

CLARIFYING EMPLOYER-EMPLOYEE STATUS OF CERTAIN NEWSPAPER AND MAGAZINE VENDORS FOR SOCIAL-SECURITY PURPOSES

MARCH 13 (legislative day, FEBRUARY 2), 1948.—Ordered to be printed

Mr. MILLIKIN, from the Committee on Finance, submitted the following

REPORT

[To accompany H. R. 5052]

The Committee on Finance, to whom was referred the bill (H. R. 5052) to exclude certain vendors of newspapers or magazines from certain provisions of the Social Security Act and Internal Revenue Code, having considered the same, report favorably thereon and recommend that the bill do pass.

By virtue of this action, the Committee on Finance adopts the report of the Committee on Ways and Means of the House of Representatives, which follows:

GENERAL STATEMENT

This bill seeks to clarify the coverage provisions of title II of the Social Security Act, as amended, and related taxing provisions found in the Internal Revenue Code as these requirements apply to the vendors of newspapers and magazines.

Whatever effect it may have on the extension or restriction of existing coverage provisions is purely incidental to its main purpose, which is the removal of a substantial area of ambiguity and confusion in the application of the coverage provisions of the act. The bill has the unqualified endorsement of the newspaper publishers, the vendors concerned, and their union representatives. A telegram recently received from an important news-vendors' union is attached to this report.

Under existing law, service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution, is specifically excluded from the type of employment covered by title II of the act. All other services for newspaper- or magazine-publishing firms, including that of delivery or distribution by individuals over the age of 18, were to be treated as giving rise to an employer-employee relationship or independent contractor relationship depending on the usual common-law tests.

One of the most difficult problems in the administration of these provisions of the law is the determination of who is and who is not an employee engaged in the sale or distribution of newspapers if the individuals concerned are over the age of 18. Coverage depends upon whether there is employment, but neither the

term "employment" nor the terms "employer" and "employee" are precisely defined in the law.

Regardless of whether news vendors are or are not technically employees, under some decisions in recent cases, including a decision by one of the Federal district courts in California, involving certain vendors of newspapers, it has been held that the common-law tests, while thoroughly valid, are inadequate. The Government now contends that any type of service relationships constitutes employment for coverage purposes if it is not incidental to the pursuit of an independent calling, such as professional services rendered by lawyers, doctors, engineers, accountants, and the like. Obviously this raises the question of what is meant by "an independent calling."

The bill in question is not offered as the complete answer to the troublesome problem of defining employment or determining the existence of an employer-employee relationship. It simply provides that in the sale or distribution of newspapers and magazines under a contractual arrangement whereby sales are made at a fixed price, and compensation in whole or in part is measured by the excess of such price over the amount at which the newspapers or magazines are charged to the vendor, such vendor shall not be covered under title II of the Social Security Act regardless of whether he is guaranteed a minimum amount of compensation or credited with newspapers or magazines returned to his supplier.

The retail sales of newspapers and magazines, especially in our larger cities, is accomplished under unique and widely varying circumstances. A great many vendors, over the age of 18, commonly purchase their papers with their own capital and become virtually free agents to dispose of them at will, retaining what they consider to be profits and not wages.

Your committee feels that an important factor in determining that newspaper and magazine vendors should be treated as independent contractors or persons otherwise pursuing an independent calling, is the fact that they deal as independent principals with their own customers and that their success depends in large measure upon the good will engendered by them among such patrons. This fact has been too frequently overlooked in recent years in ascertaining the status of many classes of working people as employees in the types of activities covered by the Social Security Act. In the case of vendors of published periodicals or other reading matter, the mere fact that the contractual right to return-unsold goods at a given time exists (and this is a familiar practice among manufacturers and merchants as well) has little if any bearing on the ascertainment of the question of employment status.

Your committee is impressed with the fact that the vendors of newspapers and magazines are ordinarily free to sell other goods, wares, and merchandise, and frequently do; that they determine the way and the manner of offering the papers and magazines for sale; that they assume the risk of loss or destruction of papers or magazines which they are prevented from returning for credit; and that their gains should be considered as profits from their own business rather than as wages for employment.

After hearing considerable testimony in a public hearing your committee believes that where the basic method of compensation is that described above, these vendors should not be treated as employees; that to consider them as employees of the publishing firms whose products they buy and sell produces a ridiculous and absurd rule with implications that could be construed so as to permit any person over the age of 18 selling the products of another, under like arrangements, to be considered the employee of the one supplying such articles or products. Such a rule would create an unconscionable administrative burden upon the Government and upon the business firms and individuals concerned.

Among other things, it would require every publishing house to withhold the required tax from the profits of every individual selling the product of that firm. News, information, and reading matter written for profit and offered for sale to any buyer, or distributed gratis, is, in the judgment of your committee, a commodity within certain obvious limitations. One who buys it and sells or distributes it for a profit even though conditions may be attached to the selling or distributing process, clearly should not be regarded as standing in an employer-employee relationship.

The requirement of the bill, that the services will not be excluded unless performed "at the time of" the sale to the ultimate consumer, was inserted to make it clear that the exclusion was not to apply to a regional distributor whose services are antecedent to but not immediately part of the sale to the ultimate consumer. The insertion of the quoted words will not deny the exclusion although the vendor performs incidental services as a part of the sale, such as services in assembling newspapers and in taking them to the place of sale.

In order to avoid wiping out benefits and benefit rights which have already accrued and on which individuals may have placed reliance, the amendment to section 209 (b) (15) of the Social Security Act, relating to benefits under the old-age and survivors insurance system, is made effective with respect only to services performed after the enactment of the bill.

The amendments to the old-age and survivors insurance and unemployment taxing provisions in the Internal Revenue Code are applicable with respect to services performed after December 31, 1939. In the case of the unemployment tax, the bill provides that, as to services performed before July 1, 1946, the amendment shall operate in the same manner and have the same effect as if such amendment had been a part of section 1607 (c) (15) of the code as added to the code by section 614 of the Social Security Act amendments of 1939.

The bill prohibits any credit or refund of any amount paid prior to the date of enactment of this bill which constitutes an overpayment of tax solely by reason of an amendment made by this bill.

Your committee does not feel enactment of this legislation would in any way impair, hinder, or restrict the development or improvement of the present social-security system. On the contrary, by making it more exact in its terms and more easily administered, it will contribute to its added respect by the public and its efficiency in meeting the broad purposes of its establishment.

ENDORSEMENT BY NEWS VENDORS UNION, LOCAL NO. 468, SAN FRANCISCO, CALIF.

SAN FRANCISCO, CALIF., *January 23, 1948.*

HON. BERTRAND W. GEARHART,
House of Representatives, Washington, D. C.:

Membership of News Vendors Union, Local 468, happy that H. R. 5052 reintroduced. Hope when bill passed will be approved by President. News Vendors union particularly interested in section of bill dealing with sale of papers by adults under an independent contractor relationship.

WILLIAM PARRISH,
Secretary-Treasurer, News Vendors Union, Local 468.

CHANGES IN EXISTING LAW

In compliance with paragraph 2a of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SOCIAL SECURITY ACT, AS AMENDED

(53 Stat. 1375-6; 59 Stat. 67)

DEFINITIONS

Sec. 209. When used in this title—

* * * * *

(b) The term "employment" means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of the Social Security Act prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * * *

(15) (A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; [or]

(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back; or

INTERNAL REVENUE CODE

SEC. 1426. DEFINITIONS.

When used in this subchapter—

(b) Employment.—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

(15) (A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; [or]

(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back; or

SEC. 1607. DEFINITIONS.

When used in this subchapter—

(c) Employment.—The term "employment" means any service performed prior to July 1, 1946, which was employment as defined in this section as in effect at the time the service was performed; and any service, of whatever nature, performed after June 30, 1946, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

(15) (A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back.