

FLSA-145

May 16, 1983

This is in reply to your letter addressed to Mr. of our Area Office in Phoenix, Arizona, concerning the Juvenile Court's policy of ordering youthful offenders, many of whom are under 14 years of age, to pay restitution or to perform community services as retribution for offenses they have committed. You enclose a copy of a letter dated March 2, 1979, issued by this office to an official of *** County,***, relating to the application of the Fair Labor Standards Act (FLSA) to a similar program.

You ask for an opinion on the application of the FLSA to the employment of minors ordered by the court to pay restitution and retribution in light of changes that may have taken place in the FLSA since the above opinion was issued. You express interest in the ages and types of labor that would be exempt from the FLSA under such court-ordered restitution or retribution; and the procedure to obtain a waiver from the child labor requirements of the FLSA for youths under age 16 who are excused from attending school.

The FLSA is the Federal law of most general application concerning minimum wage, overtime pay, and child labor standards. In order for these standards to apply to any person, an employer-employee relationship must exist under the FLSA. The opinions stated in our letter to officials of *** County,***, are still applicable. It is our general position that an employer-employee relationship will not exist in the kind of program you have in mind if the following conditions are met: (1) the juvenile offenders voluntarily enter into the program for their own benefit; (2) they do not displace regular employees or impinge on the employment opportunities of others; (3) they are under the supervision or control of the court; and (4) the offenders perform the work without contemplation of pay. It is our opinion that the work should be restricted to public service activities such as work in community action programs and to service in nonprofit organizations formed for a public purpose.

In addition, we will not assert an employment relationship where children are working with their parents' consent to pay restitution, are not displacing regular workers or impinging on employment opportunities of others, and such work is performed under the jurisdiction and pursuant to the order and subject to the protection of the court. Where no employment relationship exists, neither the pay provisions nor the child labor requirements of the FLSA apply. In such instances, the court initiating the program for youthful offenders determines the age of the child and the type of labor to be performed. You may wish to note that this is not a matter of "exemption", since the FLSA's statutory exemptions apply in situations where an employment relationship exists.

There is no provision for the issuance of a waiver from the child labor provisions of the FLSA for youths under 16 years of age permanently excused from attending school. However, 14 and 15-year olds who have been prohibited by a Court Order from attending school, or who have been expelled from school, may work as many as 8 hours a day and 40 hours a week since school is no longer in session for them. All other provisions of Child Labor Regulation 3 (Re: occupational limitations, nightwork hours, etc.) must be followed. A copy of Regulation 3 is enclosed for your convenience.

We hope this satisfactorily responds to your inquiry. However, if you have any further questions on this matter do not hesitate to let us know.

Sincerely,

James L. Valin
Assistant Administrator
Wage and Hour Division

William M. Otter
Administrator

Enclosure