to the Committee, or if he prefers, he may appoint another Industry Committee for the purpose of further consideration and recommendations. It is important to note that the Administrator can not fix the minimum wage except upon the recommendation of an Industry Committee, although he is not required to accept the recommendation of any given committee, and may refer the matter back for consideration and reconsideration. Orders are required to be published in the Federal Register.

Provision is made for requiring the attendance of witnesses and production of records in accordance with the rules of the Federal Trade Commission Act.

**Maximum Hours**

The maximum hour provision does not set a maximum week beyond which an employee may not work. It merely requires the pay-
ment of time and a half for all overtime worked in excess of the maximum number of hours set by the Act. It has been suggested, and it is no doubt true, that the purpose in requiring the payment of time and a half for overtime was to curtail hours of employment and thus spread employment more widely.

With certain exceptions to be later noted, no employer may employ an employee who is engaged in commerce or in the production of goods for commerce for more than forty-four hours per week during the second year following October 24, 1938; or forty hours per week after the expiration of the second year from October 24, 1938, unless the employee is paid time and a half for such overtime. Exceptions to the requirement that overtime be paid are made in the following instances:

1. Where there is a collective bargaining agreement made by employees, certified as bona fide by the National Labor Relations Board, which limits employment to 1000 hours during any twenty-six consecutive weeks.

2. Where there is a collective bargaining agreement made by employees, certified as bona fide by the National Labor Relations Board, which limits employment to 2000 hours during any fifty-two consecutive weeks.

3. For not to exceed fourteen work weeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature.

There is the limitation upon these exceptions, however, that the employee must receive pay at the rate of time and a half the regular rate for employment in excess of twelve hours in any work day or in excess of fifty-six hours in any work week.

The overtime provision does not apply at all to an employer engaged in the first processing of milk, cream, etc., into dairy products, or in the processing of cotton seed, sugar beets, and certain other agricultural products. In the case of an employer engaged in the first processing or canning of certain perishable or seasonal fruits or vegetables, or in the first processing within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity during season operations, the overtime provision shall not apply during the period or periods of not more than fourteen work weeks in the aggregate of any calendar year.

The expression "area of production" has been defined by the Administrator, but its uncertainty has caused both the Admin-
istrator and employers some concern. It will be noted that the newspaper report\textsuperscript{38} of the Administrator's recommendations to Congress contained the suggestion that it define the area of production by proper legislation.

There has been much discussion of the right of an employer to reduce his regular hourly wage to a point still above the minimum wage set by the Act but nevertheless low enough so that the payment for overtime at the rate of time and a half would still leave the employee receiving the same amount that he received prior to the passage of the Act. This question is closely akin to the question whether the Act effectively prohibits the reduction of wages paid at the time it became effective. Congress apparently desired to prevent the lowering of wages by providing\textsuperscript{39} that

"'No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.'"

An examination of the Act, however, fails to disclose any effective means of enforcing this provision, and the Administrator has been variously reported as indicating both that he believed wages could not legally be lowered, and on the other hand, that he did not believe that the Act was effective to prevent it. Unless this problem is clarified by further legislation, litigation is certain to determine the effect of the quoted provision.

**Exemptions**

The Act provides rather numerous exemptions from the wages and hours provisions,\textsuperscript{40} among them being the following: Those employed in a bona fide executive, administrative, professional or local retailing capacity, or as outside salesmen; employees engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce; seamen; certain air carrier employees; fishermen; agricultural workers; learners, apprentices, and handicapped workers, pursuant to regulations of the Administrator; employees of certain classes of newspapers with a circulation of less than 3000; employees of street, suburban or interurban electric railways or local trolley or motor bus carriers; certain employees in the processing of agricultural or horticultural commodities or dairy products. The maximum hours provisions do not apply in certain cases where the Interstate Commerce Commission has jurisdiction over the employees.\textsuperscript{41}

The Administrator is given power, where it is necessary in order

\textsuperscript{38}See Note 5, supra.

\textsuperscript{39}Sec. 18.

\textsuperscript{40}Sec. 13 (a).

\textsuperscript{41}Sec. 13 (b).
to prevent curtailment of opportunities for employment, to permit the employment of learners, apprentices, messengers, and handicapped persons at wages lower than the minimum wage otherwise fixed, and subject to other restrictions.\textsuperscript{18}

Several of the enumerated exemptions have caused some difficulty in their application. It has been deemed by some employers that the regulation of the Administrator defining executive, administrative and professional employees\textsuperscript{18} is rather narrow and too restrictive. Particular reference is made to the requirement in the definition of each that these employees do "no substantial amount of work of the same nature as that performed by non-exempt employees of the employer". What constitutes a "substantial amount of work"?

**Judicial Review**

Any person aggrieved by an order of the Administrator issued under Section 8 of the Act, the provision covering "Wage Orders", may obtain a review of the order in the circuit court of appeals of the United States in any circuit where he resides or has his princi-

\textsuperscript{18}Sec. 14.

\textsuperscript{18}In the Regulations issued by the Administrator on October 19, 1938, as Part 541, Title 29, Labor, Ch. V., the terms "executive and administrative" and "professional" are thus defined:

"**EXECUTIVE AND ADMINISTRATIVE**—The term 'employee employed in a bona fide executive and administrative . . . capacity' in Section 13 (a) (1) of the Act shall mean any employee whose primary duty is the management of the establishment, or a customarily recognized department thereof, in which he is employed, and who customarily and regularly directs the work of other employees therein, and who has the authority to hire and fire other employees or whose suggestions and recommendations as to the hiring and firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and who customarily and regularly exercises discretionary powers, and who does no substantial amount of work of the same nature as that performed by non-exempt employees of the employer, and who is compensated for his services at not less than $30 (exclusive of board, lodging or other facilities) for a workweek.

"**PROFESSIONAL**—The term 'employee employed in a bona fide . . . professional . . . capacity' in Section 13 (a) (1) of the Act shall mean any employee

(a) who is customarily and regularly engaged in work

(1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work, and

(2) requiring the consistent exercise of discretion and judgment both as to the manner and time of performance, as opposed to work subject to active direction and supervision, and

(3) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and

(4) based upon educational training in a specially organized body of knowledge as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, mechanical or physical processes in accordance with a previously indicated or standardized formula, plan or procedure, and

(b) who does no substantial amount of work of the same nature as that performed by non-exempt employees of the employer."
pal place of business, or in the United States Court of Appeals for the District of Columbia, by filing a written petition within sixty days after the entry of the order.\textsuperscript{4} A copy of the petition must be served upon the Administrator, and he must then file a certified transcript of the record. Thereafter the Court is given exclusive jurisdiction to consider and affirm or modify the order. The review by the Court is limited by the Act to questions of law. However, it is specifically provided that the Administrator's findings of fact shall be conclusive when supported by \textit{substantial} evidence, and to that extent at least, therefore, the Court is empowered to examine into the facts.

The Supreme Court of the United States in its recent decision in the \textit{Consolidated Edison Co.} case read into the Wagner Act the requirement that there be "substantial" evidence, although the word does not appear in the Act itself, and gave its general definition of such evidence, saying:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

It is reasonable to assume that the same test will be applied to findings of fact under the Fair Labor Standards Act.

Objections to orders of the Administrator shall not be considered by the Court unless made before the Administrator or good excuse shown for failure so to do. The Court may on proper application grant leave to adduce additional testimony, and the Administrator is granted authority to modify his findings by reason of such additional evidence. There is reserved to the Supreme Court the right to review on certiorari or certification.

Commencement of judicial proceedings does not act as a stay of the Administrator's order, although a stay may be granted by the Court upon the filing of a sufficient surety bond for the protection of the affected employees.\textsuperscript{6}

\textbf{Child Labor Provisions}

Producers, manufacturers, and dealers are prohibited from shipping or delivering for shipment in interstate commerce any goods produced in an establishment situated in the United States in or about which any oppressive child labor has been employed within thirty days prior to the removal of the goods from such establishment.\textsuperscript{7} "Oppressive child labor" is defined\textsuperscript{8} as the employment of

(1) Any employee under sixteen years of age in any occupation, (except the employment of such minor by his parent or a person standing in \textit{loco parentis} in an occupation other than manufacturing or mining); or

\begin{itemize}
\item \textsuperscript{4}Sec. 10 (a).
\item \textsuperscript{5}Consolidated Edison Co. v. National Labor Relations Board, 59 S. Ct. 206.
\item \textsuperscript{6}Sec. 10 (b).
\item \textsuperscript{7}Sec. 12 (a).
\item \textsuperscript{8}Sec. 3 (1).
\end{itemize}
(2) The employment of any person between the ages of sixteen and eighteen years in any occupation which the Chief of the Children's Bureau in the Department of Labor shall by order declare to be particularly hazardous for the employment of such children or detrimental to their health or well-being.

Employers employing persons for whom they shall have on file a certificate of the Chief of the Children's Bureau, certifying that such employee is above the oppressive child labor age, are protected. By regulation, "Certificates of Age" issued by the proper authorities in approved states will be accepted in lieu of certificates issued by the Chief of the Children's Bureau in the Department of Labor. The State of Washington is now duly approved for this purpose. Pursuant to proper regulations issued authorizing the same, children between the ages of fourteen and sixteen may be employed in occupations other than manufacturing and mining to the extent authorized by such regulations and during periods which will not interfere with their schooling and under conditions which will not interfere with their health and well-being.

The child labor provisions do not apply to any child employed in agriculture while not legally required to attend school or to any child employed as an actor in motion pictures or theatrical productions.\(^4\)

It is to be assumed that the Court will construe the child labor provisions strictly, and a literal construction of the Act would make it unlawful to ship or deliver for shipment in interstate commerce goods produced in an establishment in which oppressive child labor has been employed, even though the child employee in question may not have worked upon the particular goods in any manner. It will be interesting to see how far the courts will actually uphold a literal construction of the Act. The Act is, of course, wholly inapplicable where no goods are shipped in interstate commerce from the establishment in which oppressive child labor is employed.

**Enforcement**

It is declared unlawful\(^5\) for any person to ship, deliver, or sell in interstate commerce, or to ship, deliver or sell with knowledge that shipment, delivery or sale in interstate commerce is intended, any goods in which any employee was employed in violation of the wage and hour provisions of the Act, or in violation of any regulation issued under the learners, apprentices, and handicapped workers provision. Common carriers transporting any such goods are protected if such goods were not produced by the carrier. For the purposes of the foregoing provisions, proof

\(^4\)Sec. 13 (c).

\(^5\)Sec. 15 (a).
that an employee was employed in the place where goods shipped or sold in commerce were produced within ninety days prior to the removal of the goods from such place is deemed prima facie evidence that such employee was engaged in the production of such goods.\textsuperscript{51} Violations of the wage and hour sections are prohibited.

Of particular importance is the provision making it unlawful to discharge or in any manner discriminate against an employee because the employee has filed any complaint or participated in any proceedings under the Act or has testified in any such proceeding or has served on an Industry Committee. Violation of any child labor provision and of the section requiring the keeping of records by employers or making false statements in connection therewith is similarly declared unlawful. Any person who willfully violates any of the above provisions is subject to a fine of not more than $10,000.00 or imprisonment for not more than six months, or both.\textsuperscript{52} Imprisonment, however, may be imposed only upon a second offense and conviction.

Of immediate importance to all employers is the provision authorizing employees to collect from employers who violate the wage or hour provisions the amount of their unpaid minimum wages or overtime compensation, and an additional equal amount as liquidated damages.\textsuperscript{53} In the event of suit the Court shall allow the employee a reasonable attorney's fee in addition to any judgment awarded him, and also the costs of the action. Suit may be brought in any court of competent jurisdiction by one employee or by a representative for other employees, thus enabling employees to proceed to assert their rights economically.

The Administrator has declared "that an employer can not legally escape the provisions of the Act by obtaining the consent of an employee to overtime work."\textsuperscript{54} It is to be expected that if this problem is presented to the courts, the Administrator's position in this regard will be supported. A controversy under the Fair Labor Standards Act can be said to be one of public concern and affected with a public interest in view of the purpose of the Act. The Supreme Court of the State of Washington had a very similar question before it in the case of \textit{Larsen vs. Rice},\textsuperscript{55} where the Court permitted recovery by a woman employee under the state Women's Minimum Wage Law, although it was proven that a compromise and settlement had been entered into.

The commission of any of the prohibited acts hereinabove enumerated, and contained in Section 15 of the Act, may be restrained by any District Court of the United States, subject to the provisions of Section 20 of the Clayton Act.\textsuperscript{56}

\textsuperscript{51}Sec. 15 (b).
\textsuperscript{52}Sec. 16 (a).
\textsuperscript{53}Sec. 16 (b).
\textsuperscript{54}Seattle Post-Intelligencer, November 21, 1938.
\textsuperscript{55}100 Wash. 642, 171 Pac. 1037.
\textsuperscript{56}Sec. 17.
No provision of the Act shall excuse non-compliance with any federal or state law or municipal ordinance establishing a higher minimum wage than that established under the Act or a lower maximum hour week than that established thereunder, nor shall any provision thereof justify non-compliance with any federal or state law or municipal ordinance establishing a higher child labor standard. 57

Constitutionality

While the question is not entirely free from doubt, it is generally believed that the constitutionality of the Fair Labor Standards Act of 1938 will be sustained by the Supreme Court if challenged, although if the same question had been presented immediately following the decisions in the Schechter 58 case and in the Carter 59 case, the result would probably have been different. The intervening decisions 60 passing upon the Wagner Act have shown so liberal an attitude toward the regulation of social and economic conditions under the aegis of the Commerce Clause that there would seem to be little question about the right of Congress to legislate with reference to wages, hours and child labor in the manner of this Act. The changes in the personnel of the Supreme Court which have occurred since the Carter and Schechter cases, and in fact since the decisions under the Wagner Act, have of course resulted in a greater predominance of liberal judges, and it is scarcely to be expected that the Court as presently constituted will take a less liberal view of such economic legislation than was taken by it in passing upon the Jones & Laughlin case.

The question under the recent N.L.R.B. decisions seems to be principally whether the conditions, practices, or activities forbidden by the Act have any substantial effect upon interstate commerce or the flow of goods in interstate commerce. Under the Jones & Laughlin case the effect may not be too remote or indirect, but legislation is not limited to transactions which are a direct part of interstate commerce. As was said in that case: 61

"The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The

57 Sec. 18.
61 81 L. Ed. 893, at 911.
fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'."

Of course all distinctions between interstate commerce and intrastate commerce have not disappeared. The act prohibited or regulated must still bear a close and intimate relationship with interstate commerce. Nevertheless, in view of the findings and declared policy of Congress set forth in the Act, and in view of the Wagner Act decisions, it is to be expected that the Fair Labor Standards Act will be sustained. It is to be noted that Congress heeded the admonition of Mr. Justice Cardozo in his concurring opinion in the Schechter case by setting up standards and guides for the determinations of the Industry Committees and of the Administrator.

The legal position of the minimum wage provisions of the Act is strengthened and supported by the decision in West Coast Hotel Co. v. Parrish, in which case the constitutionality of the State of Washington Minimum Wage Law for women employed in certain industries was sustained, for running through the decision is a recognition of the principle that wages and the health and morals of employees are connected, and that the one has a bearing upon the other. While this case, of course, was not concerned with the problem of interstate commerce, the finding of the Court can nevertheless be urged in support of the findings of Congress with reference to the effect which conditions of employment are said to have upon interstate commerce and industries engaged therein.

To uphold the validity of the child labor provisions of the Act it would be necessary for the Court to overrule Hammer vs. Dagenhart, but it is considered by many that the dissenting opinion of Mr. Justice Holmes, rather than the majority opinion of Mr. Justice Day, now represents the true view of the Supreme Court of the United States on this question, and it is altogether reasonable to assume that Hammer vs. Dagenhart will be overruled when the question is presented.

Conclusion

It is too early to weigh or appraise the Fair Labor Standards Act, nor can one at this time prophesy whether or not it will accomplish all the hopes of its proponents. That it will result in improving the working and living conditions of many persons can not be doubted. Are the fears of its opponents that it will unsettle industry and result in unemployment well founded? This question has, of course, not yet been answered. Only a thorough and fair trial of the Act, based upon the complete cooperation of industry, can give a correct answer to this question. In a day when such legislation is the rule rather than the exception, it is to be doubted that industry can not adjust itself to the changes which will, of course, be required by the Fair Labor Standards Act.

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*360 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703.*
Many problems in addition to those already discussed in this article have arisen to haunt those administering the Act. The regulation of piece work and home work presents many difficulties. Further legislation will undoubtedly be necessary to solve those problems as well as others which are bound to arise.

Not the least of the problems following in the wake of the enforcement of the provisions of the Wages and Hours Law is that arising out of the fact that persons similarly engaged in the same industry, in the same locality, and perhaps even in the same establishment may find that their wage scales are different because the one is producing goods for interstate commerce and the other for intrastate commerce only. This has already resulted in the proposal that a uniform Fair Labor Standards Act be prepared for submission to the various state legislatures in the hope that working conditions in intrastate commerce and interstate commerce may be made uniform.

Our Nihilistic Philosophy

"... Intent upon pecuniary or honorific gain, the profession has stood singularly high above class biases; it has been as willing to serve the more aggressive portions of the underworld as to serve the business system, as willing to serve labor unions (provided their treasuries were substantial) as the great middle-class of economically favored rentiers. It has withheld its services from the indigent aristocrat and from the bankrupt business man just as scrupulously as from the socially submerged one-third to one-half of the citizenry. But, although no a priori social philosophy in particular is entertained by the legal profession as a whole, least of all any integrated philosophy of law, a nihilistic philosophy is implied in its work in the sense that it denies by implication any objective or real ground of truth..."


The Lawyer Men

Bumstead, Cooley, Cohen & Quill

Have given me many a nasty chill:
Well, Lawyers will.

To-wit, to-whoo, to-wit, to-whoo,
What on earth can a client do?

I had a deal, a lovely thing.
With the prosperous firm of Ting & Ling:

* * * *

To-wit, to-whoo, the deal fell through:
Oh, what on earth can a client do?

Well, I'll close my books and file the brief
As a museum piece; go on relief,
Pull in my belt and pay the bill
Of Bumstead, Cooley, Cohen & Quill.

—WILFRED FUNK, in the Saturday Evening Post, February 4th, 1939.

WE, WHO STATE CASES FOR OTHERS, LEAVE OUR OWN CASE TO BE MIS-STATTED BY OTHERS.