

## § 790.22

## 29 CFR Ch. V (7-1-05 Edition)

Act<sup>133</sup> provides that an action to enforce such a cause of action shall be considered to be “commenced”:

(1) In individual actions, on the date the complaint is filed;

(2) In collective or class actions, as to an individual claimant.

(i) On the date the complaint is filed, if he is specifically named therein as a party plaintiff and his written consent to become such is filed with the court on that date, or

(ii) On the subsequent date when his written consent to become a party plaintiff is filed in the court, if it was not so filed when the complaint was filed or if he was not then named therein as a party plaintiff.<sup>134</sup>

(c) The statute of limitations in the Portal Act is silent as to whether or not the running of the two-year period of limitations may be suspended for any cause.<sup>135</sup> In this connection, attention is directed to section 205 of the Soldiers’ and Sailors’ Civil Relief Act

In such cases it would seem that an employee’s cause of action, insofar as it may be based on such payments, would not accrue until the time when such payment should be made. Cf. *Walling v. Harnischfeger Corp.*, 325 U.S. 427.

<sup>133</sup>Section 7. See also Conference Report, p. 14.

<sup>134</sup>This is also the rule under section 8 of the Portal Act as to individual claimants, in collective or representative actions commenced before May 14, 1947, who were not specifically named as parties plaintiff on or before September 11, 1947.

<sup>135</sup>A limited suspension provision was contained in section 2(d) of the House bill, but was eliminated by the Senate. Neither the Senate debates, the Senate committee report, nor the conference committee report, indicate the reason for this. While the courts have held that in a proper case, a statute of limitations may be suspended by causes not mentioned in the statute itself (*Braun v. Sauerwein*, 10 Wall. 218, 223; see also *Richards v. Maryland Ins. Co.*, 8 Cranch 84, 92; *Bauserman v. Blunt*, 147 U.S. 647), they have also held that when the statute has once commenced to run, its operation is not suspended by a subsequent disability to sue, and that the bar of the statute cannot be postponed by the failure of the creditor (employee) to avail himself of any means within his power to prosecute or to preserve his claim. *Bauserman v. Blunt*, 147 U.S. 647, 657; *Smith v. Continental Oil Co.*, 59 F. Supp. 91, 94.

of 1940,<sup>136</sup> as amended, which provides that the period of military service shall not be included in the period limited by law for the bringing of an action or proceeding, whether the cause of action shall have accrued prior to or during the period of such service.

### § 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

<sup>136</sup>Act of October 17, 1940, ch. 888, 54 Stat. 1178, as amended by the act of October 6, 1942, ch. 581, 56 Stat. 769 (50 U.S.C.A. App. sec. 525).

<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.

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 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.

<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.

#### **§ 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 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

<sup>1</sup>29 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 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.