

**OPINION
74-391**

April 10, 1974 (OPINION)

The Honorable M. F. Peterson
Superintendent of Public Instruction
State Capitol
Bismarck, ND 58501

Dear Mr. Peterson:

This is in reply to your letter of March 25, 1974, in which you enclose a copy of a letter dated March 22, 1974, from H. C. Gulbrandson, Assistant Superintendent of Schools, Fargo, North Dakota. Mr. Gulbrandson's letter is concerned with State Department of Labor's Minimum Wage Order No. 7 dated January 7, 1974, and effective March 7, 1974. He notes there appears to be a lot of confusion relative to whether or not school districts are covered by Chapter 34-06 of the Century Code, and if school districts are covered, which employees are covered. He asks two questions:

1. "Are school districts covered under the State Minimum Wage Law?
2. "What type of employee is covered?"

He notes, in connection with the second question, that the Fargo School District has district secretaries, clerks, teacher aides, paraprofessionals, study hall and lunchroom supervisors and food service employees who may be affected. He further notes other school districts have custodial and maintenance employees who are paid less than two dollars per hour.

With respect to the first question, section 43-06-01 provides in part:

"In this chapter, unless the context or subject matter otherwise requires:

* * *

3. 'Employee' includes any individual employed by an employer;
4. 'Employer' includes any individual, partnership, association, corporation, or any person or group of persons acting in the interest of an employer in relation to an employee;
5. 'Occupation' shall mean a business or industry, or a trade or branch thereof, but it shall not include outside salesmen who are compensated by a commission basis.

* * *."

The other provisions in the chapter do authorize the Commissioner to establish minimum wages for employees.

It appears to us that a school district would be "any person or group of persons acting in the interest of an employer in relation to an employee" as used in the definition of "employer" cited above. As such the employees of the school district would be included within the term "employee." The statute is not specific in regard to the inclusion of public employees within its terms. However, in the absence of a provision to the contrary, we believe public employees are covered.

This office has previously indicated that state employees were not covered by the Minimum Wage Order. See letter of march 6, 1974, to Kenneth Raschke, Commissioner of Higher Education. This conclusion was based on the fact the Legislature, by enacting Section 54-06-16 of the North Dakota Century Code, had preempted the authority of the labor Commissioner to enact minimum wage orders applicable to state employees. Section 54-06-16 does not, however, apply to employees of political subdivisions of the state but only to employees of the state.

In reply to the first question, it is our opinion that school districts are covered under law authorizing the Commissioner of labor to enact minimum wage orders.

With regard to the second question, it appears to use this question should properly be submitted to the State Labor Commissioner. He promulgated the order and presumably knows which employees he intended to cover. In addition, without a specific description of the duties of each employee it would be difficult to determine whether they were covered by the minimum wage order or not. We do note the order in question contains the following definition:

"'Professional, Technical, Clerical and Similar Occupations' mean professional laboratory research, clerical, technical, and office occupations. Such occupations shall include: accountants, accounting clerks, appraisers, board markers, bookkeepers, checkers, checkroom attendants, canvassers, circulation clerks, claim adjuster, classified advertising, sales people, compilers, collectors, computers, elevator operators, instructors, interviewers, librarians and their assistants, x-ray medical or dental laboratory technicians and their assistants, secretaries, social workers, statisticians, stenographers, teachers, telephone, teletype and telegraph operators, tellers, typists, and other related occupations. However, occupations performed in an industry covered by North Dakota industry minimum wage order would not be subject to this order."

It would seem that district secretaries, clerks, teacher aides, paraprofessionals would be covered, and study hall and lunchroom supervisors might be covered. It would appear that some food service employees might not be covered and might well be governed by some other minimum wage order. However, we believe this questions should be presented to the department which originated the order. If they have a question as to the wording they used, they may request the opinion of this office.

Sincerely yours,

Allen I. Olson

Attorney General