

**§ 790.22 Discretion of court as to assessment of liquidated damages.**

(a) Section 11 of the Portal Act provides that in any action brought under the Fair Labor Standards Act to recover unpaid minimum wages, unpaid overtime, compensation, or liquidated damages, the court may, subject to prescribed conditions, in its sound discretion award no liquidated damages or award any amount of such damages not to exceed the amount specified in section 16 (b) of the Fair Labor Standards Act.<sup>137</sup>

(b) The conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) The employers must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. If these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. This may be done in any action brought under section 16(b) of the Fair Labor Standards Act, regardless of whether the action was instituted prior

<sup>137</sup>Section 16(b) of the Fair Labor Standards Act provides that an employer who violates the minimum—wage or overtime provisions of the act shall be liable to the affected employees not only for the amount of the unpaid minimum wages or unpaid overtime compensation, as the case may be, but also for an additional equal amount as liquidated damages. The courts have held that this provision is “not penal in its nature” but rather that such damages “constitute compensation for the retention of a workman’s pay” where the required wages are not paid “on time.” Under this provision of the law, the courts have held that the liability of an employer for liquidated damages in an amount equal to his underpayments of required wages become fixed at the time he fails to pay such wages when due, and the courts were given no discretion, prior to the enactment of the Portal-to-Portal Act, to relieve him of any portion of this liability. See *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697; *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572.

to or on or after May 14, 1947, and regardless of when the employee activities on which it is based were engaged in. If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages.<sup>138</sup>

(c) What constitutes good faith on the part of an employer and whether he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act are mixed questions of fact and law, which should be determined by objective tests.<sup>139</sup> Where an employer makes the required showing, it is for the court to determine in its sound discretion what would be just according to the law on the facts shown.

(d) Section 11 of the Portal Act does not change the provisions of section 16(b) of the Fair Labor Standards Act under which attorney’s fees and court costs are recoverable when judgment is awarded to the plaintiff.

**PART 791—JOINT EMPLOYMENT RELATIONSHIP UNDER FAIR LABOR STANDARDS ACT OF 1938**

Sec.

791.1 Introductory statement.

791.2 Joint employment.

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

**§ 791.1 Introductory statement.**

The purpose of this part is to make available in one place the general interpretations of the Department of Labor pertaining to the joint employment relationship under the Fair Labor Standards Act of 1938.<sup>1</sup> It is intended

<sup>138</sup>See Conference Report, p. 17; remarks of Representative Walter, 93 Cong. Rec. 1496-1497; President’s message of May 14, 1947, to the Congress on approval of the Portal Act, 93 Cong. Rec. 5281.

<sup>139</sup>Cf. §§ 790.13 to 790.16.

<sup>129</sup>U.S.C. 201-219. Under Reorganization Plan No. 6 of 1950 and pursuant to General Order No. 45-A, issued by the Secretary of Labor on May 24, 1950, interpretations of the provisions (other than the child labor provisions) of the act are issued by the Administrator of the Wage and Hour Division on the

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that the positions stated will serve as "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it."<sup>2</sup> These interpretations contain the construction of the law which the administrator believes to be correct and which will guide him in the performance of his duties under the Act, unless and until he is otherwise directed by authoritative decisions of the courts or he concludes upon reexamination of an interpretation that it is incorrect. To the extent that prior administrative rulings, interpretations, practices, and enforcement policies relating to sections 3 (d), (e) and (g) of the Act, which define the terms "employer", "employee", and "employ", are inconsistent or in conflict with the principles stated in this part they are hereby rescinded. The interpretations contained in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act,<sup>3</sup> so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect.

[23 FR 5905, Aug. 5, 1958]

### § 791.2 Joint employment.

(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for

more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act.<sup>4</sup> On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.<sup>5</sup> In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.

(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

<sup>4</sup> *Walling v. Friend, et al.*, 156 F. 2d 429 (C. A. 8).

<sup>5</sup> Both the statutory language (section 3(d) defining "employer" to include anyone acting directly or indirectly in the interest or an employer in relation to an employee) and the Congressional purpose as expressed in section 2 of the Act, require that employees generally should be paid overtime for working more than the number of hours specified in section 7(a), irrespective of the number of employers they have. Of course, an employer should not be held responsible for an employee's action in seeking, independently, additional part-time employment. But where two or more employers stand in the position of "joint employers" and permit or require the employee to work more than the number of hours specified in section 7(a), both the letter and the spirit of the statute require payment of overtime.

advice of the Solicitor of Labor. See 15 FR 3290.

<sup>2</sup> *Skidmore v. Swift and Company*, 323 U.S. 134, 138.

<sup>3</sup> 61 Stat. 84; 29 U.S.C. 251-262.