Opinion No. 57-74

April 15, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr., Assistant Attorney General

TO: Mr. Reuben E. Nieves, Assistant District Attorney, Ninth Judicial District, Clovis, New Mexico

QUESTIONS

QUESTIONS

What is the time limitation placed upon a representative of the Labor Commission, or a district attorney acting on his request, in demanding the records of an employer to determine whether a violation exists under the New Mexico Wage and Hour Law?

CONCLUSION

Two years, if the purpose for demanding the records is to charge the employer in a criminal case; and four years, if the purpose is for bringing a civil action under the act against the employer.

OPINION

ANALYSIS

Under § 59-3-8, N.M.S.A., 953 Comp., it is the duty of the Labor Commissioner to investigate any violations of the Wage and Hour Act, and to institute actions to enforce the same. Under sub-section (b), it is the duty of all district attorneys to prosecute cases, both civilly and criminally, which are referred to them by the Labor Commissioner.

In this case, it is assumed that a dispute has been referred to the District attorney, and he wishes to investigate the hours worked by an employee and the wages paid by an employer; and to do so he requires an examination of the employer's records.

Section 59-3-9, N.M.S.A., 1953 Compilation, reads as follows:

"(a) Every employer shall keep a true and accurate record of hours worked and wages paid to each employee. **The employer shall keep such records on file for at least one year after the entry of the record.**

"(b) The labor commissioner and his authorized representatives shall have the right at all reasonable times to inspect such records for the purpose of ascertaining whether the provisions of this act are complied with." (Emphasis supplied.)

We have carefully checked the Wage and Hour Law, and it does not expressly provide a period for the limitation of an action under the law. It is our opinion that the above quoted section only requires the employer to keep such records on file for at least one year, but the section does not operate as a bar prohibiting a representative of the Labor Commissioner, or as in this case a district attorney, from checking any wage and hour records for previous years that the employer might have on file subject to the limitations stated in the opinion hereinafter.

If the purpose in demanding the records is for filing an action against the employer under § 59-3-11, N.M.S.A., 1953 Compilation, which makes failure to comply under the act a misdemeanor, the production of the records should be limited to two years. Under § 41-9-1, N.M.S.A., 1953 Compilation, the maximum time for commencing prosecution for a misdemeanor is within two years from the time the offense was committed.

If the purpose for demanding the records is for commencement of a civil action, under § 23-1-4, N.M.S.A., 1953 Comp., we feel that the records can be obtained for a four year period. The above section limits a civil action to four years unless otherwise specified.

By way of conclusion, we are of the opinion that § 59-3-9, supra, does not operate as a statute of limitations, and that the employer's records are the "best evidence" in establishing whether a violation exists under the act and they should be produced, if available, subject to the limitation expressed in this opinion.