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NEW YORK MINIMUM WAGE ACT FOR MIGRANT WORKERS

I. Introduction

The abject state in which most migrant workers in this country exist has recently become a matter of national concern. The increasing stridency of the migrants, personified by César Chavez in California, has resulted in recognition of the need for legislative assistance to rescue them from their plight. The migrant worker is unable to help himself, being burdened by a low annual income and an education level of only eight and a half years in school.¹

In New York, the migrant's situation is aggravated by the powerful position of the crew leader or "farm labor contractor," who often determines workers' wages. As middleman between the farmer and the workers, the crew leader recruits the number of workers needed by the farmer, transports them to New York, and negotiates the migrants' wages with the farmer.² Since the crew leader is usually paid only for the number of workers he delivers, he has no incentive to bargain for higher employee wages.³ Additionally, the crew leader exercises great control over job assignment, pay disbursement, and housing and transportation, serving as "foreman, paymaster, Dutch uncle, money lender, grocer, policeman, judge and jury."⁴ In this position, the crew leader is able to abuse his authority for his own benefit at the expense of the migrants.⁵

¹ 91 MONTHLY LABOR REV. 12 (1968). In 1966, the national average income for migrant workers was \$1,580.

² Wall St. J., Sept. 15, 1969, at 1, col. 1. Most crew leaders are former migrant workers who gain sufficient stature to be recognized by the farmers. They are paid by a farmer to recruit, transport, and supervise the migrant workers needed to harvest crops. In good years, a crew leader may earn as much as \$50,000. See Friedland, *Labor Waste in New York-Rural Exploitation and Migrant Workers*, TRANS-ACTION 52 (Feb. 1969); Hoffman & Seltzer, *Migrant Farm Labor in Upstate New York*, 4 COLUM. J.L. & SOC. PROB. 1 (March Supp., 1968); and MOORE, *THE SLAVES WE RENT* (1965) at 25-34.

³ Hoffman, *supra* note 2, at S-1. Those workers who come to New York without a crew leader are not guaranteed any set wage by the farmer and may be paid less than promised.

⁴ Wall St. J., Sept. 15, 1969 at 1, col. 1.

⁵ The potential for personal gain is felt by many crew leaders to be a fringe benefit. Friedland, *supra* note 2, at 52.

As a means of improving the condition of migrant workers in New York, the New York Legislature recently extended minimum hourly wage coverage to farm employees.⁶ The effects of this attempt to deal with the migrant problem will be closely observed by other states.

II. Principal Provisions of the Act

A. *The Minimum Wage Provision*

The minimum wage act's main clause provides that farm employers shall pay employees \$1.40 per hour beginning October 1, 1969. On February 1, 1971, the minimum wage will increase to \$1.50 per hour. The current New York minimum wage for non-farm workers is \$1.60 per hour.⁷ This \$1.60 wage rate was not extended to farm employees partially because of a concern that New York growers would lose their competitive position relative to out-of-state farmers if the New York growers were required to pay a higher minimum wage.⁸ Because migrants frequently work long hours during peak periods, overtime is an important factor. However, New York's new law does not extend the usual time-and-a-half rate for work in excess of forty hours a week to farm workers. Rather it merely provides that the minimum wage must be paid for every hour worked.⁹

A statutory minimum wage is a definite improvement over New York's present wage payment practice. Although New York farm employees averaged \$1.54 per hour in 1968, the new minimum wage should significantly affect those wage rates at the low end of the wage scale.¹⁰ In 1967, those New York migrants working

⁶ N.Y. LABOR LAW § 670-683 (McKinney Supp. 1969). N.Y. PUB. HEALTH LAW § 1330 (McKinney Supp. 1969). New York has also attempted to help the migrant worker by enacting an amendment to the Public Health law setting up minimum standards for housing in migrant labor camps. *See* N.Y. PUB. HEALTH LAWS § 1331 (McKinney Supp. 1969).

⁷ N.Y. LABOR LAW § 652 (1) (c) (McKinney 1966).

⁸ N.Y. Times, February 4, 1969, at 26, col. 4. Since much of the New York hearings on the migrant wage bill were closed to the public, the rationale for many of the provisions of the act and for other regulations promulgated thereunder are not a matter of public record.

⁹ N.Y. LABOR LAW § 673 (McKinney Supp. 1969). Compare New Jersey's minimum wage provision for migrant workers, which not only does not provide for overtime, but, moreover, removes the minimum wage floor after 40 hours. N.J. STAT. ANN. § 34:11-56(a) (4) (1966).

¹⁰ N.Y. Times, April 17, 1969, at 48 col. 1.

more than twenty-five days a year on farms averaged \$2,800, an annual wage either negotiated between the crew leader and the farmer, or offered to the workers by the farmer *without* guarantee of payment.¹¹ The minimum hourly wage requirement will alleviate this present situation in which migrants are completely at the mercy of the labor market.

One of the most important provisions of the minimum wage program is that farmers must begin to pay workers for those hours spent in travelling to the farmer's fields each day, in waiting for field operations to begin, and in similar work delays, although the farmer need not pay for time lost due to poor weather conditions.¹² Currently the worker bears the entire cost of time loss, although time losses may run as high as twenty-five percent of total hours worked.¹³ Workers may be idle three to four weeks during the harvest season because of rain, bad field management practices, or crop backlogs at processing plants. Under the new act, the cost of time losses will be allocated to the employees *and* to the farmer.

The State Labor Commissioner¹⁴ has responsibility for promulgating all regulations necessary to carry out the provisions of the new law,¹⁵ and thus the precise ratio of loss allocation will depend upon his construction of the law's "hours worked" provision.¹⁶ For example, whether time losses due to unripened crops will be considered a loss due to "weather" (and thus borne by the worker), or "time spent on a single farm" (and thus borne by the employer) is a determination that the Commissioner will have to make. It seems more equitable to require the farmer to bear this particular cost, since he estimates the date by which crops will ripen and accordingly requires the workers to be at his farm by that date. Despite the statutory uncertainty created by vesting decisional discretion in the Labor Commissioner, the act does

¹¹ Hoffman, *supra* note 2, at S-3. This New York average annual wage should be distinguished from the U.S. average annual wage for migrant workers of \$1,580 in 1966. See note 1 *supra*. The New York average is calculated for heads of households only, while the national average is based on the earnings of all migrant workers, including relatively low earning juveniles.

¹² N.Y. LABOR LAW § 671 (6) (McKinney Supp. 1969).

¹³ Friedland, *supra* note 2, at 52.

¹⁴ The Commissioner is appointed by the Governor to administer, through the Labor Department, the labor laws of the state. N.Y. LABOR LAW, §§ 10, 21 (McKinney 1965).

¹⁵ N.Y. LABOR LAW § 674 (1) (McKinney Supp. 1969).

¹⁶ Note 12, *supra*.

spread the risk of financial loss more fairly by requiring the farmer and the worker to share the risk of wasted hours.¹⁷

One possible difficulty with the minimum wage law centers around the provision allowing payment at *lower* than the minimum if an employer pays his workers piece-rate rather than on an hourly basis.¹⁸ The new Regulations set out by the Labor Commissioner provide that if eighty percent of a farmer's employees earn piece-rate wages equal to, or more than, the minimum of \$1.40 an hour, the other twenty percent of the workers may be paid *less* than \$1.40 an hour, provided that the *total* group average is not less than the required minimum wage.¹⁹ Children under seventeen years of age working as hand harvesters on the same farm as their parents are excluded from this group average, and can be paid as much as twenty-five cents less than the minimum wage if the farmer obtains a "youth rate certificate" on the child.²⁰ The piece rate exception to the minimum wage requirement seems to undermine the act's announced goal of raising the wages of those workers at the bottom of the wage scale.²¹ In effect, the piece rate exception could force one out of five workers to live on a wage rate deemed by the legislature to be less than sufficient for adequate maintenance and health.

Another possible problem with the minimum wage law is the provision authorizing the Labor Commissioner to permit a farmer to deduct certain allowances from his employees' daily wages.²² Under the Regulations, allowable deductions include the cost to the farmer of meals and lodging provided to the worker.²³ Previously, the crew leader or labor camp operator provided food

¹⁷ Friedland, *supra* note 2, at 54; Hoffman, *supra* note 2, at S-4. Friedland claims that if farmers bear the cost of lost time, they will demand that state farm agencies devise more productive management methods. Hoffman states that farmers will react to the new cost for time lost by having workers do construction work, pruning, painting, etc., during bad weather, rather than leaving them idle.

¹⁸ N.Y. LABOR LAW § 674 (1) (McKinney Supp. 1969).

¹⁹ N.Y.C.R.R. § 190-3.1 (McKinney Supp. 1969).

²⁰ *Id.* §§ 190-3.2, 4.2(c). Such a certificate may be obtained by application to the Labor Commissioner. The regulations as thus far promulgated do not prescribe the conditions for issuing the certificate.

²¹ Note 10, *supra*.

²² N.Y. LABOR LAW § 674 (1) (McKinney Supp. 1969).

²³ N.Y.C.R.R. § 190-2.2 (McKinney Supp. 1969) allows a farmer to deduct up to 55c per meal and 65c per room per day. If an apartment or house is provided, up to \$1.30 per day may be deducted for each occupant, with a maximum deduction of \$2.60.

and housing to workers, and the farmer took no responsibility for either of these necessities.²⁴ The provision for wage deductions may enable the farmers to save money by excessive pricing of the meals and lodging furnished the migrants. Whether the workers receive full value for the deductions taken will depend on adequate enforcement of the Regulations by the Commissioner.

When a farmer has failed to comply with the minimum wage provisions, an aggrieved worker has two avenues of relief. He may sue the farmer directly, or he may request the Labor Commissioner to bring an action on his behalf.²⁵ In view of the limited means of the average migrant, it is unlikely that he would commence a civil suit. Moreover, the Regulations do not prescribe the procedure by which the assistance of the Commissioner may be invoked. Unless the Commissioner acts to make relief readily accessible to the migrant, the migrant may be discouraged from claiming his rights.

B. Appellate Review and Advisory Council Provisions

Both employer and workers have the right to obtain review of any regulation or compliance order issued by the Labor Commissioner by petitioning the Board of Standards and Appeals²⁶ to set aside or modify the regulation or order.²⁷ The Board's appellate jurisdiction is exclusive and its decision binding.²⁸ However, a party adversely affected by its ruling may appeal directly to the appellate division of the New York Supreme Court.²⁹

One feature of the appeal procedure is that an employer, when appealing a regulation or compliance order, may not avoid making the minimum wage payments to his employees unless and until he provides security in the form of a bond filed with the Board, or an escrow account on behalf of the workers. This security must equal the difference between the wage employees presently re-

²⁴ *Agricultural Labor Relations—The Other Farm Problem*, 14 STAN. L. REV. 120 (1961).

²⁵ N.Y. LABOR LAW § 681 (McKinney Supp. 1969).

²⁶ The Board of Standards and Appeals of the Labor Department is a three member body appointed by the Governor. N.Y. LABOR LAW § 12 (McKinney Supp. 1969). It has the power to promulgate and amend rules for carrying out the labor laws. N.Y. LABOR LAW § 27-29, 110 (McKinney 1965).

²⁷ N.Y. LABOR LAW §§ 676, 677 (McKinney Supp. 1969).

²⁸ *Id.* § 676(2).

²⁹ *Id.*

ceive from the employer, and what they are entitled to receive under the minimum wage regulation.³⁰ The bank holding the escrow account may not release the fund without written authorization from the Board.³¹ However, this security requirement *can* be waived if the Board considers the employer to be “of such financial responsibility” that back wage payments to workers can be assured without the need of security.³² Whether this waiver provision becomes a means by which some farmers can avoid prompt payment of wages due workers will depend on the Board’s careful exercise of its discretionary power to waive the requirement.

A unique aspect of the new law is the provision establishing an advisory council to represent the farmers, the employees, and the general public.³³ The Council will consist of eleven members: five representing the employer, five representing the workers and the public, and one impartial chairman. Appointed by the Labor Commissioner for five year terms, the members will advise the Commissioner on all matters related to minimum wages for workers, and may recommend any measures they consider necessary. The Council is empowered to subpoena witnesses, hold hearings, require production of records, and call upon any state agency for assistance.³⁴ The Commissioner may not issue any Regulation until he has consulted with the Council and duly considered their proposals.³⁵ However, the Council is clearly only an advisory body, and lacks the authority to compel the Commissioner to follow its suggestions. Thus there is some risk that the Council could develop into an ineffectual committee whose views are heard, but ignored.

The Council could be effective in reconciling the often divergent interests of New York farmers and farm workers. However, finding individuals sufficiently representative of farm workers, yet sufficiently articulate to be effective members of the Council, may be a difficult problem. Migrants are relatively uneducated and

³⁰ *Id.* § 676(3).

³¹ *Id.* § 676(3)(b).

³² *Id.* § 676(7). Neither the Act nor the Regulations provide any criteria for determining whether an employer is “of such financial responsibility.”

³³ *Id.* § 675(5,6).

³⁴ *Id.* § 675(5).

³⁵ *Id.* § 674(3).

disorganized, unlike the farmers who are well organized in lobby and pressure groups on both state and federal levels of government.³⁶ A New York equivalent of César Chavez has not appeared on the scene to express to the general public the plight of his fellow workers.

C. Administrative and Penal Provisions

The new law gives the Labor Commissioner authority to investigate alleged abuses of wage payment provisions and to penalize employers for violations.³⁷ The Commissioner is empowered to enter upon any farm to examine a farmer's wage records, to determine if the farmer is complying with the regulations, and to require full statements by the farmer of the contents of his records at any time the Commissioner considers necessary.³⁸

If an employer fails to comply with the minimum wage provisions, he may be found guilty of a misdemeanor punishable by a fine of not more than \$500, or by imprisonment of not more than 90 days, or both.³⁹ Discrimination against a worker who raises his rights under the law also carries a \$500 fine.⁴⁰ As imprisonment is not likely to be resorted to, the provision of a fine of only \$500 may prove to be an inadequate deterrent.

The act also gives the Commissioner the opportunity to protect migrant workers from abuse by the crew leader by providing that an agent of an employer is subject to liability for the above violations.⁴¹ That the crew leader is an agent of the farmer seems clear inasmuch as the farmer usually only deals with migrant workers through the crew leader.⁴²

III. Conclusion

The goal of the minimum wage law is to eliminate farm workers' employment at "wages insufficient to provide adequate maintenance and protection of health."⁴³ The New York Act is the most

³⁶ Kovarsky, *Congress and Migrant Labor*, 9 ST. LOUIS U.L. J. 293, 323 (1965).

³⁷ *Id.* § 678.

³⁸ *Id.*

³⁹ *Id.* § 680.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See text at note 2, *supra*.

⁴³ N.Y. LABOR LAW § 670 (McKinney Supp. 1969).

comprehensive of the existing migrant minimum wage provisions in effect and should do the most to aid the migrant worker.⁴⁴ But inasmuch as the New York provision vests broad discretionary powers of enforcement and implementation in the Labor Commissioner, its efficacy will depend to a great extent upon his desire to improve, rather than to perpetuate, the present position of the migrant worker. The provision of minimum wage protection for migrant workers is a step in the right direction, but it remains to be seen just how far that step will carry the migrants in their drive for economic security.

— *Karen E. Kuntz*

⁴⁴ California and Colorado include farm workers in their minimum wage legislation, but this legislation is applicable only to women and children. CAL. LABOR CODE § 1178 (West 1955); COLO. REV. STAT. ANN. § 80-7-6 (1963). Michigan's minimum wage provisions are not applicable to "agricultural fruit growers, pickle growers, and tomato growers or other agricultural employers who traditionally contract for the harvesting on a piecework basis, as to those employees . . . used for such harvesting." MICH. COMP. LAWS § 408.394 (1967). These employees are paid on the basis of a scale established by the Wage Deviation Board of the Labor Department that provides an equivalent to the minimum wage for "a worker of average ability and diligence," a vague quality. [Such a scale has been established—see R. 408.711, and R. 408.712 (1967), and R. 408.713 (1968).] New Jersey has a minimum wage act for all employees, including farm employees, but removes the wage floor protection for farm workers after forty hours of work a week. Note 9, *supra*.