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Appellants,

v.

HON. PETER J. BRENNAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Continued)

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

NATIONAL LEAGUE OF CITIES, *et al.*,

Appellants,

v.

HON. PETER J. BRENNAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Appellants appeal from the final order of the United States District Court for the District of Columbia, entered on December 31, 1974, dismissing the Complaint and denying Plaintiffs' (Appellants') Application for a Preliminary Injunction. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial constitutional questions are presented.

OPINION BELOW

The Order, Findings, and Opinion of the United States District Court for the District of Columbia, Civil Action 74-1812 (Dec. 31, 1974) (per curiam) is unreported but is attached as Appendix A hereto.

JURISDICTION

This Suit was brought under 28 U.S.C. § § 1331 and 1337 for injunctive and declaratory relief that all the 1974 Amendments to the Fair Labor Standards Act, Pub. L. 93-259, 88 Stat. 55, amending 29 U.S.C. § 201 *et seq.* (1970), made applicable to States and Cities, violate the Fifth, Tenth, and Eleventh Amendments to the Constitution, and cannot be based on Art. I, § 8, cl. 3 of the Constitution. This action was filed in the District Court on December 12, 1974. The District Court, having been constituted a Court of Three Judges, dismissed the Complaint and denied Plaintiffs' Application for a Preliminary Injunction on December 31, 1974. In its Order, the District Court stated it was acting under both Rule 12 and Rule 56, Federal Rules Civil Procedure. (App. at 10a). On December 31, 1974, Plaintiffs noted their appeal in the District Court and applied to this Court for a stay and an injunction *pendente lite* which was granted by the Chief Justice of the United States on December 31, 1974, and continued by this Court on January 13, 1975 on condition that this Jurisdictional Statement be filed by January 17, 1975. The jurisdiction of this Court to

review the District Court's Order by direct appeal is conferred by 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether *Maryland v. Wirtz*, 392 U.S. 183, holding the Fair Labor Standards Act's enterprise concept to be constitutional under the Commerce Clause as applied to employees of those state-owned hospitals and schools which are in competition with private hospitals and schools is controlling precedent for extension of that Act to all those State and City employees who are not engaged in such competition.

2. Whether all State and City Government is engaged in commerce among the States thus conferring constitutional power under the Commerce Clause upon the Federal Government to regulate wages, hours, and other terms and conditions of employment for all non-supervisory State and local Government employees.

3. Whether all State and City Government affects commerce among the States to an extent which confers constitutional power under the Commerce Clause upon the Federal Government to regulate wages, hours, and other terms and conditions of employment for all State and City employees.

4. Whether a Federal Act which usurps control of State and City essential Government services by increasing the cost of providing some services so greatly that these and other essential Government services must be altered or curtailed, and by conflicting with fair and valid State and City laws governing public employment and public debt, can have a rational basis under the

Commerce Clause, where States and Cities neither are in commerce nor provide essential Government services interstate.

5. Whether the careful balance struck between the Federal and the State Governments in the Constitution requires a more direct impact on commerce before the Commerce Clause can be used to rationalize an abrogation of the Tenth Amendment in the form of a Federal preemption of control over the hours, wages and other terms and conditions of employment of non-supervisory state and local government employees for the first time in 200 years, than the impact on commerce necessary to regulate private industrial functions.

6. Whether the Eleventh Amendment is violated by a Federal Statute authorizing employee suits against States and Cities in Federal Courts, including class actions, liquidated damages, counsel fees, and costs.

STATUTES INVOLVED

Public Law 93-259, 88 Stat. 55, is set forth in Appendix B hereto. This case involves the constitutionality of the provisions of that Public Law as applied to States and Cities under Article I, Section 8, Clause 3 of the Constitution of the United States and the Fifth, Tenth, and Eleventh Amendments to the Constitution.

STATEMENT

The Appellant States and Cities ask this Court to review and reverse a Three-Judge District Court decision

(Appendix A) holding that the Federal Government may take over regulation of wages, hours, compensable time, and other personnel matters for nearly all 11,000,000[1] non-supervisory State and local Government employees by amending the Fair Labor Standards Act (Act) to so provide. Public Law 93-259, 88 Stat. 55 (Appendix B), amending 29 U.S.C. § 201 *et seq.* The Federal Government thus has usurped an essential State and local governmental function in violation of the Fifth, Tenth, and Eleventh Amendments.

The District Court held that *Maryland v. Wirtz*, 392 U.S. 183, was controlling, although it was clear during the course of oral argument[2] and is stated in its opinion on Plaintiffs' Application for a Preliminary Injunction that all three judges felt uncomfortable with the total derogation of Federalism inplicit in the reading they felt constrained to find that *Wirtz* gave to the Commerce Clause of the Constitution. (App. at 9a). Appellants' core contention is that State and City employees are engaged in sovereign governmental functions of the States, and that they are not engaged in commerce. (Complaint ¶'s 7-11, 40).

The majority of increased costs resulting from the Amendments do not flow from the Act's basic mandates regarding minimum wages and maximum

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[1] *Public Employment in 1973,* U.S. Dept. Commerce, Social and Economic Statistics Admin., Bureau of Census, at 1, reporting "11.4 million" state and local government employees in October 1973.

[2] The transcript of the oral argument on the Application for Preliminary Injunction and on Defendant's (Appellee's) Motion to Dismiss the Complaint has not yet been typed. When typed, this transcript will be certified to this Court with the remainder of the Record in this case, including the evidence supporting the Complaint and the District Court's Findings.

hours. The greater portion of the budget-breaking fiscal impact projected for this federally dictated policy stems from the generalized regulatory provisions under the Act and the Act's history of application to private enterprise. When these policies collide with the diversity of State and local Government practices, the result is to force additional costs upon the Governments. This result is illustrated by examples given in the Complaint in the areas of compensatory time off (Complaint ¶¶49, 66), flexible scheduling practices (Complaint ¶49), employment of student interns (Complaint ¶¶49, 60), police and fire training (Complaint ¶¶56, 69-70), availability of "reserve" policemen (Complaint ¶57), and paid volunteers (Complaint ¶28), institution of affirmative action programs (Complaint ¶59), computation of payrolls (Complaint ¶63), membership on volunteer boards and commissioners (Complaint ¶65), and joint employment (Complaint ¶¶29, 46).

The fundamental constitutional issues raised by this Appeal will not turn on the millions of taxpayers' dollars in unnecessary costs which the Act admittedly imposes upon States and Cities. However, a few illustrations of cost estimates serve to highlight the magnitude of the impact of this unconstitutional Act on the States and Cities.

Appellee admits in the preamble to his Regulations of December 20, 1974 on tours of duty, wages, hours, compensable time in the counting of sleep and meal time, and other employment practices of fire and police for *overtime only* will cost States and Cities $27,500,000 in 1975. 29 C.F.R. § 553 reprinted as Appendix C hereto.

Plaintiffs, using 25 of 15,000 Cities and 10 of the 50 States as illustrations, presented to the Court below

specific fact estimates on increases caused by the Act in the verified Complaint, depositions and exhibits, totalling $57,000,000, with a $200,000,000 estimate of first year increased costs for all firemen, and an expert informed estimate of over one billion dollars in 1975 in increased costs for all State and local Government employees. (Complaint ¶¶44-72, Byrley Deposition at 20-21). The vast new Federal records, and reports and decisions required by the Act of States and Cities and the restructuring of State and local employment practices from State and City to Federal control, are enormously costly. Governor Askew of Florida estimates an annual $800,000 for new "Federally mandated record keeping costs under the Act" for his State. (Defendant's Ex. 43 to Byrley Deposition and Complaint ¶37).

Appellee offers no estimate of the total cost which application of the Act and Regulations will impose as to other State and City employees. The Senate Committee Report on the Act estimated a first year cost of $128,000,000 and a second year cost of $162,000,000. (S. Rep. No. 300, 93d Cong., 1st Sess. 26 (1973)). The House Report estimated a first year cost of $250,000 for the Federal Government with only $3,000,000 per year as the cost for the next 5 years. (H.R. Rep. No. 913, 93d Cong., 2d Sess. 41 (1974)).

Ultimate questions and decisions as to State and local employment practices are now moved from City Hall and State capitals to Appellee in Washington. Since personnel costs are 80 to 85% of City operating budgets, the Act effectively vests ultimate budget decisions and controls in Appellee. (Complaint ¶36, Pritchard Deposition at 126-127). These arbitrary and capricious requirements as interpreted by Appellee's Regulation of December 20 raise statutory and due process issues in terms of reasonable and timely notice

of what it is that is required of States and Cities. (Complaint ¶39 as amended). The Appellee has refused to issue new or clarifying Regulations for States and Cities, except for firemen and policemen. He has made applicable to States and Cities parts of the same 800 pages of Regulations previously issued for private industry, 29 Code of Federal Regulations Parts 500 to 1899. But Appellee has admitted that only 15% of said Regulations apply to States and Cities. (Pritchard Deposition at 121-123).

The Act was made applicable to States and Cities under false representations in congressional reports that it would have no significant impact upon States and Cities since the pay they provide exceeds the minimum wages required by the Act. The House Report on the Act quotes a Department of Labor report of 1970 that:

> "... wage levels for State and local government employees not covered by FLSA are, on the average, substantially higher than workers already covered." H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974).

Arguing from this statement, the Report continues:

> "The actual impact of a 40 hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." *Id.* at 29.

The Committee Report concludes:

> "The actual impact on State and local governments then, of a 40 hour standard, will be virtually nonexistent." *Id.* at 29.

There is no evidence in the legislative history that a "poverty level" or "substandard" wage problem involving commerce exists in State or City Government.

There is likewise no evidence that the Government functions of States and Cities are commerce or adversely affect commerce and the verified Complaint states they do not. (Complaint ¶¶7-11).

The magnitude and public importance of the issue here presented requires a final and definitive decision by this Court. The sheer breadth of the seizure of control over nearly all State and City employees by the Act is staggering. It is conceded that some specific activities of States and Cities could be in commerce, such as the railroad and similar commercial operations which have been before this Court in *United States v. California*, 297 U.S. 175, and similar cases. It is impossible, however, to envision that all the vast public service functions of such governments are in commerce. This Federal broadside claim of all power over a function as intimate and important as all State and City employment practices, makes the aim of the Act so broad as to provide no rational basis for this legislation and thus to fall under the Fifth Amendment's ban as well as the Tenth and Eleventh Amendment's prohibitions. (Complaint ¶40).

States and Cities are in dire financial straits. The record supports the conclusion that applicability of this Act to them at this time of inflation and depression could well spell bankruptcy for many of them.[3] With Cities and States already laying off thousands of

[3]See Appellee Brennan's testimony opposing the Act's applicability to States and Cities. *Hearings on H.R. 4757 & H.R. 2831 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 93 Cong., 1st Sess. 263 (1973), where he says, "Imposition of the Federal standard for coverage, particularly for overtime, could have a disruptive impact on many State civil service systems and the additional costs could overburden many small governmental units."

employees, the applicability of this Act exacerbates an already dire situation which is cresting to an ever greater national crisis. (Pritchard Deposition at 163-164).

In *Maryland v. Wirtz,* 392 U.S. 183, 196, the majority opinion said "The Court has ample power to prevent what the Appellants purport to fear—'the utter destruction of the State as a sovereign political entity.' " The Court rejected in a footnote on the same page the suggestion of Mr. Justice Douglas and Mr. Justice Stewart in their dissent that the Congress under that decision could overwhelm the States fiscally and take over their budgets by declaring an entire State an "enterprise". 392 U.S. at 204-05.

Yet, that is exactly what has happened by the Statute here challenged.

It is urged that this Court never intended its decision in *Wirtz* to allow the take-over of 80 to 85% of State and City budgets, as has been done here. (Pritchard Deposition at 126-127, Complaint ¶36). The District Court was in error in so interpreting and applying that decision. See also, *Employees v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279.

The case of *Fry v. Ferguson*, 34 Ohio St. 2d 252, 298 N.E. 2d 179 (1973), is pending (*Fry v. United States*, No. 73-822, argued November 11, 1974) and *Coan v. California,* 11 Cal. 3d 286, 520 P.2d 1003, 113 Cal. Rptr. 187 (1974) has been docketed (*California v. United States,* No. 74-739). *Iowa v. Brennan* (No. 73-1565), involving the 1966 amendments to the Act, is also receiving consideration by this Court. We therefore respectfully urge that the District Court misread *Wirtz.* Clearly that Court had misgivings as to its interpretation

as it found the constitutional questions raised here to be "substantial" and urged this Court to reconsider the meaning of some of the broad language of *Wirtz*. (App. at 6a-9a). Under these circumstances, this Court should grant review and clarify and settle the grave constitutional power questions which are involved.

It is difficult, if not impossible, to achieve a historical perspective in the heat of a controversy of this nature. Indeed, the wisdom of our forefathers gives this Court the duty of taking the longer look and to review for their constitutionality the actions of the Executive and the Legislative Branch. Especially is this true when there is a shifting to Federal officials by Federal legislation of a function performed for so long by States and Cities.

It does not require a hyperactive imagination to conclude that this is a benchmark controversy in the consideration of what the Constitution strikes as a proper balance of power and function between the Federal and State Governments. If *Wirtz* is to be given the broad sweep the District Court held compelled to read into it, then the Commerce Power has no realistic parameters, and constitutional Federalism is on the wane, if not in *rigor mortis*.

THE QUESTIONS ARE SUBSTANTIAL AND WERE EXPRESSLY SO FOUND BY THE DISTRICT COURT

1. This Court's Decision in *Maryland v. Wirtz* Cannot Provide a Rational Basis for Federal Usurpation of State and City Government Functions.

a. *Wirtz* must be limited to its facts, which are greatly different from this Case involving essential Government functions and vast power over the major element in all State and City budgets.

In 1968, this Court considered the constitutionality of the 1966 Amendments extending the Fair Labor Standards Act via the interstate "enterprise" concept and specifically, extending the Act to all schools and hospitals, including those which are State-owned. The Congress' rationale for this extended coverage is stated in the 1966 Committee Reports:

> "These enterprises [public schools and hospitals] which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose." S. Rep. No. 1487, 89th Cong., 2d Sess., 1966 U.S. Cong. and Adm. News 3010 (1966); H. R. Rep. No. 1366, 89th Cong., 2d Sess. 16 (1966).

These amendments were upheld as applied to State hospital and school employees by a divided Court in *Maryland v. Wirtz*, 392 U.S. 183.

Appellee, and the Court below, although the latter said it was "troubled" by doing so and nonetheless finding the Complaint raises "substantial" constitutional questions both stretch what this Court was careful to

describe as a very limited decision into an unlimited decision. This is error. A review of language which the District Court thought this Court might now "draw back from" demonstrates this error in expanding a narrowly conceived decision based on a new industrial "enterprise" concept and "competition" into State and City governmental function areas where the concept does not fit and actual competition cannot reasonably be found.

The finding in *Wirtz* of a rational basis under the "labor strife" theory, 392 U.S. at 192, and the "use of goods imported interstate" theory, 392 U.S. at 195, does not dispose of this Case, especially against the tremendous broad fiscal impact and coverage of the 1974 Amendments, which are made applicable to nearly all State and local Government employees, and the usurpation of sovereign powers guaranteed against irrational Federal usurpation by the Tenth Amendment. (Complaint ¶ 40).

This Court refused to decide in *Wirtz* "whether the schools and hospitals have employees engaged in commerce or production," 392 U.S. at 201, reserving this question. This question is now before this Court in *Iowa v. Brennan*, No. 73-1565, *petition for cert. filed*, 43 U.S.L.W. 3637.

The holding in *Wirtz* was limited by this statement:

> "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions [operating State schools and hospitals] it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operating schools and hospitals." 392 U.S. at 193-194.

Implicit in this statement is a finding by the Court that State schools and hospitals are to some extent in competition in commerce with private schools and hospitals. Not only is this finding of competition in commerce wrongly credited as a rational basis for application of the Act to States and Cities—not only was *Wirtz* wrongly decided on its facts—but the facts of this case make *Wirtz* inapposite. It was this distinction between *Wirtz* and the instant case which the Court below, in dismissing the Complaint, failed to recognize. State and City police and fire service, for example, compete with no one—not with private police and fire services, and not with the essential Government services of other States and Cities. No one competes with State and City regulation of businesses, licensing and tax collection. Federal interference with these essential Government functions was not considered, and certainly was not approved or condoned, in *Wirtz*.

Wirtz did not consider an impact on States and Cities of near the magnitude of the damage which the 1974 Amendments to the Act cause. This Court was not swayed by the impact of applying the Act to school and hospital employees. According to the Bureau of the Census' report, *Public Employment in 1973*, footnote 1, *supra,* page 5, hospital employees constitute only 9.6% of full-time State and local Government employees. *Id.* at 3 Table C. Of these, the Act as reviewed in *Wirtz* exempted from coverage physicians, nurses, professionals and administrators. Pub. L. 89-601, 80 Stat. 833, amending 29 U.S.C. § 213(a)(1). Of the 49.6% of full-time State and local Government employees who are in education, *Public Employment in 1973* at 3 Table C, well over half are teachers, *Id.* at 9 Table 3, who were

exempted from coverage by the Act reviewed in *Wirtz*, Pub. L. 89-601, 80 Stat. 833, 29 U.S.C. § 213(a)(1).

Appellants present here the very situation which was the cause for alarm to the *Wirtz* dissent, 392 U.S. at 204-205, and which the majority there excluded by cautiously limiting its holding, 392 U.S. at 196 and footnote 27 on that page. By the 1974 Amendments to the Act Congress has created the concept of a "public agency" and attempted to give it all the attributes of an "enterprise" engaged in commerce. This unconstitutional extension of the commerce power has caused, by regulation, the entire reordering of budgetary priorities of State and local Governments. The result is the elimination or diminution of unique sovereign governmental functions, without which States and local Governments cannot adequately serve and protect the persons within their jurisdictions. (Complaint ¶ 39).

Personnel costs are 80 to 85% of City budgets. (Pritchard Deposition at 126-127). The 1974 Amendments to the Fair Labor Standards Act transfer control of City and State budgets—and with control of budgets, control of City and State Governments themselves— to Federal officials and employees who are neither elected from nor residents of the Cities and States they will control. (Complaint ¶ 36). No State or City election can vote the Administrator of the Department of Labor's Wage and Hour Division, to whom Appellee has delegated many of his duties under the Act, out of office because she or he raised their budget through his or her decisions in enforcing an irrational law. (Pritchard Deposition at 212-213).

It is ironic that the Bicentennial of this Nation's freedom from control by non-elected officials geo-

graphically remote from local needs, is the year during which Appellee herein will determine, pursuant to §6(c) of the 1974 Amendments (App. at 6b), what hours may be worked by employees of State and City Governments. *See*, Appendix C for his minute regulations of work performance by police and firefighters. This determination will dictate the overtime requirements of employees providing noncompetitive, intrastate, essential Government services. Thus will the 1974 Amendments produce "a mass of confusion which is going to completely disrupt 200 years of stylized operations, which has been a tradition at the local government level." (Pritchard Deposition at 123). State and City law (Complaint ¶¶19, 22-32) governing the provision of essential services will be replaced by Federal law and regulations, 85% of which are admittedly applicable only to private industry and not to States and Cities. (Pritchard Deposition at 122).

Moreover, the 1974 Amendments expose States and Cities to criminal penalties for willful violation, double back wages, individual and class actions and other civil penalty provisions, all in violation of the Fifth Amendment's requirement of substantive due process. The Act authorizes, not only enforcement by Appellee the Secretary of Labor, but also private and private class enforcement actions in State or Federal Courts, in violation of the Eleventh Amendment. *See, Edelman v. Jordan*, 415 U.S. 651. To permit these enforcement actions to flood the Federal Courts would overtax our already burdened system of justice. A glance at the some 150 State supreme court decisions rendered monthly involving Cities demonstrates the vast amount of litigation in State Courts involving employment

rights which must go into the Federal Courts under the Act. *See, Municipal Law Court Decisions* published monthly by the National Institute of Municipal Law Officers since 1942.

While this Court in *Employees v. Dept. of Public Health,* 411 U.S. 279, 286, indicated its reluctance to believe that Congress would alter §16 of the Act, 29 U.S.C. §216, to allow for liquidated damage suits against a State by its employees, the 1974 Amendments make it clear that this is the exact result Congress desires to impose.

Never before has there been such a vast elimination of successful State and local initiative and autonomy under the shared duties and powers of Federalism. The Constitution does not contemplate homogeneous State and City Governments, indistinguishable except as to name and geography, with uniform governmental services provided by rigidly (and federally) regulated public employees who all work for the same pay and under precisely the same conditions. Since *Wirtz* did not involve such a vast elimination, this first attempt should be cause for careful consideration of the disastrous results that such a power shift will cause. Never before has there been such a pervasive interference with the constitutional powers of States and Cities to establish their own Governments and methods of providing Government services, as preserved by the Tenth Amendment. *See, Collector v. Day*, 78 U.S. (11 Wall.) 113, 124; *Brush v. Commissioner*, 300 U.S. 352, 364; *Shapiro v. Thompson*, 394 U.S. 618, 633; *Texas v. White*, 74 U.S. (7 Wall.) 700, 725; *Wilson v. North Carolina ex rel. Caldwell*, 169 U.S. 586, 594; *Kotch v. River Port Pilot Commrs.*, 330 U.S. 552, 557; *Taylor v.*

Beckham, 178 U.S. 548, 570; *Newton v. Comm'rs*, 100 U.S. 548, 559. It is the office of this Court not to let this attempt be fulfilled without a finding of rational connection to a delegated constitutional grant of power to the Federal Government. No such rational connection exists.

b. The 1974 Amendments, in usurping State and City Government functions, must pass a test of rationality higher than that applied in *Wirtz*.

To follow *Maryland v. Wirtz*, 392 U.S. 183, in this case would be to ignore the principle—which the Court in *Wirtz* did not consider, likely because of its finding, at 392 U.S. 193, of no Federal interference with State and City functions—that a rational basis for Federal legislation is more reluctantly found where to do so would force the States and Cities to reduce or eliminate provision of essential Government services. State legislation is more carefully scrutinized under the Fourteenth Amendment when it interferes with a constitutionally protected right or status, such as those of race discrimination or freedom of expression. So also must Federal legislation be more carefully scrutinized under the Fifth Amendment standard of rationality when it interferes with rights and powers protected under the Tenth Amendment. Judge Leventhal raised this question during the argument below (Hearing on Application for Preliminary Injunction and on Motion to Dismiss, Dec. 30, 1974).

The decision in *Wirtz* cannot govern this challenge to the commerce power as a justification for coverage of

all State and City employees by the Act. Citation to *Wirtz* subsumes the question here of the rational basis under the Commerce power of the 1974 Amendments:

> "There remains, of course, the question whether any particular statute is an 'otherwise valid regulation of commerce.' *This Court has always recognized that the power to regulate commerce, though broad indeed, has limits.*" 392 U.S. at 196 (emphasis added).

The opinion of a divided Court in *Wirtz* did not address itself to the question of this case, whether a Federal act which irreparably harms States and Cities in conflict with valid, fair and reasonable State and City laws and policies for the operation of States and Cities can have a rational basis.

The opinion in *Wirtz* is neatly divided into consideration of two principal challenges to the 1966 amendments to the Fair Labor Standards Act. This Court, at 392 U.S. 188-193, considered the rationality of the "enterprise concept" as applied to all employees, including those of the private sector. There is no discussion of rationality of the "enterprise concept" as applied to the facts of the case, that is, as applied to States. The majority opinion, at 392 U.S. 195-199, then considered whether the Tenth Amendment to the Constitution could stand in the way of "the Federal Government, when acting within a delegated power", 392 U.S. at 195. The missing logical connective, of course, is whether the power is rationally delegated and the Federal Government can rationally act within a delegated power when it takes action usurping State power and dictates to States and Cities the extent of essential Government services. The opinion of the

divided Court in *Wirtz* treated this connective, the essence of the instant case, only cursorily. In doing so, the Court found facts and enunciated law which are not here controlling.

This Case involves power under the Constitution of the United States to regulate wages, hours and other personnel practices of some 11,000,000 State and City employees.[4] From the adoption of the Constitution until 1974 this power to regulate their own employees was considered to reside in the States and their political subdivisions except in a few instances where State employees were engaged in, or were overwhelmingly in competition with business in, interstate commerce.

On the question, essential here, of the possibility of a rational basis for Federal legislation which increases State and City Government costs, *Wirtz* is inconsistent within itself. While in the body of the opinion this divided Court said:

> "The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to

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[4] *See* footnote 1, ***supra,*** page 5 and H.R. Rep. No. 913, 93d Cong., 2d Sess. (1974) 27 which gives a figure of 5 million to be covered by the 1974 Amendments with 3.5 million (not all State employees) covered by the 1966 amendments, then states: "The bill will provide that virtually all non-suprevisory government employees will be covered."

> perform medical and educational functions is not factually accurate."[5] 392 U.S. at 193,

the Court appended to the following sentence a footnote which contradicts this finding of no interference with State functions, so essential to the decision in *Wirtz*:

> "That this provision [special means of computing hospital overtime] may seem to some inadequate, and that no similar provision was made in the case of schools, are matters outside judicial cognizance. The Act's overtime provisions apply to a wide range of enterprises, with differing patterns of worktime; they were intended to change some of those patterns. It is not for the courts to decide that such changes as may be required are beneficial in the case of some industries and harmful in others." 392 U.S. at 194 n. 22

The question presented here of whether Congress, under the guise of the Commerce Clause, may rationally dictate to States and Cities which essential Government services may be provided within State debt and tax limitations, is also before this Court in the cases of *Fry v. United States*, No. 73-822, and *California v. United States*, No. 74-739. (Complaint ¶¶ 36, 73-78).

Nowhere in the hearings or congressional findings is there any indication that State and local Governments

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[5] *But see* the Appellee's regulations of December 20, 1974, for police and firefighters, Appendix C, and note the detailed controls of sleep time and all the other employment practices there covered with the Administrator in §553.2 reserving to herself final decision power to "determine the compensable hours of work, tour of duty and work period in applying the section 7(k) exemption." This is no mere formality of action with little impact on police and firefighters.

in carrying out essential governmental activities such as police and fire protection compete with interstate industrial enterprises. As this Court stated in *Gomillion v. Lightfoot,* 364 U.S. 339:

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts." 364 U.S. at 343-344.

By disregarding the variant controlling facts of the present situation, Congress has transgressed the constitutional boundaries of the Commerce Clause and has rendered the Act it has adopted without rational basis and therefore invalid.

Quite clearly, the police and fire protection given by State and local Governments, along with numerous other State and local sovereign functions such as tax collection, are not the type of activities engaged in by "private persons" at all. Absent therefore is the concept of "competition" heavily relied upon in *Wirtz.* (See App. at 7a for reference to this subject by District Court). A person does not choose between two competing fire departments for the one which can most cheaply extinguish his fire, or between two competing police departments for the one which can most economically bring a felon to justice. Unlike the schools and hospitals in *Wirtz*, there are no such things as private and public police departments, fire departments or court houses. Only Government can license, regulate and tax. There is only the State or local Government

within its well-defined jurisdictional boundaries, acting in its traditional sovereign capacity. Therefore, the result if the 1974 Amendments are upheld by this Court will be not to end wage stifling competition but rather to end many Government services through federally imposed costs which cause State constitutional and charter spending limitations to be reached. (Complaint ¶¶ 36, 73-78). This provision of the barest minimum of sovereign Government services at increased costs is the certain result of wiping out local governmental arrangements and imposing vast new overtime, record keeping, reporting, administrative and decision costs to meet Federal mandates. (Complaint ¶¶ 37, 73-78).

c. Federal officials, both Legislative and Executive, admit that the 1974 Amendments can pass neither this higher test nor the traditional rational basis test.

In *Maryland v. Wirtz* (No. 742, Oct. Term 1967), the United States in its Brief on the merits stated, at page 21 n. 11:

> "The nature of the commerce power is, like the war power, [citing cases] such that its exercise cannot be limited if the ends for which it was designed are to be accomplished."

In its decision this Court rejected that claim of plenary power. 392 U.S. at 196.

By the time of *Fry v. United States*, No. 73-822, this Term, the United States, in its Brief on the merits would say only, at 17:

> "This Court has repeatedly recognized the broad sweep of the power that Congress has over commerce."

And in oral argument before the Supreme Court, the United States admitted expressly that the commerce power is not plenary.

That in *Fry*, a case challenging the constitutionality of the Wage Stabilization Act of 1970 to States and their political subdivisions, the United States relied on *Wirtz* but retreated from the untenable assertion in its Brief in *Wirtz* that the commerce power was plenary and without limits, constitutes an admission by the United States, important to this case.

The legislative history of the original Fair Labor Standards Act indicates that one of Congress primary goals was the elimination of unfair competition in commerce due to wages below poverty levels and substandard working conditions. S. Rep. No. 884, 75th Cong., 1st Sess. 2 (1937); H. R. Rep. No. 1452, 75th Cong., 1st Sess. 6 (1937). *Joint Hearings on S. 2475 and H. R. 7200 Before the Sen. Comm. on Education and Labor and the House Comm. on Labor*, 75th Cong., 1st Sess. pt. 1 at 2-3 (1937).

The 1974 Amendments extend coverage under the Act well beyond the scope of enterprises competing in interstate commerce (the basis of the 1966 amendments and the question presented in *Wirtz*) to all non-supervisory State and local Government employees engaged in essential noncompetitive governmental functions. The original purpose of the Act, to eliminate an unfair method of competition, remains a basic goal of the 1974 Amendments. As was noted in *Wirtz*, "The original Act stated Congress' findings and purposes as of

1938. Subsequent extensions of coverage were presumably based on similar findings and purposes with respect to the areas newly covered." 392 U.S. at 190 n. 13. Moreover, the 1974 Senate Committee Report implies that the elimination of competition in substandard wages and excessively long hours is a basic purpose of the 1974 Amendments. S. Rep. No. 690, 93 Cong., 2d Sess. 4 (1974). There is no testimony in the Hearings or congressional findings which indicates that State and local Governments engaging in activities such as police and fire protection and tax collection compete with other enterprises. On the contrary, both Appellee herein and his predecessor admitted that Congress had no rational basis, under the commerce power, to regulate non-competing Government functions. Secretary Hodgson stated:

> "We cannot support this proposal [extension of coverage to state and local Government employees]. In 1966, enterprise coverage was extended to employees of hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit. Here the Congress took the position that failure to cover all such institutions would have resulted in failure to implement one of the basic purposes of the act – the elimination of conditions which constitute an unfair method of competition in commerce.
>
> "But extending coverage to all State and local employees is an entirely different matter. It would certainly involve the Federal Government in the regulation of the functions of State and local governments." *Hearings on H. R. 7130 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 92 Cong., 1st Sess. pt. 1 at

552 (1971); *Hearings on S. 1861 & S. 2259 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. pt. 1 at 29 (1971).

Similarly, Appellee Brennan testified in 1973:

> "I realize that the 1966 Amendments extended enterprise coverage to employees of hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit.
>
> "The reason for the extension to this group of employees was that failure to cover all employees of such institutions would constitute an unfair method of competition in commerce.
>
> "However, extension of coverage to all State and local government employees is too great an interference with State prerogatives.
>
> "Imposition of the Federal standard for coverage, particularly for overtime, could have a disruptive impact on many State civil service systems and the additional costs could overburden many small governmental units." *Hearings on H. R. 4757 & H. R. 2831 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 263 (1973).

In his veto of H. R. 7935, the original bill on this subject, in a message to Congress on September 6, 1973, 119 Cong. Rec. H. 7596 (daily ed. Sep. 6, 1973), President Nixon said of the proposed Amendments to the Act:

> "Extension of Federal minimum wage and overtime standards to State and local government employees is an unwarranted interference with State prerogatives and has been opposed by the Advisory Commission on Intergovernmental Relations."

Likewise, in his letter of February 27, 1974, to Senator Harrison Williams, 120 Cong. Rec. S. 2516 (daily ed. Feb. 28, 1974) President Nixon recognized "the need for enacting a responsible minimum wage bill. . .", but cautioned:

> "The extension of the Federal minimum wage and overtime requirements to State and local Government employees is also a problem. I appreciate the fact that the House bill under consideration tries to avoid undue interference in the operations of these Governments by exempting police and firemen from the overtime requirements. However, I continue to agree with the Advisory Commission on Intergovernmental Relations that, in general, additional Federal requirements affecting the relationship between these governments and their employees is an unnecessary interference with their prerogatives. The available evidence has failed to convince me that these governments are not acting responsibly in setting their wage and salary rates to meet local conditions. Additionally, if the Congress desires to make the minimum wage and overtime laws applicable to Federal employees, who are already adequately protected by other laws, it should place enforcement responsibility in the Civil Service Commission, which has the responsibility under the other laws."

The conclusion to be drawn from the test enunciated in *Wirtz* is that such a limit on the commerce power in no way upsets or contradicts the interpretation of that power which has existed for longer than the Fair Labor Standards Act itself. Thus, in *United States v. California*, 297 U.S. 175, the distinction was easily made when California sought to resist application of the Federal Applicance Safety Act to its State-owned

railroad. The Court, in rejecting the State's claim, concluded:

> "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act, as are other carriers.
>
> * * *
>
> "No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection." 297 U.S. at 185.

However, a State's sovereign, non-competitive, unique functions cannot be regulated under the Commerce Clause. These functions have no rational relation to commerce such as to create a constitutional basis for their regulation under the Commerce Clause. In fact, the cases since *United States v. California* reinforce the distinction made there. In both *California v. United States*, 320 U.S. 577, 580, and *Case v. Bowles*, 327 U.S. 92, 100-101, a finding of competition with private enterprises was the *sine qua non* of Federal Regulation of State activities.

The District Court in this case found in its Order, Findings and Opinion, attached hereto as Appendix A:

> "The institutions whose employees are in question here perform governmental functions, not seriously in competition with private industry." (App. at 7a).

Federal officials have, as stated above, admitted that the 1974 Amendments irrationally usurp State and City

decision-making, protected by the Tenth Amendment. Former Secretary of Labor James Hodgson said in opposing the imposition of Federal control over State and City labor union relations, *Hearings on H. R. 12532, H. R. 7684, H. R. 9324 Before Special Subcomm. on Labor of the House Comm. on Education and Labor,* 93d Cong., 2d Sess. 281-83 (1972):

> "The States are taking advantage of this opportunity to adapt various public sector labor relations models to their local needs. The past six years has been a period of great activity in public sector labor relations at the State level. Not only have States developed various initial approaches to public sector labor relations, but they are refining and perfecting these approaches on the basis of their experience. For example, Wisconsin and New York have both amended their comprehensive statutes. Minnesota has replaced two 'meet and confer' laws with one collective bargaining statute. Connecticut is involved in a major legislative study of possible revision of its law. Thus, the States are not neglecting the problems of labor and management in the public sector. Rather than being detrimental as in the private sector, experimentation on a State-by-State basis in the public sector takes into account important State differences and contributes substantially to our understanding of the issues in public sector labor relations. This process of development should not be interrupted when there is no urgency for Federal legislation. Under these circumstances, variation rather than uniformity among the States is the more valuable pattern for policy development."

If this Act is upheld, the already proposed legislation covering State and City labor union relations under the

National Labor Relations Act, 29 U.S.C. §141 *et seq.*, is clearly the next step.

d. Federalism is dead if this Act is upheld as applied to States.

In recognition of "Our Federalism", this Court in *New York v. United States,* 326 U.S. 572, agreed that "there are, of course, State activities . . . that partake of uniqueness from the point of view of intergovernmental relations", 326 U.S. at 582 (opinion of Frankfurter, J.), so that the national Government may not "interfere unduly with the State's performance of its sovereign functions of government", 326 U.S. at 587 (concurring opinion of Stone, C.J.); this is so because "[t]he notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." 326 U.S. at 594 (dissenting opinion of Douglas, J.). This analysis of constitutionally protected essential State functions is as applicable to the commerce power here as it was to the taxing power in *New York.*

This is the same distinction which was analyzed with respect to the Eleventh Amendment in *Employees v. Missouri Public Health Dep't*, 411 U.S. at 279, where this Court said:

> "It is true that, as the Court said in Parden [v. Terminal R. Co., 377 U.S. 194], 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S. at 191, 12 L. Ed. 2d 233. But

> we decline to extend Parden to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear." 411 U.S. at 286-87.

The Court below failed to recognize the inapplicability of *Wirtz* in searching for a rational basis to congressional legislation "lifting the sovereignty of the States". Although it dismissed the Complaint, the Court below, in its Order of December 31, 1974, recognized this lack of rational basis. (App. at 7a-8a). The District Court erroneously dismissed the Complaint and that Order should be reviewed and reversed by this Court.

State and local variety and State and local autonomy have been meaningful principles to which the renowned success of our governmental system of shared powers and responsibility called "Federalism" is attributed. In the area of personnel management and practices many differences exist across our Nation. State and local conditions have dictated these to meet local public service needs. (Pritchard Deposition at 150-151). Mandating compliance with fixed uniform Nation-wide Federal requirements is not in the public interest and is certainly destructive of essential public service by unreasonably and unnecessarily increasing its costs. (Pritchard Deposition at 158-169). See *Younger v. Harris*, 401 U.S. 37, 44, stating:

> " 'The notion of comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare

> best if the States and their institutions are left free to perform their separate functions in their seperate ways. . ."

Most confusingly disastrous here is the impact of the 1974 Amendments on local public service volunteerism, especially the some 2,000,000 volunteer firemen. (Pritchard Deposition at 119-120, 169-172). While true volunteers are not covered by the 1974 Amendments, some volunteers are purposely "paid" just enough money to get them covered by workmen's compensation in case of injury (Complaint ¶ 28). These volunteers are now covered by the Act's Amendments. Because of the few dollars received for workmen's compensation purposes, all hours worked must now be paid for. The localities cannot afford to pay the Act's mandated wages. Without these volunteer workers, local government fire protection is difficult or impossible of operation. Being unable to pay the full wages and overtime required means closing down of this essential public service. (Pritchard Deposition at 154-55, 167-71).

Volunteerism is a peculiar American concept largely unknown in other parts of the world. Here no commerce is involved and no competition is involved. The confusion and damage to the public interest by the Act's applicability to partly paid volunteers is a devastating, irrational result.

CONCLUSION

It is urged that for the reasons given above the questions presented herein are substantial. This Court should note probable jurisdiction of this appeal.

The District Court, after the contentions stated herein were presented to it, stated:

> "We are troubled by these contentions and consider that they are substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz*; but that is a decision that only the Supreme Court can make, and as a Federal District Court we feel obliged to apply the *Wirtz* opinion as it stands." (App. at 9a)

What this Court expressly said in *Wirtz* was a very limited decision as to limited concepts and subjects and should not now be stretched to engulf the whole of State and City Governments and thus become an unlimited decision. *Wirtz* did not envision such a "giant" take over.

Respectfully submitted on behalf of all Counsel,

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APPENDIX A

DECISION OF DISTRICT COURT

FILED
DEC 31, 1974
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL LEAGUE OF CITIES,
an Illinois Corporation,
on behalf of its member cities,
1620 Eye Street, N.W.,
Washington, D.C. 20006,

Civil Action
No. 74-1812

THE NATIONAL GOVERNORS' CONFERENCE,
a District of Columbia Corporation,
on behalf of its members,
1150 Seventeenth Street, N.W.,
Washington, D.C. 20036

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Phoenix, Arizona 85007

METROPOLITAN GOVERNMENT OF NASHVILLE
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Thomas Utterback, City Attorney
Office of the City Attorney
Cape Girardeau, Missouri 63701,

Plaintiffs,

and

The State of CALIFORNIA,
State Capitol,
Sacramento, California 95814

by and through
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Attorney General, on
behalf of the People of
the State of California,

RONALD REAGAN
Governor,

VERNE ORR
Director, Department of Finance,

JAMES G. STEARNS
Secretary, Agriculture and Services Agency,

FRANK J. WALTON
Secretary, Business and Transportation Agency,

NORMAN B. LIVERMORE, JR.
Secretary, Resources Agency,

JAMES E. JENKINS
Secretary, Health and Welfare Agency,

Plaintiffs-Intervenors,

and

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Slade Gorton, Attorney General,
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Olympia, Washington 98504,

Plaintiffs-Intervenors,

v.

The Honorable PETER J. BRENNAN
Secretary of Labor
of the United States,

Defendant.

Per Curiam:

Petitioners, individual cities and states, the National League of Cities, and the National Governors' Conference, challenge the 1974 amendments to the Fair Labor Standards Act (FLSA), Public Law 93-259, 88 Stat. 55, amending 29 U.S.C. § § 201 *et seq.* (1970), as beyond the power of Congress under the Commerce Clause in that they purport to extend the coverage of the FLSA to nonsupervisory state and municipal employees, including police and firemen. The amendments generally went into effect on May 1, 1974; provisions relating to overtime pay of police and firemen become effective on January 1, 1975. Plaintiffs seek a declaratory judgment and temporary and permanent injunctive relief. Defendant opposed a temporary injunction, and moved to dismiss the action for failure to state a claim upon which relief can be granted. A three-judge district court was duly convened. We grant defendant's motion to dismiss the complaint.

Although plaintiffs have raised a difficult and substantial question of law, we feel that our decision is controlled by the decision of the Supreme Court in *Maryland v. Wirtz,* 392 U.S. 183 (1968).[1] Upholding the constitutionality of an earlier extension of the FLSA to cover employees of state-operated schools and hospitals against an attack similar to that lodged here,

[1] In this opinion we have not addressed ourselves to any issue concerning the regulations and rulings issued by defendant under the 1974 amendments, either as to procedure followed, or as to substantive compliance with the Act. These issues were not the core of the complaint filed, and the contentions may be presented by plaintiffs either by way of defense, or in actions for declaratory relief. *See* National Automatic Laundry and Cleaning Council v. Shultz, 143 U.S.App.D.C. 274, 443 F.2d 689 (1971).

Justice Harlan, writing for the court, found a sufficient and independent rational relationship of the provisions of the Act to interstate commerce in that state hospitals and schools were significant purchasers of out-of-state goods and that strikes and work stoppages involving their employees would consequently interrupt and burden the flow of goods across state lines. 392 U.S. at 194-95. Since it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods, the decision in *Wirtz* disposes of this case.

Although the theory described above was an explicitly independent ground for the decision, there is language in the opinion that stresses that the state competes with private institutions which also operate schools and hospitals.[2] The institutions whose employees are in question here perform governmental functions, not seriously in competition with private industry. Moreover, there is evidence that the impact of the 1974 Amendments, in terms of confusing and complex regulations and an enormous fiscal burden on the states, is so extensive that it may seriously affect the structuring of state and municipal governmental activities by reducing flexibility to adapt to local and special circumstances, as through compensatory time off

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[2] *See, e.g.*, "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." 392 U.S. at 197.

arrangements, rather than time and half overtime pay, and through other local governmental agreements.[3]

Plaintiffs contend that the amendments will mean either increase in local government fiscal requirements, or reduction in services and personnel, with layoffs, or both, due to provisions in state and municipal constitutions, charters, statutes and ordinances, like those against deficit financing. Plaintiffs further contend that a large part of the budgets of state and local governments reflect costs of non-supervisory personnel, and that the budgeting processes currently under way indicate that the amendments may have the practical impact of a large scale reconstitution of tours of duty, without any factual predicate showing that there has

[3]California, for example, has a mutual aid program, through which counties cooperate to provide aid in time of floods and other disasters. The municipalities and counties participate gratuitously, without reimbursement. Counsel for California fear that the overtime pay provisions of the Amendments will prove so burdensome that counties will be unwilling to continue to cooperate in this venture.

Also, compensatory time-off arrangements which allow for heavy working seasons during the summer, for forest fire fighters, or during the winter, for snow removal personnel, may be prohibited by the provisions requiring overtime payment. California, for example, represents that its forestry service employees are under special arrangements for the 5-8 month forest fire campaign program, which are dependent as a practical matter on a compensatory time off arrangement during the winter months. Salt Lake City fears it may not be able to continue its practice of working its snow removal employees some 7,000 hours in excess of 40 hours per week during the winter with an equal amount of time off during the summer, despite the apparent acceptability of this arrangement to both employer and employees.

been in the past any substantial degree of either widespread labor unrest curtailing flow of interstate commerce or substandard wage scales. They contend that the amendments here will intrude upon the state's performance of essential governmental functions far more than did those reviewed in *Wirtz*, although here, as there, the federal requirements are nominally limited to wage and hour regulations. We are troubled by these contentions, and consider that they are substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz*; but that is a decision that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the *Wirtz* opinion as it stands.

If, as we must assume, the amendments are constitutional, a preliminary injunction would be inappropriate. We have pondered the possibility of relief pending appeal, to assure opportunity to litigate, but, apart from jurisdictional doubts, we apprehend that the only assistance available from such relief would be this, that states failing to comply with the new provisions would not be exposed to the liquidated damages and double damage penalties provided for bad faith violations of the Act. However, we feel that since our opinion recognizes that plaintiffs have raised a substantial question regarding the amendments' constitutionality, this will be sufficient to indicate that the claim of the part of the cities and states that the Act cannot be constitutionally enforced has been raised in good faith.

Plaintiffs' request for declaratory and preliminary injunctive relief is denied. Defendant's motion for

dismissal is hereby granted. Because the papers before us include depositions and affidavits, and they should be part of the record in the event of an appeal to the Supreme Court, our order dismissing the complaint will be entered under both Rule 12 and Rule 56 of the Federal Rules of Civil Procedure.

The foregoing will constitute our findings of fact and conclusions of law.

Accordingly, it is hereby ORDERED, pursuant to and in accordance with Rules 12 and 56 of the Federal Rules of Civil Procedure, that the complaint of the National League of Cities, et al., as amended December 31, 1974, and the complaint in intervention of the State of California, be, and they hereby are, dismissed with prejudice.

/s/ Harold Leventhal
Harold Leventhal
United States Circuit Judge

/s/ Oliver Gasch
Oliver Gasch
United States District Judge

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

December 31, 1974

APPENDIX B
1974 AMENDMENTS TO FAIR LABOR STANDARDS ACT

Public Law 93-259
93rd Congress, S. 2747
April 8, 1974

An Act

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, to expand the coverage of the Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Fair Labor Standards Amendments of 1974.

SHORT TITLE; REFERENCES TO ACT

SECTION 1. (a) This Act may be cited as the "Fair Labor Standards Amendments of 1974". 29 USC 203 note.

(b) Unless otherwise specified, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the section or other provision amended or repealed is a section or other provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201–219). 52 Stat. 1060.

INCREASE IN MINIMUM WAGE RATE FOR EMPLOYEES COVERED BEFORE 1966

SEC. 2. Section 6(a)(1) is amended to read as follows: 80 Stat. 838.

"(1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;". 29 USC 206.

INCREASE IN MINIMUM WAGE RATE FOR NONAGRICULTURAL EMPLOYEES COVERED IN 1966 AND 1974

SEC. 3. Section 6(b) is amended (1) by inserting ", title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974" after "1966", and (2) by striking out paragraphs (1) through (5) and inserting in lieu thereof the following: 86 Stat. 373. 20 USC 1681.

"(1) not less than $1.90 an hour during the period ending December 31, 1974,

"(2) not less than $2 an hour during the year beginning January 1, 1975,

"(3) not less than $2.20 an hour during the year beginning January 1, 1976, and

"(4) not less than $2.30 an hour after December 31, 1976."

88 STAT. 55

INCREASE IN MINIMUM WAGE RATE FOR AGRICULTURAL EMPLOYEES 88 STAT. 56

SEC. 4. Section 6(a)(5) is amended to read as follows:

"(5) if such employee is employed in agriculture, not less than—

"(A) $1.60 an hour during the period ending December 31, 1974,

"(B) $1.80 an hour during the year beginning January 1, 1975,

"(C) $2 an hour during the year beginning January 1, 1976,

"(D) $2.20 an hour during the year beginning January 1, 1977, and

"(E) $2.30 an hour after December 31, 1977."

INCREASE IN MINIMUM WAGE RATES FOR EMPLOYEES IN PUERTO RICO AND THE VIRGIN ISLANDS

SEC. 5. (a) Section 5 is amended by adding at the end thereof the following new subsection: 63 Stat. 911. 29 USC 205.

31-596 O

Infra.
63 Stat. 915;
75 Stat. 70.
29 USC 208.

"(e) The provisions of this section, section 6(c), and section 8 shall not apply with respect to the minimum wage rate of any employee employed in Puerto Rico or the Virgin Islands (1) by the United States or by the government of the Virgin Islands, (2) by an establishment which is a hotel, motel, or restaurant, or (3) by any other retail or service establishment which employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. The minimum wage rate of such an employee shall be determined under this Act in the same manner as the minimum wage rate for employees employed in a State of the United States is determined under this Act. As used in the preceding sentence, the term 'State' does not include a territory or possession of the United States.".

80 Stat. 839.
29 USC 206.

(b) Effective on the date of the enactment of the Fair Labor Standards Amendments of 1974, subsection (c) of section 6 is amended by striking out paragraphs (2), (3), and (4) and inserting in lieu thereof the following:

"(2) Except as provided in paragraphs (4) and (5), in the case of any employee who is covered by such a wage order on the date of enactment of the Fair Labor Standards Amendments of 1974 and to whom the rate or rates prescribed by subsection (a) or (b) would otherwise apply, the wage rate applicable to such employee shall be increased as follows:

"(A) Effective on the effective date of the Fair Labor Standards Amendments of 1974, the wage order rate applicable to such employee on the day before such date shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

88 STAT. 56
88 STAT. 57

"(B) Effective on the first day of the second and each subsequent year after such date, the highest wage order rate applicable to such employees on the date before such first day shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

In the case of any employee employed in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, to whom the rate or rates prescribed by subsection (a)(5) would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the increases prescribed by this paragraph shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage rate is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

Ante, p. 56

"(3) In the case of any employee employed in Puerto Rico or the Virgin Islands to whom this section is made applicable by the amendments made to this Act by the Fair Labor Standards Amendments of 1974, the Secretary shall, as soon as practicable after the date of enactment of the Fair Labor Standards Amendments of 1974, appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates, which shall be not less than 60 per centum of the otherwise applicable minimum wage rate in effect

under subsection (b) or $1.00 an hour, whichever is greater, to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate recommended by the special industry committee shall (A) be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation, but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1974, and (B) except in the case of employees of the government of Puerto Rico or any political subdivision thereof, be increased in accordance with paragraph (2)(B).

"(4)(A) Notwithstanding paragraph (2)(A) or (3), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(A) or (3) of this subsection, shall, on the effective date of the wage increase under paragraph (2)(A) or of the wage rate recommended under paragraph (3), as the case may be, be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

"(B) Notwithstanding paragraph (2)(B), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(B), shall, on and after the effective date of the first wage increase under paragraph (2)(B), be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher. 88 STAT. 57

"(5) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a) or (b) which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under such subsection shall apply to such employee. 88 STAT. 58

"(6) Each minimum wage rate prescribed by or under paragraph (2) or (3) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 8) fixing a higher minimum wage rate."

(c)(1) The last sentence of section 8(b) is amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon and the following: "except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(c), unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years or in the case of employees of public agencies other appropriate information, in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage."

(2) The third sentence of section 10(a) is amended by inserting after "modify" the following: "(including provision for the payment of an appropriate minimum wage rate)".

(d) Section 8 is amended (1) by striking out "the minimum wage prescribed in paragraph (1) of section 6(a) in each such industry" in the first sentence of subsection (a) and inserting in lieu thereof "the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c)", (2) by striking out "the minimum wage rate prescribed in paragraph (1) of section 6(a)" in the last sentence of subsection (a) and inserting in lieu thereof "the otherwise applicable minimum wage rate in effect under paragraph (1) or (5) of section 6(a)", and (3) by striking out "prescribed in paragraph (1) of section 6(a)" in subsection (c) and inserting in lieu thereof "in effect under paragraph (1) or (5) of section 6(a) (as the case may be)".

Infra.
63 Stat. 915; 69 Stat. 711. 29 USC 208.
Ante, p. 55. Ante, p. 56.
69 Stat. 712; 72 Stat. 948. 29 USC 210.
75 Stat. 70.

FEDERAL AND STATE EMPLOYEES

"Employer."
52 Stat. 1060;
80 Stat. 830.
29 USC 203.

SEC. 6. (a) (1) Section 3(d) is amended to read as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

"Employee."
80 Stat. 832.

(2) Section 3(e) is amended to read as follows:

"(e) (1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.

88 STAT. 58
88 STAT. 59

"(2) In the case of an individual employed by a public agency, such term means—

"(A) any individual employed by the Government of the United States—

"(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

80 Stat. 378.

"(ii) in any executive agency (as defined in section 105 of such title),

"(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

"(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

"(v) in the Library of Congress;

"(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

"(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

"(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

"(ii) who—

"(I) holds a public elective office of that State, political subdivision, or agency,

"(II) is selected by the holder of such an office to be a member of his personal staff,

"(III) is appointed by such an officeholder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

"(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.".

"Industry."
52 Stat. 1060.

(3) Section 3(h) is amended to read as follows:

"(h) 'Industry' means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.".

75 Stat. 65;
86 Stat. 375.

(4) Section 3(r) is amended by inserting "or" at the end of paragraph (2) and by inserting after that paragraph the following new paragraph:

"(3) in connection with the activities of a public agency,".

80 Stat. 831;
86 Stat. 375.

(5) Section 3(s) is amended—

(A) by striking out in the matter preceding paragraph (1) "including employees handling, selling, or otherwise working on goods" and inserting in lieu thereof "or employees handling, selling, or otherwise working on goods or materials",

(B) by striking out "or" at the end of paragraph (3), 80 Stat. 831.

(C) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; or", 29 USC 203.

(D) by adding after paragraph (4) the following new paragraph:

"(5) is an activity of a public agency.", and

(E) by adding after the last sentence the following new sentence: "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.".

(6) Section 3 is amended by adding after subsection (w) the following: "Public agency."

"(x) 'Public agency' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.". 52 Stat. 1060; 39 Stat. 832.

(b) Section 4 is amended by adding at the end thereof the following new subsection: 75 Stat. 66. 29 USC 204.

"(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.". 29 USC 216.

(c)(1)(A) Effective January 1, 1975, section 7 is amended by adding at the end thereof the following new subsection: 52 Stat. 1063; 80 Stat. 842. 29 USC 207.

"(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

"(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

"(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed."

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours". Effective date. Supra.

(C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours". Effective date.

88 STAT. 61

Effective date. Ante, p. 60.

(D) Effective January 1, 1978, such section is amended—

(i) by striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) by striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days".

75 Stat. 71; 80 Stat. 837. 29 USC 213.

(2)(A) Section 13(b) is amended by striking out the period at the end of paragraph (19) and inserting in lieu thereof "; or" and by adding after that paragraph the following new paragraph:

"(20) any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions);".

Effective date. Supra.

(B) Effective January 1, 1975, section 13(b)(20) is amended to read as follows:

"(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or".

Studies. 29 USC 213 note.

(3) The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register.

Supra.

Publication in Federal Register.

(d)(1) The second sentence of section 16(b) is amended to read as follows: "Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.".

52 Stat. 1069; 75 Stat. 74. 29 USC 216.

Statute of limitation, suspension. 61 Stat. 87. 29 USC 255.

(2)(A) Section 6 of the Portal-to-Portal Pay Act of 1947 is amended by striking out the period at the end of paragraph (c) and by inserting in lieu thereof a semicolon and by adding after such paragraph the following:

"(d) with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judg-

Supra.

ment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.".

(B) Section 11 of such Act is amended by striking out "(b)" after "section 16". 61 Stat. 89. 29 USC 260.

DOMESTIC SERVICE WORKERS

SEC. 7. (a) Section 2(a) is amended by inserting at the end the following new sentence: "That Congress further finds that the employment of persons in domestic service in households affects commerce." 52 Stat. 1060; 63 Stat. 910. 29 USC 202.

(b)(1) Section 6 is amended by adding after subsection (e) the following new subsection: 80 Stat. 841. 29 USC 206.

"(f) Any employee—

"(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or 64 Stat. 492; 68 Stat. 1078. 42 USC 409.

"(2) who in any workweek—

"(A) is employed in domestic service in one or more households, and

"(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b)." Ante, p. 55.

(2) Section 7 is amended by adding after the subsection added by section 6(c) of this Act the following new subsection: Ante, p. 60.

"(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a)."

(3) Section 13(a) is amended by adding at the end the following new paragraph: 75 Stat. 71; 80 Stat. 838. 29 USC 213.

"(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

(4) Section 13(b) is amended by adding after the paragraph added by section 6(c) the following new paragraph: Ante, p. 61.

"(21) any employee who is employed in domestic service in a household and who resides in such household; or".

RETAIL AND SERVICE ESTABLISHMENTS

SEC. 8. (a) Effective January 1, 1975, section 13(a)(2) (relating to employees of retail and service establishments) is amended by striking out "$250,000" and inserting in lieu thereof "$225,000". Effective date. 80 Stat. 833.

(b) Effective January 1, 1976, such section is amended by striking out "$225,000" and inserting in lieu thereof "$200,000". Effective date.

(c) Effective January 1, 1977, such section is amended by striking out "or such establishment has an annual dollar volume of sales which is less than $200,000 (exclusive of excise taxes at the retail level which are separately stated)". Effective date.

TOBACCO EMPLOYEES

SEC. 9. (a) Section 7 is amended by adding after the subsection added by section 7(b)(2) of this Act the following: Supra.

88 STAT. 63

"(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

"(1) is employed by such employer—

"(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

"(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

"(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.".

Repeal.

(b) (1) Section 13(a)(14) is repealed.

75 Stat. 71; 80 Stat. 838. 29 USC 213.

(2) Section 13(b) is amended by adding after the paragraph added by section 7(b)(4) of this Act the following new paragraph:

Ante, p. 62.

"(22) any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco; or".

TELEGRAPH AGENCY EMPLOYEES

Repeal.

SEC. 10. (a) Section 13(a)(11) (relating to telegraph agency employees) is repealed.

Supra.

(b)(1) Section 13(b) is amended by adding after the paragraph added by section 9(b)(2) of this Act the following new paragraph:

"(23) any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under paragraph (2) of subsection (a) with respect to whom the provisions of sections 6 and 7 would not otherwise apply, who is engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month, and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

Ante, pp. 55, 60.

Effective date.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(23) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

(3) Effective two years after such date, section 13(b)(23) is repealed. Repeal; effective date. Ante, p. 63.

SEAFOOD CANNING AND PROCESSING EMPLOYEES

SEC. 11. (a) Section 13(b)(4) (relating to fish and seafood processing employees) is amended by inserting "who is" after "employee", and by inserting before the semicolon the following: ", and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed". 75 Stat. 71. 29 USC 213.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(4) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours". Effective date.

(c) Effective two years after such date, section 13(b)(4) is repealed. Repeal; effective date.

NURSING HOME EMPLOYEES

SEC. 12. (a) Section 13(b)(8) (insofar as it relates to nursing home employees) is amended by striking out "any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises" and the remainder of that paragraph. 80 Stat. 833.

(b) Section 7(j) is amended by inserting after "a hospital" the following: "or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises". 80 Stat. 842. 29 USC 207.

HOTEL, MOTEL, AND RESTAURANT EMPLOYEES AND TIPPED EMPLOYEES

SEC. 13. (a) Section 13(b)(8) (insofar as it relates to hotel, motel, and restaurant employees) (as amended by section 12) is amended (1) by striking out "any employee" and inserting in lieu thereof "(A) any employee (other than an employee of a hotel or motel who performs maid or custodial services) who is", (2) by inserting before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed", and (3) by adding after such section the following: Supra.

"(B) any employee of a hotel or motel who performs maid or custodial services and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, subparagraphs (A) and (B) of section 13(b)(8) are each amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-six hours". Effective date.

(c) Effective two years after such date, subparagraph (B) of section 13(b)(8) is amended by striking out "forty-six hours" and inserting in lieu thereof "forty-four hours". Effective date.

(d) Effective three years after such date, subparagraph (B) of section 13(b)(8) is repealed and such section is amended by striking out "(A)". Repeal; effective date.

(e) The last sentence of section 3(m) is amended to read as follows: "In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an 80 Stat. 830. 29 USC 203.

amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.".

SALESMEN, PARTSMEN, AND MECHANICS

80 Stat. 836. 29 USC 213.

SEC. 14. Section 13(b)(10) (relating to salesmen, partsmen, and mechanics) is amended to read as follows:

"(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

"(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or".

FOOD SERVICE ESTABLISHMENT EMPLOYEES

SEC. 15. (a) Section 13(b)(18) (relating to food service and catering employees) is amended by inserting immediately before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed".

Effective date.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(c) Effective two years after such date, such section is repealed.

BOWLING EMPLOYEES

Effective date.

SEC. 16. (a) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(19) (relating to employees of bowling establishments) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(b) Effective two years after such date, such section is repealed.

SUBSTITUTE PARENTS FOR INSTITUTIONALIZED CHILDREN

Ante, p. 63.

SEC. 17. Section 13(b) is amended by inserting after the paragraph added by section 10(b)(1) of this Act the following new paragraph:

"(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

"(A) who are orphans or one of whose natural parents is deceased, or

"(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or".

EMPLOYEES OF CONGLOMERATES

SEC. 18. Section 13 is amended by adding at the end thereof the following: 52 Stat. 1067; 71 Stat. 514. 29 USC 213.

"(g) The exemption from section 6 provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 6 provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) if it were in an enterprise described in section 3(s).". Ante, p. 55. Ante, p. 59.

SEASONAL INDUSTRY EMPLOYEES

SEC. 19. (a) Section 7(c) and 7(d) are each amended— 80 Stat. 835. 29 USC 207.

(1) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks", and

(2) by striking out "fourteen workweeks" and inserting in lieu thereof "ten workweeks".

(b) Section 7(c) is amended by striking out "fifty hours" and inserting in lieu thereof "forty-eight hours".

(c) Effective January 1, 1975, sections 7(c) and 7(d) are each amended— Effective date.

(1) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks", and

(2) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks".

(d) Effective January 1, 1976, sections 7(c) and 7(d) are each amended— Effective date.

(1) by striking out "five workweeks" and inserting in lieu thereof "three workweeks", and

(2) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks".

(e) Effective December 31, 1976, sections 7(c) and 7(d) are repealed. Repeal; effective date.

COTTON GINNING AND SUGAR PROCESSING EMPLOYEES

SEC. 20. (a) Section 13(b)(15) is amended to read as follows: 80 Stat. 835.

"(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or".

(b)(1) Section 13(b) is amended by adding after paragraph (24) the following new paragraph: Ante, p. 65.

"(25) any employee who is engaged in ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(25) is amended—

Ante, p. 66. (A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(E) forty-four hours in any other workweek in that year,".

Effective date. (3) Effective January 1, 1976, section 13(b)(25) is amended—

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty";

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

Ante, p. 66. (c)(1) Section 13(b) is amended by adding after paragraph (25) the following new paragraph:

"(26) any employee who is engaged in the processing of sugar beets, sugar beet molasses, or sugarcane into sugar (other than refined sugar) or syrup and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(26) is amended—

(A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(E) forty-four hours in any other workweek in that year,".

(3) Effective January 1, 1976, section 13(b)(26) is amended— Effective date.

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty"; Ante, p. 67.

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

LOCAL TRANSIT EMPLOYEES

SEC. 21. (a) Section 7 is amended by adding after the subsection added by section 9(a) of this Act the following new subsection: Ante, p. 62.

"(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment."

(b)(1) Section 13(b)(7) (relating to employees of street, suburban or interurban electric railways, or local trolley or motorbus carriers) is amended by striking out ", if the rates and services of such railway or carrier are subject to regulation by a State or local agency" and inserting in lieu thereof the following: "(regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed". 80 Stat. 836. 29 USC 213.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours". Effective date.

(3) Effective two years after such date, such section is repealed. Repeal; effective date.

COTTON AND SUGAR SERVICES EMPLOYEES

SEC. 22. Section 13 is amended by adding after the subsection added by section 18 the following: Ante, p. 66.

"(h) The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who— Supra.

"(1) is employed by such employer—

"(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

"(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

"(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

"(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 7.".

Ante, p. 68.

OTHER EXEMPTIONS

Repeal. 80 Stat. 836. 29 USC 213.

SEC. 23. (a)(1) Section 13(a)(9) (relating to motion picture theater employees) is repealed.

(2) Section 13(b) is amended by adding after paragraph (26) the following new paragraph:

Ante, p. 67.

"(27) any employee employed by an establishment which is a motion picture theater; or".

Repeal. 75 Stat. 71; 80 Stat. 838.

(b)(1) Section 13(a)(13) (relating to small logging crews) is repealed.

(2) Section 13(b) is amended by adding after paragraph (27) the following new paragraph:

"(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.".

(c) Section 13(b)(2) (insofar as it relates to pipeline employees) is amended by inserting after "employer" the following: "engaged in the operation of a common carrier by rail and".

EMPLOYMENT OF STUDENTS

80 Stat. 842. 29 USC 214.

SEC. 24. (a) Section 14 is amended by striking out subsections (a), (b), and (c) and inserting in lieu thereof the following:

"SEC. 14. (a) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

Ante, p. 55.

"(b)(1)(A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special

certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

Ante, p. 56.

80 Stat. 839.
29 USC 206.

"(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed—

"(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this Act before the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

"(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater;

"(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,

"(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater; or

"(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establish-

ment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.

"Student hours of employment." For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term 'student hours of employment' means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

"(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 6(a)(5) or not less than $1.30 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

Ante, p. 56.

80 Stat. 839. 29 USC 206.

"(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

Regulations.

"(4)(A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

"(B) If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed four, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed four—

"(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

"(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing students under certificates issued under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

"(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate."

(b) Section 14 is further amended by redesignating subsection (d) as subsection (c) and by adding at the end the following new subsection: Ante, p. 69.

"(d) The Secretary may by regulation or order provide that sections 6 and 7 shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws." Ante, pp. 60, 68.

(c) Section 4(d) is amended by adding at the end thereof the following new sentence: "Such report shall also include a summary of the special certificates issued under section 14(b)." 52 Stat. 1062; 69 Stat. 711. 29 USC 204. Ante, p. 69.

CHILD LABOR

SEC. 25. (a) Section 12 (relating to child labor) is amended by adding at the end thereof the following new subsection: 52 Stat. 1067; 63 Stat. 917. 29 USC 212.

"(d) In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age."

(b) Section 13(c)(1) (relating to child labor in agriculture) is amended to read as follows: 80 Stat. 834. 29 USC 213.

"(c)(1) Except as provided in paragraph (2), the provisions of section 12 relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee— Supra.

"(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of section 13(a)(6)(A)) required to be paid at the wage rate prescribed by section 6(a)(5), 80 Stat. 833. Ante, p. 56.

"(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

"(C) is fourteen years of age or older.".

(c) Section 16 is amended by adding at the end thereof the following new subsection: 52 Stat. 1069; 71 Stat. 514. 29 USC 216.

"(e) Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness Penalty.

of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

"(1) deducted from any sums owing by the United States to the person charged;

"(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

"(3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.

52 Stat. 1068. 29 USC 215.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States

80 Stat. 384.

Code, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled 'An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof,

48 Stat. 582; 53 Stat. 581.

and for other purposes' (29 U.S.C. 9a)."

SUITS BY SECRETARY FOR BACK WAGES

63 Stat. 919; 80 Stat. 844. 29 USC 216.

SEC. 26. The first three sentences of section 16(c) are amended to read as follows: "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation

Ante, pp. 55, 68.

owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary."

ECONOMIC EFFECTS STUDIES

Ante, p. 72.

SEC. 27. Section 4(d) is amended by

(1) inserting "(1)" immediately after "(d)",

(2) inserting in the second sentence after "minimum wages" the following: "and overtime coverage"; and

(3) by adding at the end thereof the following new paragraphs:

"(2) The Secretary shall conduct studies on the justification or lack

Ante, p. 72.

thereof for each of the special exemptions set forth in section 13 of this Act, and the extent to which such exemptions apply to employees

Ante, p. 66.

of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such

employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976. Report to Congress.

"(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 14 of this Act.". Reports to Congress. Ante, p. 69.

AGE DISCRIMINATION

SEC. 28. (a)(1) The first sentence of section 11(b) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630(b)) is amended by striking out "twenty-five" and inserting in lieu thereof "twenty". 81 Stat. 605.

(2) The second sentence of section 11(b) of such Act is amended to read as follows: "The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.".

(3) Section 11(c) of such Act is amended by striking out ", or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance".

(4) Section 11(f) of such Act is amended to read as follows:

"(f) The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.". "Employee."

(5) Section 16 of such Act is amended by striking out "$3,000,000" and inserting in lieu thereof "$5,000,000". 29 USC 634.

(b)(1) The Age Discrimination in Employment Act of 1967 is amended by redesignating sections 15 and 16, and all references thereto, as sections 16 and 17, respectively.

(2) The Age Discrimination in Employment Act of 1967 is further amended by adding immediately after section 14 the following new section: 29 USC 633.

"NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

"SEC. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in 29 USC 633a.

88 STAT. 75

80 Stat. 378.

section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement.

"(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

Reports.

"(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

"(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

"(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Civil actions.

"(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

"(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

"(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law."

EFFECTIVE DATE

SEC. 29. (a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.

Approved April 8, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-913 accompanying H.R. 12435 (Comm. on Education and Labor) and No. 93-953 (Comm. of Conference).
SENATE REPORT No. 93-690 (Comm. on Labor and Public Welfare).
CONGRESSIONAL RECORD, Vol 120 (1974):
Feb. 28, Mar. 5, 7, considered and passed Senate.
Mar. 20, considered and passed House, amended, in lieu of H.R. 12435.
Mar. 28, Senate and House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 15:
Apr. 8, Presidential statement.

APPENDIX C

POLICE AND FIREFIGHTER REGULATIONS

41112

Title 29—Labor

CHAPTER V—WAGE AND HOUR DIVISION

PART 553—EMPLOYEES OF PUBLIC AGENCIES ENGAGED IN FIRE PROTECTION OR LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

The Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. 201 et seq.), as amended by the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259, 88 Stat. 55), extends the Act's minimum wage, overtime, equal pay and recordkeeping requirements to most public agency employees. In the case of certain public agencies (i.e., those having employees engaged in fire protection and law enforcement activities, including security personnel in correctional institutions), application of the Act's overtime provisions was delayed until January 1, 1975. This delay was accomplished by new section 13(b)(20) which provided an interim overtime exemption for all such employees regardless of the size of the employing public agency. Effective January 1, 1975, however, the section 13(b)(20) exemption will, by its express terms, be limited to fire protection and law enforcement employees who are employed by a public agency which has, during the workweek, less than five employees so engaged. For larger public agencies having such employees, the Act provides, in section 7(k), a partial overtime exemption which, by its express terms, becomes effective January 1, 1975. These two sections are self-executing and do not depend upon administrative rules or regulations.

On May 17, 1974, however, the Acting Administrator of the Wage and Hour Division, United States Department of Labor, recognizing the need for the issuance of guidelines for interpreting the new and unique overtime exemptions relating to these public agency employees, published in the FEDERAL REGISTER (39 FR 17596) notice of a hearing scheduled for June 3, 1974, to obtain evidence and receive comments regarding the duties, customs, practices, and working conditions of such employees.

The public hearing, which was held as scheduled on June 3, 1974, lasted two full days, during which time 11 individuals and organizations testified and 143 related exhibits were made a part of the hearing record.

Thereafter, on October 30, 1974, the Administrator of the Wage and Hour Division, after reviewing the hearing record in light of the express language and legislative history of the sections 7(k) and 13(b)(20) exemptions, issued proposed regulations (29 CFR Part 553), defining "employees engaged in fire protection and law enforcement activities" and prescribing tentative guidelines for determining hours worked, the work period and tour of duty, and caused the proposed regulations to be published in the FEDERAL REGISTER (39 FR 38663).

The proposed regulations as thus published invited interested persons to submit written comments, suggestions, data or arguments in regard to them on or before December 2, 1974, and, in addition, scheduled a further public hearing for November 18, 1974. In order to give as wide publicity as possible to all affected public agencies, copies of the proposed regulations were mailed directly to the governors of all 50 States, with informational copies going to every State Attorney General and State Fire Marshal, each of whom was requested to bring the proposed regulations to the attention of interested State and local government officials. In addition, approximately 800 copies of the proposed regulations were mailed to individuals, labor organizations, employer organizations, State and local government officials and agencies, as well as to members of the United States Congress.

The further public hearing, announced in the FEDERAL REGISTER on November 1, 1974, was held in Washington, D.C., on November 18-21, 1974, for the purpose of receiving oral suggestions, proposals and comments on the proposed Part 553 from interested persons. Thirty-eight individuals and organizations testified at this second hearing and approximately 300 related exhibits were made a part of the hearing record, which, along with the June 1974 hearing record, is on file with the Chief, Branch of Wage-Hour Standards, Wage and Hour Division, United States Department of Labor, Room 1107, 711 14th Street, NW., Washington, D.C. 20210.

A thorough analysis of all testimony and written material received in connection with the November 1974 hearing has been made, again in conjunction with the express statutory language and pertinent legislative history. This analysis indicated the desirability of making certain changes and additions in 29 CFR Part 553, as proposed, as well as adding new sections to it for the purpose of calling attention to the existence of other Fair Labor Standards Act exemptions which might be available to public agencies affected by new Part 553, as well as to the Act's recordkeeping requirements which are applicable to all covered employers. Other changes in proposed Part 553 expand the term "any employee in fire protection activities" to include employees of forestry conservation agencies who spot forest or brush fires and help in their extinguishment along with other individuals who are called upon to assist during periods of emergencies and high fire danger. Similarly, the term "any employee in law enforcement activities" has been expanded to include "border patrol agents," and modified to indicate that fish and game wardens and criminal investigative agents assigned to such offices as those of a district attorney may be engaged in such activities, depending upon the particular facts. Both of the foregoing terms have been further expanded to indicate that bona fide fire protection and law enforcement employees will not lose their exempt status when they perform "support activities" on a rotational assignment for training or familiarization purposes, or for other reasons due to illness, injury or infirmity; the requirement that law enforcement officers be sworn has been deleted, as has the requirement for completed training. The sections dealing with training (§ 553.7), secondary and joint employment (§ 553.9), volunteers (§ 553.11) and "comp time" (formerly § 553.17 and now § 553.19) have been further clarified, and a new section has been added to explain the general rules for determining compensable hours of work. Numerous other minor changes have been made but they are not discussed in this preamble since they can be readily discerned by comparing the proposed Part 553 with the version now to be issued. It was suggested that changes be made in the current definitions of executive, administrative or professional employees, and these suggestions, although not germane to the section 7(k) or 13(b)(20) exemptions, will be considered when 29 CFR Part 541 is reissued. The arguments criticizing the subsections dealing with mutual aid agreements (§ 553.10) and sleep and meal time (§ 553.15) were carefully considered. No substantive changes were made, however, because these subsections restate legal requirements which cannot be waived or altered by any official of the Department of Labor. Numerous other arguments were directed to the inflationary or cost impact of Part 553. Whatever impact there is, however, is the result of the 1974 Amendments, which, after Congress had considered these same arguments, expressly extended overtime protection to employees engaged in fire protection and law enforcement activities. Moreover, the extent to which the Act will have a cost impact on such public agencies depends, in large part, upon which of the several alternatives open to them the State and local jurisdictions elect to use. Assuming that all jurisdictions elect section 7(k), without any modification in the present tours of duty, the estimated cost impact of the extension of the Act's overtime requirement for calendar year 1975 is estimated to be $27 million for all such jurisdictions.

In issuing Part 553, it is recognized that the Secretary of Labor has been directed by the 1974 Amendments to conduct a study in calendar year 1976 of the hours ordinarily worked by fire protection and law enforcement employees, and to publish the results thereof in the FEDERAL REGISTER (88 Stat. 61). Now, therefore, pending completion of such study or studies, the final version of Part 553 is hereby adopted on an interim basis to read as follows:

Sec.
553.1 Statutory provisions.
553.2 Purpose and scope.

EMPLOYEES ENGAGED IN FIRE PROTECTION AND LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

Sec.
553.3 Fire protection activities.
553.4 Law enforcement activities.
553.5 20-percent limitation on nonexempt work.
553.6 Public agency employees engaged in both fire protection and law enforcement activities.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 88 Stat. 60; (29 U.S.C. 201-219).

§ 553.1 Statutory provisions.

(a) In extending coverage to certain public agency employees, the Fair Labor Standards Act (hereafter the Act), by virtue of section 13(b)(20), provided a complete overtime exemption for any employee of a public agency who is engaged in fire protection or law enforcement activities (including security personnel in correctional institutions) during the period between the effective date of the 1974 Amendments (May 1, 1974) to and through December 31, 1974. Beginning January 1, 1975, however, this complete overtime exemption may be claimed only with respect to "any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than five employees in fire protection or law enforcement activities, as the case may be."

(b) Beginning January 1, 1975, public agencies not qualifying for the complete overtime exemption provided in section 13(b)(20) will be required to pay overtime compensation to their fire protection and law enforcement employees on a workweek basis as required by section 7(a) of the Act unless they elect to take advantage of the partial overtime exemption provided in section 7(k) which applies, not on a workweek basis, but on a work period basis, as follows:

• • • No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) In a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

(2) In the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days, compensation at a rate of not less than one and one-half times the regular rate at which he is employed.

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours".

(C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours".

(D) Effective January 1, 1978, such section is amended—

(i) By striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) By striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days • • •.

(c) These statutory provisions, as is apparent from their terms, are limited to public agencies and do not apply to any private organization engaged in furnishing fire protection or law enforcement services, and this is so even if the services are provided under contract with a public agency.

(d) In determining whether a public agency qualifies for the section 13(b)(20) exemption after January 1, 1975, the fire protection and law enforcement activ-

ities are considered separately. Thus, for example, if a public agency employs less than five employees in fire protection activities but five or more employees in law enforcement activities (including security personnel in a correctional institution), it may claim the exemption for the fire protection employees but not for the law enforcement employees. No distinction is made between full-time and part-time employees, and both must be counted in determining whether the exemption applies. Bona fide volunteers may be excluded. This determination of the number of employees engaged in each of the two named activities is made on a workweek basis.

(e) In addition to the special exemptions provided in sections 7(k) and 13(b)(20), which are the subject matter of Parts 53, the Act provides other exemptions which, depending upon the facts, may be claimed for certain employees in lieu of such special exemptions. For example, section 13(a)(1) provides a complete exemption for any employee employed in a bona fide executive, administrative or professional capacity, as those terms are defined and delimited in 29 CFR Part 541, and that exemption may be claimed for any fire protection or law enforcement employee who meets all of the tests specified in Part 541 relating to duties, responsibilities and salary. Thus, although police captains are clearly employees engaged in law enforcement activities, they may also, depending upon the facts, qualify for the section 13(a)(1) exemption, in which event the employing agency may claim that exemption for such employees in lieu of the section 7(k) or 13(b)(20) exemption. Similarly, certain criminal investigative agents may qualify as administrative employees, in which event the employing agency may elect which of the applicable exemptions it will claim for such employees. In no event, however will the election to take the section 13(a)(1) exemption for an employee who qualifies for it result in excluding that employee from the count that must be made under § 553.1(d) in determining whether the employer may claim for its other employees the section 13(b)(20) exemption.

§ 553.2 Purpose and scope.

The purpose of Part 553 is to define the pertinent statutory terms used in sections 7(k) and 13(b)(20) and to set forth the rules by which the Administrator of the Wage and Hour Division will determine the compensable hours of work, tour of duty and work period in applying the section 7(k) exemption.

Employees Engaged in Fire Protection and Law Enforcement Activities (Including Security Personnel in Correctional Institutions)

§ 553.3 Fire protection activities.

(a) As used in section 7(k) and 13(b)(20) of the Act, the term "any employee in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district and who, pursuant to the extent required by State statute or local ordinance, has been trained and has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type and (2) who performs activities which are required for, and directly concerned with the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent" employee, or of their particular speciality or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (d) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.7.

(b) The term "any employee in fire protection activities" also refers to employees who work for forest conservation agencies or other public agencies charged with forest fire fighting responsibilities, and who direct or engage in (1) fire spotting or lookout activities, or (2) fighting fires on the fireline or from aircraft or (3) operating tank trucks, bulldozers and tractors for the purpose of clearing fire

breaks. The term includes all persons so engaged, regardless of their status as full time or part time agency employees or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training. It does not include such agency employees as biologists and office personnel who do not fight fires on a regular basis, except, of course, during those emergency situations when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraph (b) (1), (2) and (3) of this section. Additionally, for those persons who actually engage in these fire protection activities, the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads, would also be within the section 7(k) or 13(b)(20) exemption.

(c) Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

§ 553.4 Law enforcement activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee in law enforcement activities" refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power of arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics. Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "trainee," "probationary" or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See § 553.8.

(b) Typically, employees engaged in law enforcement activities include city police; district or local police; sheriffs, under sheriffs or deputy sheriffs who are regularly employed and paid as such; court marshals or deputy marshals; constables and deputy constables who are regularly employed and paid as such; border control agents; state troopers and highway patrol officers. Other agency employees not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, fish and game wardens or criminal investigative agents assigned to the office of a district attorney, an attorney general, a solicitor general or any other law enforcement agency concerned with keeping public peace and order and protecting life and property.

(c) Some of the law enforcement officers listed above, including but not limited to certain sheriffs, will not be covered by the Act if they are elected officials and if they are not subject to the civil service laws of their particular State or local jurisdition. Section 3(e)(2)(C) of the Act excludes from its definition of "employee" elected officials and their personal staff under the conditions therein prescribed. 29 U.S.C. 203(e)(2)(C). Such individuals, therefore, need not be counted in determining whether the public agency in question has less than five employees engaged in law en-

forcement activities for purposes of claiming the section 13(b)(20) exemption.

(d) Employees who do not meet each of the three tests described above are not engaged in "law enforcement activities," as that term is used in sections 7(k) and 13(b)(20). Such employees would typically include (1) building inspectors (other than those defined in § 553.3(a)), (2) health inspectors, (3) animal control personnel, (4) sanitarians, (5) civilian traffic employes who direct vehicular and pedestrian traffic at specified intersections or other control points, (6) civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices, (7) wage and hour compliance officers, (8) equal employment opportunity compliance officers, (9) tax compliance officers, (10) coal mining inspectors, and (11) building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(e) The term "any employee in law enforcement activities" also includes, by express reference, "security personnel in correctional institutions." A correctional institution is any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. Typically, such facilities include penitentiaries, prisons, prison farms, county, city and village jails, precinct house lockups and reformatories. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank (e.g., warden, assistant warden or guard) or of their status as "trainee," "probationary," or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(f) Not included in the term "employee in law enforcement activities" are the so-called "civilian" employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

§ 553.5 20-percent limitation on nonexempt work.

Employees engaged in fire protection or law enforcement activities, as described in §§ 553.3 and 553.4, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their firefighting activities. For example, those who work for forest conservation agencies may, during slack periods, plant trees and perform other conservation activities. The performance of such nonexempt work will not defeat either the section 7(k) or 13(b)(20) exemption unless it exceeds 20 percent of the total hours worked by the particular employee during the applicable work period.

§ 553.6 Public agency employees engaged in both fire protection and law enforcement activities.

Some public agencies have employees (sometimes referred to as public safety officers) who engage in both law enforcement activities and fire protection activities, depending upon the agency needs at the time. This dual assignment would not defeat either the section 7(k) or 13(b)(20) exemption, provided that each of the activities performed meets the appropriate tests set forth in §§ 553.3 (a), 553.4(a) and (e). This is so regardless of how the employees divide their time between the two types of activities. If, however, either the fire protection or law enforcement activities do not meet the tests of § 553.3(a) or §§ 553.4(a) and (e), and if such nonqualifying activities, standing alone or in conjunction with

some other nonexempt activity, exceed 20 percent of the employee's total hours of work in the work period, neither exemption would apply.

§ 553.7 Employees attending training facilities.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing public agency, does not constitute engagement in exempt activities, unless the employee in question meets all the tests described in § 553.3(a) or § 553.4(a), as the case may be, in which event such training or further training would be incidental to, and thus part of, the employee's fire protection or law enforcement activities. Only the time spent in actual training or retraining constitutes compensable hours of work. All other time, such as that spent in studying and other personal pursuits, is not compensable hours of work even in situations where the employee is confined to campus or to barracks 24 hours a day. See § 553.14. Attendance at training facilities and schools, which is not required but which may incidentally improve the employee's performance of his or her regular tasks or prepare the employee for further advancement, need not be counted as working time even though the public agency may pay for all or part of such training.

§ 553.8 Ambulance and rescue service employees.

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received special training in the rescue of fire and accident victims or firefighters injured in the performance of their firefighting duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, riots, natural disasters and accidents.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it was not the purpose of those Amendments to deny the Act's protection of previously covered employees. This would include employees of public agencies engaged in the operation of a hospital; an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions; a school for mentally or physically handicapped or gifted children; an elementary or secondary school; an institution of higher education; a street, suburban, or interurban electric railway; or local trolley or motor bus carrier.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency.

§ 553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.

(a) If an employee regularly engaged in exempt fire protection or law enforcement activities also works for another department or agency of the same State or political subdivision, such employee will lose the exemption if the other work is unrelated to fire protection or law enforcement activities. For example, if a city police officer also works as a clerk in the city health department, which is clearly nonexempt work, the city could not claim the section 7(k) exemption for such employee and would have to pay overtime compensation for all hours worked for the two agencies in excess of 40 per week. See 29 CFR 778.117 for an explanation of how overtime compensation is computed in such a situation. If, however, such employee's other job for the city is also exempt work, as, for example lifeguarding at a seasonally operated city beach which work is exempt from both the Act's minimum wage and overtime provisions by virtue of section 13(a)(3), the city would be entitled to claim the lesser of the two exemptions which, in the example given would be the section 7(k) exemption, and it would have to pay overtime compensation only for the combined hours (if any) which are in excess of the employee's tour of duty.

(b) These same principles also apply where the fire protection or law enforce-

ment employee works for another public or private employer who, although entirely separate from the employee's regular employer, is nonetheless a joint employer with the fire protection or law enforcement agency. Usually, of course, working for a separate employer does not affect the employee's status as an employee engaged in fire protection or law enforcement activities or the employing agency's right to claim the section 7(k) or 13(b)(20) exemption. In some limited circumstances, however, the relationship between the fire protection or law enforcement agency and the other employer is so closely related that they must be treated as joint employers. Such a joint employment relationship exists where the work done by the employee simultaneously benefits both employers and where it is done pursuant to an arrangement between the employers to share or interchange employees, or where one employer acts directly or indirectly in the interest of the other employer in relation to the same employee, or where the employers are so closely associated that they share control of the employee, directly or indirectly. See 29 CFR Part 791.

(c) To illustrate, if a police officer independently finds after-hours employment as a repair mechanic in a gas station or as a security guard in a department store, there would be no joint employment relationship between the police department and the second employer. This would be so even if the police officer wore his or her uniform at the second job and even if the police department engaged in such "brokering" functions as maintaining a list of officers available for extra outside work and referring employment requests to such officers. Nor would it matter whether the police department also established a wage scale for such extra outside work and approved it so as to avoid any conflict of interest problem. On the other hand, if the second employer is required by local ordinance or otherwise to hire a police officer to control crowds at a stadium or to direct traffic at a sports arena or during a parade, such employment benefits both the police department and the second employer, and, since both act in the interest of the other, a joint employment relationship is created.

§ 553.10 Mutual aid.

If employees engaged in fire protection activities voluntarily respond to a call for aid from a neighboring jurisdiction, they are volunteers in rendering such aid and their employer is not required to compensate them for the time spent in the neighboring jurisdiction. See § 553.10. If, however, the employees respond to such a call because their employer has a mutual aid agreement with a neighboring jurisdiction or if the employees are directed by their agency to respond, all hours worked by these employees in rendering such aid must be added to their regular hours of work for purposes of the section 7(k) exemption.

§ 553.11 Fire protection and law enforcement volunteers.

(a) Individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis and as a public service, are not considered to be employees of the public agency which receives their services. Such individuals do not lose their volunteer status because their tuition may have been paid or they may have been reimbursed for attending special classes or other training to learn about fire protection or law enforcement or because they are reimbursed for approximate out-of-pocket expenses incurred incidental to answering a call or to the cost of replacing clothing or other items of equipment which may have been consumed or damaged in responding to a call. Nor is the volunteer status of such individuals lost where the only material recognition afforded them is the holding of an annual party, the furnishing of a uniform and related equipment, or their inclusion in a retirement or relief fund, a workman's compensation plan or a life or health insurance program, or the payment of a nominal sum on a per call or other basis which may either be retained, in whole or in part, by the volunteer or donated to finance various social activities conducted by or under the auspices of the agency. Payments which average $2.50 per call will be considered nominal. Payments in excess of this amount may also qualify as nominal, depending upon the distances which must be traveled and other expenses incurred by the volunteer. For purposes of this paragraph, it is not necessary for the

agency to maintain an exact record of expenses.

(b) Where, however, individuals engaged in fire protection or law enforcement activities receive more than a nominal amount or payment on a basis which does not reasonably approximate the expenses incurred by them, they are employees rather than volunteers and must be paid in accordance with the Act's requirements.

(c) Volunteers engaged in fire protection or law enforcement activities may include individuals who are employed in some other capacity by the same public agency. For example, a civilian PBX operator of a public agency engaged in law enforcement activities may also be a volunteer member of the local police reserve force. Similarly, an employee of a village Department of Parks and Recreation may serve as a volunteer firefighter in his or her local community.

(d) Police officers or firefighters of one jurisdiction may engage in fire protection or law enforcement activities on a voluntary basis for another jurisdiction where there is no mutual aid agreement or other relationship between the two jurisdictions. Such employees cannot, however, perform fire protection or law enforcement activities on a voluntary basis for their own agency, although they can engage in other activities not directly related to these primary functions. For example, a paramedic employed by a city fire department could volunteer to give a course in first aid at the city hospital and a police officer could volunteer to counsel young juveniles who are members of a boy's club or other similar organizations.

RULES FOR DETERMINING THE TOUR OF DUTY, WORK PERIOD AND COMPENSABLE HOURS OF WORK

§ 553.12 General statement.

(a) In extending the Act's coverage to public agency employees engaged in fire protection and law enforcement activities, Congress, recognizing the uniqueness of these activities, established section 7(k) which permits the computation of hours worked on the basis of a work period (which can be longer than a workweek) and which bases the overtime requirements on a work period concept. In adding this provision, Congress made it clear that some adjustment would have to be made in the usual rules for determining compensable hours of work (Conf. Rept. 93-953, p. 27) and where the employer elects section 7(k), these rules must be used for purpose of both the Act's minimum wage and overtime requirements.

(b) If, however, any public agency chooses not to claim the partial overtime exemption provided in section 7(k), but elects to pay overtime compensation as required by section 7(a), it need not concern itself with the "tour of duty" or "work period" discussion which follows or with the special rules relating to the determination of what constitutes compensable hours of work since, in that event, overtime would be payable on a workweek basis and the regular method of computing "hours worked" as set forth in 29 CFR Part 785 would apply. Such an agency would not, however, be able to take advantage of the special provisions of Part 553 relating to the balancing of hours over an entire work period, trading time and early relief.

§ 553.13 Tour of duty.

The term "tour of duty," as used in section 7(k), means the period during which an employee is on duty. It may be a scheduled or unscheduled period. Scheduled periods refer to shifts, i.e., the period of time which elapses between scheduled arrival and departure times, or to scheduled periods outside the shift, as in the case of a special detail involving crowd control during a parade or other such event. Unscheduled periods refer to time spent in court by police officers, time spent handling emergency situations, or time spent after a shift in order to complete required work. When an employee actually works fewer hours than those scheduled, the employee's tour of duty is reduced accordingly. Nothing in section 7(k) precludes employers (acting pursuant to collective bargaining agreements or in accordance with their own authority) from establishing new tours of duty for their employees, provided, however, that the change is intended to be permanent at the time that it is made.

§ 553.14 General rules for determining compensable hours of work.

(a) Compensable hours of work generally include all of that time during which an employee is on duty or on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such hours thus include all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related and indispensable to its performance, such as attending roll call, writing up and completing reports or tickets, and washing and re-racking fire hose. It also includes time which an employee spends in attending required training classes. See § 553.7. Time spent away from the employer's premises under conditions so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. For example, a police officer who is required to remain at home until summoned to testify in a pending court case and who must be in a constant state of instant readiness, is engaged in compensable hours of work. On the other hand, employees who are confined to barracks while attending police academies are not on duty during those times when they are not in class or at a training session since they are free to use such time for personal pursuits. This would also be true in a forest fire situation where employees, who have been relieved from duty and transported away from the fire line, are, for all practical purposes, required to remain at the fire camp because their homes are too far distant for commuting purposes. Also, a police officer who has completed his or her tour of duty but who is given a patrol car to drive home and use on private business, is not working simply because the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls would be compensable, except in those instances where it is miniscule and cannot, as an administrative matter, be recorded for payroll purposes.

(b) Additional examples of compensable and noncompensable hours of work are set forth in 29 CFR Part 785 which is fully applicable to employees for whom the section 7(k) exemption is claimed except to the extent that it has been modified below in § 553.15.

§ 553.15 Sleeping and meal time as compensable hours of work.

(a) Where the employer has elected to use the section 7(k) exemption, sleep and meal time cannot be excluded from compensable hours of work where (1) the employee is on duty for less than 24 hours, which is the general rule applicable to all employees (29 CFR 785.21) and (2) where the employee is on duty for exactly 24 hours, which represents a departure from 29 CFR 785.21.

(b) Sleep and meal time may, however, be excluded in the case of fire protection or law enforcement employees who are on duty for more than 24 hours, but only if there is an express or implied agreement between the employer and the employee to exclude such time. In the absence of any such agreement, sleep and meal time will constitute hours of work. If, on the other hand, the agreement provides for the exclusion of sleep time the amount of such time shall, in no event, exceed 8 hours, in a 24-hour period, which is also the amount of time permitted when the agreement fails to specify the duration of sleep time. If such sleep time is interrupted by a call to duty, the interruption must be counted as hours worked, and if the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes, means at least 5 hours), the entire time must be counted as hours of work.

§ 553.16 Work period.

(a) As used in section 7(k), the term "work period" refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the pay period or with a particular day of the week or hour of the day. Once the beginning time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within that period. The beginning of the work period, may, of course, be changed, provided that the change is intended to be permanent at the time that it is made.

(b) An employer may have one work period applicable to all of its employees, or different work periods for different employees or groups of employees. Prior

approval from the Wage and Hour Division is not required. The employer must, however, make some notation in its records which shows the work period for each employee and which indicates the length of that period and its starting time.

(c) For those employees who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required until the ratio between the number of days in the work period and the hours worked during such work period exceeds the ratio between a work period of 28 days and 240 hours, at which point all additional hours are paid for at one and one-half times the employee's regular rate of pay.

(d) The ratio of 240 hours to 28 days is 8.57143 hours per day (8.57 rounded). Accordingly, overtime compensation at a rate of not less than one and one-half times the employee's regular rate of pay must be paid during calendar year 1975 for all hours worked in excess of the following maximum hours standards:

Work period (days):	*Maximum hours standard*
28	240
27	231
26	223
25	214
24	206
23	197
22	189
21	180
20	171
19	163
18	154
17	146
16	137
15	129
14	120
13	111
12	103
11	94
10	86
9	77
8	69
7	60

§ 553.17 Early relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift or tour of duty prior to the scheduled starting time. Such early relief may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer the time involved must be added to the employee's tour of duty and treated as compensable time.

§ 553.18 Trading time.

Another common practice or agreement among employees engaged in fire protection or law enforcement activities is that of substituting for one another on regularly scheduled tours of duty (or for some part thereof) in order to permit an employee to absent himself or herself from work to attend to purely personal pursuits. This practice is commonly referred to as "trading time." Although the usual rules for determining hours of work would require that the additional hours worked by the substituting employee be counted in computing his or her total hours of work, the legislative history makes it clear that Congress intended the continued use of "trading time" "both within the tour of duty cycle * * * and from one cycle to another within the calendar or fiscal year without the employer being subject to [additional overtime compensation] by virtue of the voluntary trading of time by employees" (Congressional Record, March 28, 1974, Page S 4692). Accordingly, the practice of "trading time" will be deemed to have no effect on hours of work if the following criteria are met: (a) The trading of time is done voluntarily by the employees participating in the program and not at the behest of the employer; (b) the reason for trading time is due, not to the employer's business operations, but to the employee's desire or need to attend to personal matter; (c) a record is maintained by the employer of all time traded by his employees; (d) the period during which time is traded and paid back does not exceed 12 months.

§ 553.19 Time off for excess hours or so-called "comp time."

(a) As a general rule, all overtime hours must be paid for in cash and not in time off. Section 7(k) creates a partial exception to this general rule by allowing employers to balance the employee's

hours over a work period, which, as indicated in § 553.16, may be longer than a workweek, and to pay the overtime compensation required by the Act only if the employee's hours exceed the total number of hours established by section 7(k) for that particular work period. Thus, for example, if the duration of the employee's work period is 28 consecutive days, and he or she works 80 hours in the first week, but only 60 in the second week and 50 in each of the next 2 weeks, no additional overtime compensation would be required, since the total number of hours worked does not exceed 240. Of course, there might be a State law requiring overtime compensation at some earlier point (e.g., for any hours worked in excess of 40 in a week), but that obligation could be met with "comp time," if comp time is permissible under State law and if the wages paid to the employee for all hours worked during the entire 28-day tour of duty equal at least the minimum wage set forth in section 6(b) of the Act (29 U.S.C. 206(b)). Similarly, an employee whose work period is 1 week could be paid in "comp time" for all excess hours up to 60, provided that comp time is a permissible form of payment under State law and provided, also, that the wages paid to the employee equal at least the statutory minimum wage. Such "comp time" could be taken at any time authorized by state law or local ordinance.

(b) If the employee in either of the examples given above works more than the stated number of hours for a 7-day or 28-day work period, overtime compensation must be paid at one and one-half times the employee's regular rate. In computing the employee's regular rate, the cash equivalent of any comp time must be included. See also § 553.20.

§ 553.20 The "regular rate".

The rules for computing an employee's "regular rate," for purposes of the Act's overtime requirements, are set forth in 29 CFR Part 778. These rules are fully applicable to employees for whom the section 7(k) exemption is claimed, except that wherever the word "workweek" is used the word "work period" should be substituted.

§ 553.21 Records to be kept.

The recordkeeping requirements of the Act are set forth in 29 CFR Part 516. These requirements are applicable to public agencies engaged in fire protection and law enforcement activities, except that where section 7(k) is claimed, the records for those employees can be kept on a work period, instead of a workweek, basis. In addition, the records must show, as indicated in § 553.16(b), the work period for each employee.

Signed at Washington, D.C. this 18th day of December 1974.

BETTY SOUTHARD MURPHY,
Administrator.

[FR Doc.74-29843 Filed 12-19-74;8:45 am]

APPENDIX D

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed 12-31-74
James F. Davey
Clerk

The NATIONAL LEAGUE OF CITIES, *et al.*	)	
Plaintiffs,	)	
	)	Civil
v.	)	Action
	)	No.
The Honorable PETER J. BRENNAN,	)	74-1812
Defendant.		

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the National League of Cities, the National Governors' Conference, the States of Arizona, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, the Metropolitan Government of Nashville and Davidson County, Tennes-

see, and the Cities of Cape Girardeau, Missouri, Lompoc, California, and Salt Lake City, Utah, Plaintiffs, hereby appeal to the Supreme Court of the United States from the final Order dismissing the Complaint in this Action, entered on December 31, 1974.

This Appeal is taken pursuant to 28 U.S.C. §1253.

/s/ Charles S. Rhyne
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