

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.¹³⁸

(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.¹³⁹ 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.

¹³⁸See 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.

¹³⁹Cf. §§ 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 1938.¹ 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."² 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,³ 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

¹29 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.

²*Skidmore v. Swift and Company*, 323 U.S. 134, 138.

³61 Stat. 84; 29 U.S.C. 251-262.