Governmental Regulation of Individual Employment Conditions in the United States

Charles A. Reynard
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During the past twenty-five years the United States has witnessed a vast growth of statutory enactments aimed at the regulation of the individual employment relationship. Legislative measures of this kind, adopted both by the Federal Government as well as by the various state legislatures, have been designed to protect the individual employee against a host of risks, economic as well as physical. Despite the phenomenal growth of governmental regulation in this field, it must be said that in comparison with most European legal systems, American labor law affecting the individual employee is substantially marginal, if not insignificant.

For more than seventy-five years legislative enactments on the Continent have assured workers of the right to notice prior to discharge, time off with pay for the purpose of seeking new employment, severance pay, paid vacations, sick leave, and other absence from work without loss of compensation, and many other incidents of job security. Such guarantees are, of course, virtually unknown in the United States. The basic reasons underlying this sharp contrast are many and varied. Among them are the facts: (1) that America's economic growth did not develop and flourish until a considerably later date than that of Europe (and following the adoption of the early European forerunners of present day labor law there); (2) American labor unions have not followed the tradition of political activity pursued by their European counterparts; and (3) a fundamental difference in the political philosophy of legislative bodies in the United States.

It should not be inferred from what has just been said, however, that job security is wholly unprotected in the case of Amer-

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ican workers. In the United States, with its common law heritage, the employment relationship has been customarily viewed as a contractual institution. As a consequence, governmental intervention in the field of labor law has been directed primarily at circumstances surrounding the formation of the employment contract, with an appreciation of the relative bargaining power of the persons who create it. Recognizing that the individual employee in contemporary economic society is incapable of dealing with organized management on equal terms because of the disparity in bargaining power, the national labor policy of the United States, since 1935, has been to encourage the processes of collective bargaining. Implicit in this policy is the fundamental theory that the individual worker, by associating with his fellow employees and designating a union as his agent for purposes of making a collective bargaining contract, will achieve a comparable degree of job protection and security by contract, which the European worker achieves through legislation. By thus encouraging and protecting the processes of collective bargaining, the government assures itself that the parties will achieve by their private law-making activities the same results which European legislation envisages.

Thus it may be said, at the outset, that the primary role of government in the regulation of labor relations in the United States is to provide a favorable setting for collective bargaining with the expectation that the bargaining process, in these circumstances, will achieve job security for the worker. When one speaks of "labor law" in the United States, he immediately thinks in primary terms of the statutes governing the collective bargaining process, and only to a lesser extent of statutes and other regulations bearing upon the individual employee. This is most graphically portrayed by the author of a recent labor law case book who began his work with this statement in the preface:

"Labor law, as I conceive it, is primarily concerned with the government of men working in industrial establishments. To some extent they are governed from Washington and the State capitals—by wage and hour laws, for example, by workmen's compensation acts, health and safety laws and similar social and labor legislation. Such legislation, however,

1. This is not to say that the collective agreement is itself the contract of hire. However, once the collective agreement is concluded, individual hirings must be made in accordance with its terms. See J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).
is largely peripheral and hits only at extremes. That we place 'floors' under wages and 'ceilings' over hours is enough to illustrate the point; it is emphasized by the rapid spread of insurance plans negotiated by employers and employees to supplement inadequate social security and workmen’s compensation payments. The rules which most vitally affect workers in their daily lives are made in each industrial establishment either by the employer or by the institution we know as collective bargaining — by the negotiation and administration of collective agreements. The rules are voluntary in a sense they are made without political intervention; but they are nonetheless the law of the plant.”

In keeping with the federal system created by our national Constitution, the distribution of governmental power naturally has its impact upon the regulation of the employment relationship. The Constitution does not grant the Federal Government a specific power to regulate employment. However, Congress is authorized to regulate interstate commerce and to enact all laws necessary and proper to the attainment of that end. It is pursuant to this power to regulate interstate commerce that most national laws regulating the employment relationship have been enacted. The states are free to adopt laws regulating employment so long as these measures do not come into conflict with federal laws on the same subject matter; in case of conflict, the federal law controls and supersedes state law. As a matter of historical development it should be noted that early attempts by the Congress of the United States to invoke the commerce power as a basis for regulating the employment relationship were invalidated by the Supreme Court on two counts. The first, an attempt to protect the right of interstate railroad workers to join unions, was declared to infringe the liberty of contract contrary to the provisions of the due process clause of the Fifth Amendment of the Constitution. The second, an attempt to prohibit the employment of child labor by banning the products of the employment establishment from interstate shipment, was held to be beyond the reach of congressional power and to constitute an invasion of the powers of the states. The latter decision was expressly overruled in 1941 when the Court sustained the constitutionality of the Fair Labor Standards (Wage and Hour)

Act, a decision which was foreshadowed by the tribunal's 1937 opinion sustaining the validity of the National Labor Relations Act. In the intervening period, due to the presumed inability of the Federal Government to legislate on the subject, the matter of governmental regulation of employment was left substantially to the states.

For purposes of discussion, the writer has divided the subject matter into three classifications: regulations dealing with "employment opportunity," protection against "physical risks," and restrictions against "economic exploitation and insecurity." The classification thus adopted is admittedly arbitrary and in no way reflects the relative importance of the subject matter. The regulations will be discussed in the order set forth above.

**EQUAL OPPORTUNITY IN EMPLOYMENT**

Twelve of the states and the Territory of Alaska have adopted statutes forbidding discrimination in the hiring or discharging of employees because of race, creed, color, or national origin. Generally speaking, these statutes create state commissions charged with the duty of enforcing the acts' provisions by making investigations of individual complaints of injured persons, seeking administrative settlements, or ultimately by orders, issued after administrative hearings, enforceable in the state courts. Two of these state laws (Massachusetts and Pennsylvania) also forbid discrimination on the basis of age. Two other states (Indiana and Kansas) have statutes which provide no enforcement machinery, but are otherwise comparable to the type of act mentioned above. The State of Colorado has adopted a statute of similar kind applicable solely to public employment (i.e., by the state, or local political subdivisions). A number of cities have adopted city ordinances forbidding discrimination in employment.

There is no comparable federal statute. During World War II, President Roosevelt created a "Fair Employment Practices Committee" by executive order which was charged with the duty of attempting to eliminate discrimination which was found to impair the effective utilization of manpower in the prosecution

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5. United States v. Darby, 312 U.S. 100 (1941).
of the war. This Committee had no enforcement powers and terminated at the close of the war. Attempts to revive such an agency by statutory enactments have failed. During the same period and pursuant to the terms of another executive order, the various procurement agencies of the Federal Government were directed to include clauses in all contracts made by them for the purchase of supplies forbidding the contracting parties to engage in discriminatory hiring practices in the course of fulfilling these contracts.

Neither of the federal statutes controlling collective bargaining (Railway Labor Act and National Labor Relations Act, as amended) makes specific reference to discrimination based upon racial considerations. However, where a union is selected by the employees for the purpose of effecting such discrimination, the federal courts have enjoined them from such action.8

**Physical Damage — Avoidance and Redress**

In the realm of physical damage, laws have been aimed at three basic objectives: (1) prevention of injuries (by the adoption of safety legislation); (2) protection of women and children (by restricting or forbidding their employment in designated situations); and (3) compensation for industrial injury and diseases (workmen's compensation). Statutes on these subjects have been widely adopted by both state and national legislatures. They will be discussed in the groupings enumerated above.

**Prevention of Physical Harm**

*State laws.* Virtually all of the states enacted detailed factory safety laws during the latter part of the nineteenth century. Prior to 1920, roughly speaking, these laws failed to provide for any system of administration; enforcement was achieved almost entirely through personal injury actions brought by employees against their employers. In such an action it would be alleged that the injury resulted from the latter's failure to comply with applicable provisions of the state law. In general these laws provided that proof of injury resulting from noncompliance constituted negligence per se and thus relieved the employee of the duty of further proof in such cases.

With the advent of workmen's compensation laws during the

decade preceding 1920, the significance of these factory safety laws diminished, as the compensation laws afforded recovery even in the absence of employer legal remedy. Modern state factory safety legislation (enacted subsequent to 1920) is aimed primarily at the correction or prevention of unsafe working conditions, such as hazardous plant layout or unguarded machinery, unsanitary conditions, or even unsafe conduct of the workers themselves. These more recent statutes also provide for a system of administrative enforcement. Periodic inspections are made, violations called to the attention of the employer, and in appropriate cases, judicial action may be instituted to compel compliance with the law or the forfeiture of fines.

**Federal laws.** The Federal Safety Appliance Acts impose requirements concerning the safety of railroad equipment which affect train and railroad yard safety. The Federal Boiler Inspection Acts relate solely to the safety of locomotive boilers. Neither of these statutes, by terms, vests a right of action in an employee injured as a consequence of the employer's noncompliance with the acts' provisions. However, the Supreme Court of the United States has held that such employees may bring actions under the provisions of another act (Federal Employer's Liability Act) incorporating these charges and recover damages for their injuries.

The Federal Coal Mine Inspection Act of 1941 provides for regular inspections of coal mines and the filing of reports. A more comprehensive statute, the Federal Coal Mine Safety Act of 1952 provides that the Director of the Federal Bureau of Mines shall inspect all coal mines and he is given power to forbid employees to approach any area he determines to be unsafe or dangerous. His orders are appealable to the Federal Coal Mine Safety Board and then to the courts.

One of the most significant of the federal statutes relating to safety is the Walsh-Healey Public Contracts Act of 1936, as

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amended,\textsuperscript{14} which applies to all contracts made by governmental agencies "for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000." As indicated later in the course of this article, this statute imposes minimum wage and maximum hours regulations upon the contracting parties. In addition, the act also declares that no part of such contracts shall be performed "under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract." Enforcement of the act is vested in the hands of an administrator in the Department of Labor. He is regularly furnished with the names and addresses of persons who have been awarded contracts with the government and a staff of inspectors under his supervision makes regular, routine investigations of the contractors' plants to determine the extent of compliance with the statute. When violations are discovered in the course of these investigations, administrative compliance may be effected, or, if the violations appear to be serious in character, a hearing may be scheduled to establish the fact of violation, with the right of appeal to the Secretary of Labor. If, following the appeal, it is the Secretary's determination that violations in fact have occurred, the contractor is "blacklisted" for a period of three years during which he is ineligible to enter into further contracts with governmental agencies.

\textit{Protection of Women and Children}

\textit{State laws}. Proceeding upon the theory that women are the "weaker" sex, the various state legislatures have enacted a variety of statutory regulations aimed at the protection of their health and virtue. These laws were of early origin and the validity of such measures was sustained in 1908 when the Supreme Court of the United States rejected an employer's contention that an Oregon statute forbidding the employment of women for more than ten hours per day constituted an unwarranted interference with freedom of contract.\textsuperscript{15} The details of such regulations vary from state to state. In general, however, they consist of limitations upon the number of hours of work per day and per week, the outright prohibition of female employment in certain industries which pose particular threats to health (i.e., blast furnaces,


\textsuperscript{15}. \textit{Muller v. Oregon}, 208 U.S. 412 (1908).
mines, etc.) or character (i.e., public drinking places, hotel porters, taxi drivers, etc.), prohibitions against the lifting of objects of great weight, and a common provision requiring that employers of women must provide seats for the use of these employees while not engaged in active duties.

Sanctions and enforcement machinery also vary from state to state. In many instances these laws simply provide that violations shall subject the employer to the payment of fines approximating fifty dollars or imprisonment for periods of approximately ten to thirty days. In some states the enforcement official charged with the duty of administering the provisions of the factory inspection laws, discussed above, is also charged with the duty of inspecting for compliance with the laws relating to the employment of females. Cases of violation are prosecuted at his request.

Each of the states in the United States has adopted some form of a child labor law. Again the substantive details of the measures vary widely from state to state. In the main, however, they follow a similar pattern. The most common provisions impose age limitations as conditions for employment. In a few instances, a single age standard is created for all forms of gainful employment and the employment of persons below the designated age is forbidden. More often there is a classification of industry or employments with varying levels of ages prescribed in the order of the hazardous character of the particular employment. Frequently it is required that the otherwise eligible minor be shown to be physically fit to perform the job for which he is hired.

As an additional safeguard, the age provisions are sometimes appended to regulations of the hours of work, and these added requirements may take either of two common forms. In the one instance, absolute maximums are imposed in terms of the permissible hours of work each day or week. In other instances, the employment of minors of given ages is made permissible only during stipulated portions of the day. This latter type of provision is aimed either at night work which threatens loss of rest and physical disability, or at making employment possible only during after-school hours, so as to encourage education. Compulsory school attendance laws in all the states serve as an indirect deterrent to the employment of children.

Another feature to be found in most of the state laws relat-
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ing to child labor is the provision requiring the young worker to obtain an employment certificate which must be given to the employer and retained by him in his files during the period of employment. The certificates are a protection to both the employee and the employer, and frequently the state laws make the absence of a certificate a violation of the law despite the fact that the employment may otherwise be proper.

Although the pattern varies, enforcement and administration of the state child labor laws follow the same general trend as in the case of laws relating to the employment of women.

Federal laws. The Walsh-Healey Public Contracts Act, mentioned previously in the Section on Prevention of Physical Harm forbids persons holding contracts with the government for supplies and equipment in excess of $10,000 to employ male persons under 16 years of age or female persons under 18 years of age in the performance of such contracts. A liquidated penalty of ten dollars per day is imposed upon contractors who violate these provisions of the act. Regulations issued under this act also impose certain requirements with respect to female employees in regard to sanitation and safety requirements. With the exceptions just mentioned, however, there are no other federal statutes regulating the employment of women.

The federal regulation of the employment of child labor in all industry affecting interstate commerce became a reality with the adoption of the Fair Labor Standards Act of 1938.\(^\text{16}\) This act prohibits the employment of "oppressive child labor" which is defined generally to embrace employment of any person below the age of 16 years. The Secretary of Labor, charged with the duty of administering the act, may both reduce and increase this age requirement by appropriate administrative action. He is authorized to permit employment of 14 year old persons in non-manufacturing and non-mining operations where the work is performed outside of school hours and does not interfere with the child's health and well-being. The Secretary may also increase the age minimum to 18 years where the prospective employment is found to be a "hazardous occupation." Administrative orders of this type have been issued respecting the use of power driven machinery of various kinds, including elevators and trucks, and

\(^{16}\) Prior thereto, congressional efforts to regulate child labor under the Commerce Clause had been invalidated by the Supreme Court. Hammer v. Dagenhart, 247 U.S. 251 (1918).
in such industries as mining, the manufacture of explosives, meat packing, radioactivity, and silica refractory products.

The act extends its prohibition against the employment of "oppressive child labor in (interstate) commerce or in the production of goods for (interstate) commerce." It likewise prohibits the shipment of goods in interstate commerce from any establishment in or about which oppressive child labor was employed at any time within thirty days prior to shipment. The effect of this latter provision is to make the child labor provision applicable to the entire establishment whether or not the minor happened to work on the particular goods which are the subject of the shipment.

Violation of the act's provisions may be restrained by civil actions for injunctions or may be made the basis for criminal prosecutions where it is shown that the violations were of a willful character.

The act contains a provision designed to protect employers against unwitting violations which declares that "oppressive child labor shall not be deemed to exist by virtue of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age." Pursuant to regulations issued by the Secretary, state employment certificates (mentioned above) are accepted as proof of age in 44 of the states as well as most of the territories.

Compensation for Industrial Injury and Diseases

Reference has already been made in the section on the "Prevention of Physical Harm" to the widespread enactment of various types of safety regulations during the latter part of the nineteenth century. When these statutes failed to arrest the growing number of industrial accidents and the economic losses resulting therefrom, further pressure was brought to bear upon state legislative bodies to effectuate a system which would provide a solution to the problem which would be more socially acceptable. The answer came in the form of the enactment of state workmen's compensation laws. The legislatures of ten states adopted such laws in 1911, and by 1925 forty-two of the forty-eight states had followed their example. The six states which had not adopted
such laws at this time were non-industrial, and even these jurisdic-
tions had succumbed to the mounting pressure for a legislative solu-
tion to the problem of industrial injury by 1948.

It has frequently been said that these enactments were moti-
vated by two considerations. First, it was said that the enormous
cost of industrial accidents should be added to the price of the
product of industry by making the employer liable for the in-
juries suffered by the employee, thus inducing him to pass the
cost to the consumer in an increased price of the product. Sec-
ond, it was said that the common law defenses (assumption of
risk, fellow-servant rule and contributory negligence) available
to an employer in personal injury actions brought by the injured
employee (or his dependents) all too frequently deprived the
plaintiff of recovery. Both theses have been questioned. It has
been said, respecting the first, that since the employee is not
completely compensated for his injury, there is in fact no real
passing of the total cost to the consuming public, but rather, a
redistribution of the loss, part of which is still imposed upon the
employee and only part of which is laid upon the employer. And
even then, the employer may or may not be in a position to pass
his share of the burden on to the consumer; his ability to do so
depends upon many other factors concerning his competitive
position in the industry. Insofar as the second consideration, re-
lating to the common law defenses, is concerned, it has been said
that while employees frequently failed to sustain their actions
for damages because of insuperable problems of proof, neverthe-
less, the percentage of cases in which they did succeed resulted
in verdicts of such substantial proportions that employers were
quite willing to forego the apparent advantages of the common
law in return for the much more modest schedule of liability im-
posed upon them by the new workmen’s compensation laws.

Turning to the provisions of the statutes themselves, it must
be said that there is considerable variation in the several states.
Space does not permit a detailed discussion of the subject at this
point. However, the following generalizations may be of interest.
The controlling and guiding principle of workmen’s compensa-
tion is that the injured worker (or his dependent) shall be en-
titled to recover a monetary award for damages suffered in the
course of his employment without the necessity of showing fault
on the part of the employer. The coverage provisions of the stat-
utes will vary from state to state, some providing that all but
excepted employments are subject to the acts, others restricting the application of the law to hazardous employments. All statutes customarily exempt agricultural and domestic employment. Some acts make no mention of occupational diseases, but a growing majority of the states now make at least some provision for this aspect of the problem. Benefits are usually fixed at a percentage (usually two-thirds) of the regular weekly compensation, but maximum limitations are customarily imposed which may be as little as $23 (in Alabama) or as much as $150 (in Arizona) per week. Fixed schedules for loss of designated physical members (i.e., a hand, an arm, an eye, a leg, etc.) are common, frequently stated in terms of the payment of a designated number of weeks of benefits. Lump sum settlements are also permitted under most statutes.

Administration of these laws is usually placed in the hands of a board or commission, although a few states provide for the judicial administration of their laws through the state courts.

In some states the laws are of the so-called compulsory type, i.e., requiring that all covered employers accept the act and compensate their employees in accordance with its provisions. In other states the law is elective, giving the employer a choice whether or not he will come under its provisions, with the proviso that if he elects to remain outside the act, he will be deprived of the common law defenses of assumption of risk, fellow servant rule, and contributory negligence in case an injured employee elects to sue him for damages following an injury on the job. Most of the state laws permit the employer to obtain risk protection through insurance with private insurers; a few states have compulsory state insurance funds and a few others provide a combination of types, permitting the employer to utilize either the state fund or private insurance coverage.

As suggested by the foregoing discussion, workmen's compensation in the United States is almost exclusively a matter of state control. This is largely the result of the history of legal development. As indicated above, state workmen's compensation laws were first adopted in large numbers during the interval between 1910 and 1925. At this time it was not thought that the Federal Government might utilize the commerce clause to effect similar legislation on a national level. When it subsequently became clear that such power existed in the Congress, as a result
of Supreme Court decisions in 1937 and 1941, the states had so completely occupied the field that it was believed to be either unwise or unnecessary to adopt federal legislation on the subject.

Federal legislation has been adopted, however, in several areas which are not subject to state laws, or where state laws have been found to be inadequate. The oldest and most significant of the federal regulations is the Federal Employers Liability Act which applies to employees of interstate railroads. The act was first adopted in 1908 and has been amended frequently. It applies to every employee "any part of whose duties . . . shall be the furtherance of . . . or shall in any way directly or closely and substantially affect" interstate or foreign commerce. Such employees, when injured in the course of their employment by reason of the negligence of the employer may bring actions against the railroad, and in such actions the common law defenses, previously mentioned, are abolished. The act extends to occupational diseases, as well as accidents, and the right of action created by it survives the death of the employee, permitting actions by surviving dependents.

Maritime law, administered by the federal courts in the exercise of their admiralty jurisdiction, has always permitted recovery of "maintenance and cure" where it is shown that the seaman is injured in the course of his employment. This is analogous to the workmen's compensation principle. However, maritime law has never permitted the recovery of compensatory damages for injuries resulting from the shipowner's negligence. The Merchant Marine (Jones) Act of 1920 has made the provisions of the Federal Employers Liability Act applicable to seamen, thereby giving them a choice of remedies.

In still another area, federal legislation has been adopted to provide compensation where there is doubt concerning the adequacy of workmen's compensation law coverage. Longshoremen are not subject to the Merchant Marine Act, and at the same time it has been held that such workmen are not subject to the state's control while engaged in loading or unloading a vessel in navigable waters. To meet the hiatus thus created, Congress passed the Longshoremen's and Harbor Workers' Compensation Act in

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17. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) and United States v. Darby, 312 U.S. 100 (1941).
1927. This act extends its protection to employees in cases of injuries or death “occurring upon the navigable waters of the United States, . . . and if the recovery for the disability or death through workmen's compensation proceedings may not be validly provided by State law.”

PROTECTION AGAINST ECONOMIC EXPLOITATION AND INSECURITY

The two principal legal bulwarks for the protection of American workers against the risks of economic exploitation and insecurity are the federal Social Security Act of 1935, as amended, and the Fair Labor Standards Act of 1938, as amended. The former provides for a comprehensive system of social security including unemployment compensation (through the cooperative action of the states), old age and survivors insurance as well as other forms of public assistance to needy aged, dependent children, blind and disabled persons. The latter enacts a comprehensive regulation of the wages and hours of employment for persons engaged in interstate commerce or the production of goods for interstate commerce.

Before turning to a consideration of the Federal Wage and Hour Law (i.e., the Fair Labor Standards Act of 1938), it seems appropriate to present a brief account of the history and present nature of state laws relating to the control of wages and hours of employment.

State Wage and Hour Laws

The demand for legislative control of hours preceded that for the regulation of wages with the result that the legislatures of many of the American states had adopted statutes limiting the hours of work prior to the turn of the twentieth century. In most instances, as previously indicated, these legislative enactments were aimed at the employment of women, but occasionally forbade the employment of men for excessively long hours in particular industries. Although legislation of both types was subjected to constitutional attack upon the ground that it deprived the parties to the employment relationship of their liberty of contract, such statutes were sustained at an early date.
Despite the fact that legislative regulation of the hours of employment has long enjoyed judicial approval in the United States, the various state legislatures have been exceedingly sparing in their use of this authority. As already indicated in the previous discussion concerning the protection of women, most states have adopted some form of laws restricting the permissible hours of their employment. However, approximately half of the states restrict female employment to an eight hour day or forty-eight hour week, while the remaining jurisdictions provide for a greater maximum. Furthermore, there are many exceptions in these state laws which result in excessively long hours of employment in numerous types of industry, such as agricultural and domestic workers, telephone operators and restaurant employees.

There has been a general reluctance on the part of American legislatures to enact maximum hour legislation of general application to men. At the present time only three states have such laws. Most of the remaining states impose limitations upon the number of hours that men may be employed in particularly hazardous industries, but impose no general limitations in this regard.

State regulation of wages was not generally undertaken until after the turn of the twentieth century and was, at first, directed primarily at the establishment of minimum wages for women. This movement subsequently was extended to the general fixing of minimum wages, applicable to the employment of men and women alike. However, decisions of the Supreme Court of the United States stood athwart this path of legislative development until 1937. In a series of decisions during the period between 1905 and 1936, the Supreme Court had declared that legislative efforts to fix minimum wages constituted a deprivation of liberty of contract without due process of law. In 1937 the Supreme Court did an about face and sustained a minimum wage law which had been enacted by the State of Washington, and subsequent to that time there has been no doubt concerning the validity of legislation of this type.

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Thirty of the states now have minimum wage laws. All but seven of these statutory enactments relate solely to women's wages, however, and make no provision respecting male employment. These laws are of principal importance in the mercantile and service industries, which are not within the coverage of the federal wage and hour legislation.

Twenty-one of the thirty states having minimum wage laws provide for the fixing of the minima by administrative action; in the other nine states the wages are fixed by statute. The administrative agency charged with the duty of fixing wages is directed to consider the minimum cost of living necessary to maintain health and decency as well as the fair and reasonable value of the services rendered in arriving at the rate to be paid. This lends a desirable degree of flexibility to the rate-setting process and enables the law to take proper account of the changing events in the economy.

**Federal Regulation of Wages and Hours**

As already intimated, the most comprehensive federal enactment governing the wages and hours of employment is the Fair Labor Standards Act of 1938. This was not the first attempt of the national government to impose restrictions in the field, however. As early as 1840 President Van Buren, by executive order, had established a ten-hour day for navy yard workers employed by the federal government. This early precedent was followed by the congressional enactment of Eight Hour Acts of 1892, 1913, which limit the employment of mechanics and laborers employed by contractors on federal public works to eight hours daily unless time and one-half is paid for overtime.

The Davis-Bacon Act of 1931, as amended, authorizes the Secretary of Labor to establish minimum wages, based upon the prevailing rates in the community, which must be paid to mechanics and laborers employed on federal building or construction contracts amounting to more than $2,000. This act, of course, merely provides minimum wages, and does not prevent collective bargaining agreements calling for higher rates. The

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Anti-Kickback Act of 1934,30 complements the Davis-Bacon Act by imposing criminal penalties upon contractors who seek to exact rebates of wages from employees paid in accordance with the prevailing minimum wage orders established under the latter act.

Reference has already been made to the Walsh-Healey Public Contracts Act of 1936 applying to the employment of workers in the fulfillment of any government contract for supplies or equipment in excess of $10,000. This act calls for the payment of minimum wages, "determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries . . . operating in the locality where the goods contracted for are to be made or furnished."31 As a matter of practice, the Secretary has given broad scope to the concept of "locality" and his tendency has been to designate minimum wages on a nationwide basis for each industry. The act also requires the payment of overtime compensation at the rate of time and one-half for all hours of employment in excess of eight per day or forty per week, whichever is greater.

Numerous other federal statutes impose restrictions upon the hours of employment in particular industries or occupations. Thus, for example, Part I of the Interstate Commerce Act, as amended,32 limits the hours of service of employees of interstate railroads; the Merchant Marine Eight Hour Act, as amended,33 restricts the hours of work on certain merchant vessels of the United States; the Motor Carriers Act of 1935, as amended,34 authorizes the Interstate Commerce Commission to fix maximum hours of service for employees of interstate motor carriers whose duties affect safety of operation; the Civil Aeronautics Act of 193835 governs the hours of employment of pilots and co-pilots engaged in interstate air transportation; and the Sugar Act of

1947[^36] regulates child labor and the wages of workers employed in the production of sugar beets or sugar cane.

Each of the federal laws just mentioned is limited in scope or application. Some are restricted to federal employment or employment in the course of the fulfillment of federal contracts, while others apply only to particular occupations or industries. The Fair Labor Standards Act of 1938 was the first federal statute to impose a comprehensive system of wage and hour restrictions upon general employment within the federal regulatory power. Drawing upon its power to regulate interstate commerce, Congress in this act declared that no employer should employ any employee engaged in interstate commerce or in the production of goods for interstate commerce unless compensated in accordance with its wage and overtime provisions. The original act fixed a minimum wage of twenty-five cents per hour and required overtime payment after forty-four hours per week. These standards have since been increased and currently provide for a minimum wage of one dollar per hour and overtime compensation after forty hours of work in the workweek. Overtime is at the rate of not less than time and one-half the regular rate. The act also prohibits the employment of "oppressive child labor" as previously discussed in the section of this paper devoted to that subject.

The provisions of the act are administered and enforced through the agency of a Wage and Hour Division of the federal Department of Labor. Regional offices of this agency are established throughout the country and a large staff of inspectors makes regular and periodic investigations of all establishments covered by the act to determine compliance with its provisions. The Wage and Hour Division is headed by an Administrator, who, under the general supervision of the Secretary of Labor, directs the administration and enforcement of the statute.

Unlike many other federal enactments of such broad scope, the administrator is not given the power to make administrative decisions in the course of the enforcement of the Fair Labor Standards Act. In all cases involving violations, compliance may be effected only by means of resort to judicial proceedings in the federal courts. The act provides for both civil and criminal sanctions. The civil remedy is by way of an action for an in-

junction against the noncomplying employer to restrain him from further violations. Criminal prosecutions may be instituted in cases involving wilful violations, with penalties up to $10,000 or imprisonment for not more than six months or both. The act also authorizes suits to be instituted by employees for the recovery of unpaid minimum wages or overtime compensation, and when successful, they may also be awarded an additional equal amount as liquidated damages, plus reasonable attorneys’ fees. Suits for the recovery of unpaid wages may also be instituted by the Secretary of Labor for and on behalf of employees who have not been paid in accordance with the act’s provisions.

As already indicated, the coverage of the act extends to employees engaged in interstate commerce or in the production of goods for interstate commerce. Employees falling within the first category (i.e., engaged in interstate commerce) are typically those engaged in interstate transportation and communication. Those engaged in the production of goods for interstate commerce obviously comprise the larger category of workers. The term “produced” is broadly defined in the act to include, among other things, “any closely related process or occupation directly essential to the production” of such goods. This language has been construed to embrace such occupations as watchmen, office workers, maintenance workers and others who do not come into direct contact with the products of the establishment or the operations involved in their manufacture.

The statute contains many exemptions and they are of various types. Some of the exemptions apply to both the minimum wage as well as the overtime provisions. Typical of this category are employees employed as bona fide executives, administrators or professional personnel, those engaged in retail and service establishments, in agricultural pursuits, fisheries, small newspapers, seamen, etc. Other exemptions apply only to the overtime provisions, leaving the minimum wage terms applicable to such occupations. Examples of this class are transportation workers (i.e., employees of railroads, motor carriers and airlines) whose employment is subject to regulation by the Interstate Commerce Commission insofar as their hours of work are concerned. A third type of exemption provides that the overtime provisions shall be inapplicable only during a designated portion of the year (14 work weeks) to employees engaged in the canning or packing of perishable fruits or vegetables or in the first
processing of agricultural commodities of certain kinds. A somewhat similar provision declares that the overtime provisions shall not apply to employees in “seasonal” industries for a period of fourteen work weeks, provided overtime compensation is paid after twelve hours per day or fifty-six hours per week.

The effect of these exemptions is to remove large numbers of employees from eligibility for the act’s benefits. They were largely the result of political pressures which developed during the course of the consideration and passage of the original act. These exemption provisions have been frequently criticized and there have been frequent suggestions that amendatory legislation be adopted to narrow the scope of many of them or to eliminate certain of them entirely.