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April 10, 1987

ATTORNEY GENERAL OPINION NO. 87- 69

Curtis E. Watkins
Kingman County Attorney
105 Avenue A East
Kingman, Kansas 67068

Re: Labor--Fair Labor Standards Act--Definitions; Employee

Synopsis: The terms "employer," "employee" and "employ" are construed broadly under the Fair Labor Standards Act. The United States Department of Labor's determination that an individual is an employee of both the City of Norwich and the Kingman County Sheriff's Office is reasonable under the circumstances and should be observed. Cited herein: 29 U.S.C. §§203, 207, 213; 29 C.F.R. §§553.9, 553.200, 791.2.

* * *

Dear Mr. Watkins:

As attorney for Kingman County, Kansas, you request our opinion regarding the status of an individual who performs part time duties for the sheriff's department. You question whether this individual would be considered an employee of the sheriff's department for purposes of overtime pursuant to the Fair Labor Standards Act. You explain that if this individual is considered an employee, there would be five law enforcement employees in the department and thus the department would not be eligible for the Section 13(b)(20) exemption from the Fair

Labor Standards Act. 29 U.S.C. §213(b)(20); 29 C.F.R. §553.200.

You give us the following facts: Kingman County pays the City of Norwich $125.00 per month for services of the City Marshall. The City Marshall is employed by the City of Norwich, receiving a salary from the city. His health insurance is paid by the City of Norwich and the city pays into a pension fund for him. The City Marshall, while performing duties for the sheriff's department, wears a sheriff's office uniform, but drives a city-owned vehicle. The City Marshall is not on the payroll of the county and no withholding of social security or any other payments are made from the check paid by the county to the city. The county does, however pay the City Marshall for uniform upkeep.

In response to this set of facts, the Area Director for the United States Department of Labor stated:

> "I have examined the information provided concerning the employment of [the City Marshall] and how his employment effects application of section 13(b)(2) to employees of the Sheriff's Office. Based on this information it is my opinion that [he] is jointly employed by the city of Norwich and the Kingman County Sheriff's Office and must be included in the employee count of the Sheriff's Office for purposes of the section 13(b)(2) overtime exemption. This means that in the weeks when [he] is employed in law enforcement activities for the County he would be added to the four deputies employed, which would make an employee count of five, and prevent the application of section 13(b)(20) to all five employees."

Joint employment under the Fair Labor Standards Act is discussed in 29 C.F.R. §791.2:

> "(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:
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> "(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
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> "(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or. . . ." See also 29 C.F.R. §553.9.

At least one provision of 29 C.F.R. §553.9 has apparently been revoked by §207(p)(1) of the 1985 Fair Labor Standards Amendments, which allows a law enforcement officer to work a special detail without creating a joint employment relationship, even where a public agency requires the second employer to hire its officers. 29 U.S.C §207(p)(1) provides as follows:

> "If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--
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> "(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

> "(B) facilitates the employment of such employees by a separate and independent employer, or
>
> "(C) otherwise affects the condition of employment of such employees by a separate and independent employer."

Nevertheless, 29 U.S.C. §207(p) does not prevent the possibility of dual employment, it merely protects each employer from having to count the hours worked for the other employer when calculating overtime. Indeed, this section, by implication, fosters employment of law enforcement by two or more separate employers, and indicates that cooperation between the employers does not destroy the separateness of the employers or preclude one from being an employer.

29 C.F.R. §553.200 provides as follows:

> "(a) Section 13(b)(20) [29 U.S.C. §213(b)(20)] of the FLSA provides a complete overtime pay exemption for 'any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correction 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.'
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> "(b) In determining whether a public agency qualifies for the section 13(b)(2) exemption . . . [n]o distinction is made between full-time and part-time employees, or between employees on duty and employees on leave status, and all such categories must be counted in determining whether the exemption applies. Individuals who are not considered 'employees' for purposes of the FLSA by virtue of section 3(e) of the Act including persons who are 'volunteers' within the meaning of §553.101, and 'elected officials and their appointees' within the meaning of §553.11) (sic) are not counted in determining whether the section 13(b)(20) exemption applies.

> "(c) The section 13(b)(20) exemption applies on a workweek basis. It is therefore possible that employees may be subject to maximum hours standard in certain workweeks, but not in others. In those workweeks in which the section 13(b)(20) exemption does not apply, the public agency is entitled to utilize the section 7(k) exemption. . . ."

The definitions of "employer," "employee" and "employ" found in 29 U.S.C. §302(d),(e) and (g) of the Act are of little help in determining whether the individual in question is an employee of the county.

> "The FLSA defines 'employee' as 'any individual employed by an employer'. 29 U.S.C. §203(e)(1). The term 'employ' is defined as 'to suffer or permit to work'. 29 U.S.C. 203(g). This Court has previously addressed these broad definitions as requiring a judicial interpretation of the boundaries of the Act's applicability: In Dunlop v. Carriage Carpet Co., 548 F.2d 139, 143-45 (6th Cir. 1977):
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> "'The Fair Labor Standards Act of 1938 was enacted by Congress to be a broadly remedial and humanitarian statute. The Act was designed to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. . . ." In interpreting [the FLSA] the courts have construed the Act's definitions liberally to effectuate the broad policies and intentions of Congress. . . . "The terms 'independent contractor', 'employee', and 'employer' are not to be construed in their common law senses when used in federal social welfare legislation. . . . Rather, their meaning is to be determined in light of the purposes of the legislation in which they were used."'
>
> . . . .

> "The issue of the employment relationship does not lend itself to a precise test, but is to be determined on a case-by-case basis upon the circumstances of the whole business activity. Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947)." Donovan v. Brandel, 736 F.2d 1114, 1115 (6th Cir. 1984).

The courts, in determining whether an individual is an employee or an independent contractor under the Act, have often used the test of economic dependence. See, e.g., Dunlop v. Carriage Carpet Co.., 548 F.2d 139, 145 (6th Cir. 1977); Weisel v. Singapore Joint Venture, Inc., 602 F.2d 1185, 1189 (5th Cir. 1979); United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947) (for purposes of employment taxes on employers under the Social Security Act). Other courts have recognized that economic dependence is merely one of several factors to consider when looking at the relationship as a whole. See, e.g., Dunlop v. Dr. Pepper-Pepsi Cola Bottling Co., 529 F.2d 198, 301 (6th Cir. 1976).

Control over the work is another factor to consider. Public Building Authority of Birmingham v. Goldberg, 298 F.2d 367, 369 (5th Cir. 1962); Powell v. United States Cartridge Co., 339 U.S. 497, 70 S.Ct. 755, 94 L.Ed. 1017 (1950). In Bowman v. Pace, 119 F.2d 858 (5th Cir. 1941), the court used a control test in determining that a night watchman was the employee of the company who hired and paid him rather than the company for which he performed services. In so finding, the court relied on the following facts:

> "Forsyth, being in that line of business, on his own account contracted with the Pace Company for a monthly consideration to maintain said factory watchman service at these premises, and on his own account hired Bowman at a weekly wage to watch there, putting him under the direction to some extent of the Pace Company to insure that the service should be satisfactory. The hiring, transferring, or discharging of Bowman was Forsyth's affair. Bowman could and did look to Forsyth alone for his pay. If

> the employment as watchman comes under the Act, Forsyth owes him the minimum wage, for he is Bowman's employer. Instead of using only one man to furnish the service contracted for, Forsyth could have hired other men to work in eight-hour shifts, or done the work himself. It would be most unjust to enforce the overtime rates, which make up a large part of Bowman's claim, against the Pace Company, who had no control over this matter." 119 F.2d at 860, 861. See also Dugas v. Nashua Mfg. Co., 62 F.Supp. 846, 851 (D.N.H. 1945). (Emphasis added.)

In Schroepfer v. A. S. Abell Co., D.C., 48 F.Supp. 88, 94 (D.Md. 1942), the court narrowed the factors to these:

> "The statutory definitions of 'employer,' 'employee' and 'employ' are in very general terms, and should be understood in 'their natural sense, and intended to describe the conventional relations of employer and employee'. . . . The Act thus contemplates (a) a situation in which the employer, expressly or impliedly, agrees to pay a certain sum of money to the employe [sic], and (b), has the control and determination of the hours of work by the employe [sic]. . . ." (Emphasis added.)

Finally, the court in Hodgson v. Ellis Transportation Co., 456 F.2d 937 (9th Cir. 1972) concluded that an individual can be an employee for purposes of the Fair Labor Standards Act even though he pays his own insurance, taxes and social security, and does not receive medical coverage, vacation benefits or paid holidays, and keeps his own time statements and submits weekly invoices to the company. The court held that the individual was not in business for himself, but was an integral part of the employer's everyday operation, thus making him an employee rather than an independent contractor for purposes of the Fair Standards Act.

Based upon the above and the facts you have provided, it is our opinion that the Department of Labor is justified in regarding the City Marshall as an employee of the sheriff's department when performing duties for that department. The

Department appears to have based its conclusion on the following: The sheriff directs the day to day activities performed for that office, provides the Marshall with a sheriff's office uniform and pays for uniform maintenance. Because of the control necessary to operate a public law enforcement agency, and the fact that the City of Norwich is not primarily in the business of hiring out law enforcement officials, the Department has concluded that this cannot be treated as an independent contractor situation for purposes of the Fair Labor Standards Act. In that the United States Department of Labor has enforcement powers under the Act, it is our opinion that their decision should be observed. Thus, the individual in question should be considered an employee of the county sheriff's department as well as an employee of the city.

Very truly yours,

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