Opinion No. 45-4778

August 23, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. Ralph Apodaca Superintendent of Insurance State Corporation Commission Santa Fe, New Mexico

*{*123}* Replying to your request for an opinion on the following questions relating to the interpretation of a portion of Chapter 135, Laws of 1945, entitled "New Mexico Occupational Disease Disablement Law."

"1. If there is a large concern employing two hundred men in Chicago, and have one salesman located in Albuquerque, is he under the OD Act."

"2. If the employer qualifies under the act for six employees and thereafter employs only three men would the employer have protection under the Act or would it be necessary to file acceptance when the number dropped to less than four employees?"

It appears that your first question is answered by that portion of Section 2 of the Act which reads as follows:

*{*124}* "* * *, and every private person, firm or corporation engaged in carrying on business or trade for gain within the State, having in service four or more employees regularly employed in the same business, or in or about the same establishment, under any contract for hire * * *" and

"Section 12. Not applicable in Certain Cases. This act shall not be construed to apply to business pursuits or employments which according to law are so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged."

See: Hughey v. Ware, 34 N.M. 29, 276 Pac. 27.

It is my opinion that "he is not under the OD Act."

In answer to your second question. This question relates to a portion of section 2 which reads as follows:

"Provided that employers who have in service less than four employees, * * * shall have the right to come under the terms of this act by complying with the provisions thereof." and Paragraph 3 of Section 5:

"Any employer subject to the provisions of this act may withdraw from its provisions and reject the same upon the first day of any month * * * which notices shall be posted at

least thirty days prior to the date of such withdrawal and shall be kept continuously posted thereafter in sufficient places frequented by his employees to reasonably notify such employees of such withdrawal."

The above provisions do not explicitly apply to the question, but by implication it seems reasonable to construe the same to mean that once the act is accepted and acted upon by employer and employee, the contractual relation would continue until proper notice was given by either of the parties. The employee would know that the employer had the "right" to continue under the act and would be justified in relying on a notice of termination.

"It has been held that a Colorado employer who has the required number of employees to automatically come under the act, continues to be subject to it unless he withdraws, although at the time of an injury to an employee he had less than the required number of employees." Colo. -- Comerford v. Carr, 96 Colo. 590, 284 P. 121.

It is therefore my opinion that the employer having once complied with the act, regardless of the number of employees, he would be subject to the act until he complied with giving notice of rejection in the manner provided by statute.

The quotations from Chapter 135, Laws of 1945, have been taken from the printer's copy of the enrolled and engrossed House Bill 189. Several changes and amendments were made after the original bill was introduced, and you may find that unless you have the printer's copy, the quotations may differ from the original Bill 189.

By THOS. C. McCARTY,

Asst. Atty. General