

Opinion No. 68-02

January 4, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Eugene W. Peirce, Jr. State Representative 120 Vassar Drive, S. E.
Albuquerque, New Mexico

QUESTIONS

FACTS

The Goodwill Industries of New Mexico, Inc., was organized as a nonprofit organization for exclusively religious, charitable and educational purposes. It provides rehabilitation services, training, employment and opportunities for the handicapped, disabled and disadvantaged who are unable to compete in the open labor market. The organization receives its principal financial support from contributions by private individuals of discarded but repairable items such as old clothing, furniture, appliances, etc. These items are reconditioned by the handicapped and then sold to the public at the organization's various stores. These handicapped individuals are referred to Goodwill by the New Mexico Division of Vocational Rehabilitation and from the Veteran's Administration. The Albuquerque establishment of Goodwill has been issued "sheltered workshop" certificates by the U.S. Department of Labor allowing employment of the handicapped only at that establishment at less than the Federal minimum wage.

Must Goodwill Industries of New Mexico. Inc., pay the special minimum wage for handicapped persons as cited in Section 59-3-22.1, N.M.S.A., 1953 Compilation (P.S.)?

CONCLUSION

Yes.

OPINION

{*3} ANALYSIS

Section 59-3-22.1, N.M.S.A., 1953 Compilation (P.S.) is a recent enactment of our legislature providing for the issuance of special employment certificates by the State Labor Commission to certain physically or mentally deficient individuals whose productivity or learning capacity has been impaired. These certificates allow the individual to be employed at less than the minimum wages established in Section 59-3-22, N.M.S.A., 1953 Compilation (P.S.).

Subsection B, Section 59-3-22.1, supra, provides as follows:

B. The state labor commissioner, pursuant to his regulations and upon certification of any state agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates, which allow the holder thereof to work at wages which are less than those required by subsection A of this section and which are related to the workers' productivity, for the employment of:

(1) handicapped workers engaged in work which is incidental to training or evaluation programs; and

(2) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment.

(Emphasis supplied)

Paragraphs (1) and (2) of Subsection B above appear to cover the type of employment relationship existing at Goodwill Industries. {4} The work product which results from the handicapped persons' rehabilitation and training efforts is merely incidental to the overall program. Further, some of the severely handicapped are unable to engage in normal competitive employment. Therefore, upon certification from the proper state agency described in Subsection B, supra, the labor commissioner is authorized to issue a special certificate to these handicapped persons allowing them to obtain employment at a rate below the established state minimum wages.

In concluding that Goodwill's handicapped workers are within the scope of the provisions of Section 59-3-22.1, supra, we recognize that these workers may not be "employees" as defined in Section 59-3-21(D)(4), N.M.S.A., 1953 Compilation of the Minimum Wage Act. It should be noted in this regard, however, that Section 59-3-22.1, supra does not use the term "employee" in describing those intended to be covered by its provisions. We believe our legislature undoubtedly was aware that a true employer-employee relationship does not in fact exist between an organization such as Goodwill Industries and its handicapped workers and avoided the "employee" terminology to assure coverage for these workers.

Not all of the handicapped persons working for Goodwill Industries, Inc., will necessarily be covered by the New Mexico Minimum Wage Act. For instance, those workers who are "engaged in commerce or in the production of goods for commerce" and for whom sheltered workshop certificates have been issued by the U.S. Department of labor pursuant to Section 14 of the Fair Labor Standards Act of 1938 (29 USC 214 29 CFR, Part 525) would not be subject to our Minimum Wage Act. (See Section 59-3-26.1, N.M.S.A., 1953 Compilation (P.S.)).

By: David R. Sierra

Assistant Attorney General