

3. Act 151, P.A. 1962, makes no provision for a director of drugs and drug stores. This officer is replaced by the secretary.

4. The board will have to elect a secretary on or after the effective date of the act, March 28, 1963, to perform those duties prescribed by Sec. 4 (2) of the act and to serve until the next annual election and qualification of a successor. The requirement of the statute that the "board shall elect annually a secretary" would not fix any specific time to do so, but rather leaves it to the direction of the board to select the date. The only mandate is that the election is made once in a year. *McMaster v. New York Life Insurance Company*, 99 Fed. 856.

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SUNDAY CLOSING LAW: Exemption provisions construed – closing of stores owned by same person or legal entity.

Act 128, P.A. 1962, exempts from its provisions any retail store where food is sold for consumption away from the premises in which are employed not more than two proprietors and one other person at any one time. The phrase "at any one time" construed and applied for purposes of exemption in determining the number of persons employed in a retail store.

All of the retail stores where food is sold for consumption away from the premises in Michigan owned and managed by the same person or legal entity which are subject to Act 128, P.A. 1962, are deemed a single entity for the purpose of selecting the Saturday or Sunday as the day of refraining from prohibited transactions. Whether a store is exempt from the provisions of Act 128, P. A. 1962, is to be determined at each separate location by application of the tests for exemption.

No. 4147

April 4, 1963.

Honorable James H. Karoub
State Representative
The Capitol
Lansing, Michigan

You have requested an opinion of this office as to the interpretation of Act No. 128, P.A. 1962.¹ The act prohibits the sale, trade or exchange, or the offer to sell, trade or exchange on both of any successive Saturdays and Sundays of certain tangible personalty specified in section 1 of the act.

Section 2 of the act provides exceptions by specifying certain tangible personal property which may be sold, exchanged or traded or offered for sale, trade or exchange during seven days of the week. In pertinent part, section 2 provides:

"Nothing in this act shall be construed to prohibit any sale of * * * food for consumption away from the premises where sold if grown on

¹ Sections of this act have been assigned C.L. section nos. 435.51 et seq. and M.S.A. section nos. 18.857(1) et seq.

premises of which the place of sale is a part or if sold in a retail store not larger than 4,000 square feet or in which are employed not more than 2 proprietors and 1 other person at any one time, * * *."

Section 3 of the act contemplates that during any period of six consecutive calendar months, a person, firm or corporation engaged in the sale, trade or exchange or the offer for sale, trade or exchange of tangible personal property enumerated in section 1 of the act, may only once change its practice of sale on either Saturday or Sunday. In other words, persons, firms or corporations subject to the alternative Saturday or Sunday closing requirement set forth in section 1 of the act, may change from a Saturday closing to a Sunday closing, or vice versa, only once in any period of six consecutive calendar months. Further, on the weekend when the change-over from Saturday closing to Sunday closing, or vice versa, is made, there shall be only one of those two days upon which the sale of items specified in section 1 of the act is permitted.

Section 3 goes on to specify as follows:

"* * * When any person, firm or corporation owns or manages or has a beneficial interest of more than $\frac{1}{2}$ in the ownership, except as independent lessor or vendor, or management of more than 1 place of business in this state, all such places of business shall be considered a single entity for all purposes of selection between Saturday and Sunday under this act, and for this purpose a husband and wife shall be considered a single person unless at the time legally separated by order of a court having competent jurisdiction. * * *"

To facilitate the presentation of this opinion, we have rephrased your questions as follows:

1. What does the phrase "at any one time" mean relative to the exclusion from the closing requirement of establishments engaged in the sale or offer for sale, trade or exchange of food for consumption away from the premises "in which are employed not more than 2 proprietors and 1 other person at any one time"?
2. What is the meaning of the provision in section 3 of Act No. 128, P.A. 1962, which specifies, in case of single ownership or management of several establishments, that "all such places of business shall be considered a single entity for all purposes of selection between Saturday and Sunday"?
3. In case of single ownership of two or more establishments engaging in the sale or offer for sale of food for consumption away from the premises, are all of such establishments which EITHER contain less than 4,000 square feet in floor area customarily open to the public OR in which not more than two proprietors and one other person are employed at any one time excluded from the provisions of Act No. 128, P.A. 1962?

In answering the questions posed, we take cognizance of certain undisputed rules of statutory construction, i.e.

- (1) The words of a statute must be given their ordinary and usual meaning.

Hammons vs. Franzblau, 331 Mich. 572.

Jewel Tea Company, Inc. vs. Board of Pharmacy, 335 Mich. 673.

(2) Full effect must be given to the intent of the legislature.

Van Antwerp vs. State, 334 Mich. 593, 599, citing *City of Grand Rapids vs. Crocker*, 219 Mich. 178, 182, 183.

As above noted, section 2 exempts those stores "in which are employed not more than two proprietors and one other person at any one time." In construing such phrase attention should first be given to the meaning to be ascribed to the term "employed." It will be noted that such term is used to refer to both the two proprietors and the one employee. Obviously, therefore, it is not used to refer to the relationship between employer and employee, or master and servant. In *People vs. McKinney*, 10 Mich. 54, it was held that a statute prescribing penalties for "any officer, clerk or other person employed in the treasury of this State" who shall commit any fraud or embezzlement therein was applicable to the state treasurer, as well as others in that office. The court stated at page 84:

"The primary signification of the word 'employ,' is not that for which the defendant's counsel contends; the primary meaning, as given by Webster, is 'to occupy the time, attention and labor of; to keep busy or at work,' etc., the sense which would here include the treasurer. The sense claimed by defendant's counsel is the fourth given by Webster, 'to engage one's services.'"

Stephens et al vs. Cotton Producers Association et al, 117 F. Supp. 517, was an action to recover unpaid minimum wages and over-time payments pursuant to the fair labor standards act. Plaintiffs were employed by an association hired by chicken growers to catch chickens, put them in coops and load them on trucks, and transport them to a local processing plant. The opinion stated at page 523 with respect to the interpretation to be placed upon certain regulations of the administrator:

"A casual reading of the above regulations adopted by the Administrator may create the impression that the phrase 'where employed' means that the person working at the processing plant must be employed by the processing plant in order to be exempt. Slight reflection, however, will dispel such an inference. The word 'employed' frequently refers to a person whose services are utilized in furtherance of the business of another, notwithstanding the absence of a technical employer-employee relationship. 14 Words & Phrases, Employed, p. 500 et seq. Where the Administrator used the words 'where employed' he evidently meant 'where engaged'. As stated by Judge Borah in *Tobin v. Girard Properties, Inc.*, 5 Cir., 206 F. 2d 524, 527. 'It is not important whether the employer * * * is engaged in interstate commerce. It is the work of the employee which is decisive.'"

In *Caroli et al vs. Saxl et al*, 81 N.Y.S. 2d 213, 215; 192 Misc. 887, action was brought against the commissioner of housing and buildings of the city of New York, et al, to restrain enforcement by defendants of a notice of violation served on the owner. It was claimed that parts of a building were being used for factory purposes contrary to the certificate

of occupancy which permitted use of the building as an office building only. The statutory definition of the term "factory building" concluded:

"The provisions of this chapter shall, so far as prescribed by the rules, also apply to a building, not a factory building, any part of which is occupied or used for a factory, except as otherwise provided by this subdivision."

The term "factory" was defined by the same statute to include:

"* * * a mill, workshop or other manufacturing establishment * * * where one or more persons are employed at manufacturing, including making, altering, repairing, finishing, bottling, canning, cleaning or laundering any article or thing, in whole or in part * * *. The provisions of this chapter affecting structural changes and alterations shall not apply to factories or to any buildings, * * * where less than six persons are employed at manufacturing * * *."

The administrative code prohibited change in the occupancy or use of the structure, if such change was inconsistent with the last issued certificate of occupancy. The opinion stated at page 216:

"It follows that if six persons are employed in manufacturing as defined by the Labor Law the Commissioner acted rightfully. The parties are not in accord as to what persons are to be counted in this classification. In this connection the word 'employed' means 'engaged in,' and would apply to an employer or a person working for himself if he engaged in the acts which constituted manufacturing but would not apply to an employee who did clerical or other work separate from the work of manufacturing."

Webster's Third New International Dictionary, Unabridged Edition, defines the term "employ" to mean "occupy" or "busy."

I therefore interpret the term "employed" as used in section 2 of Act No. 128 for the purpose of determining the number of persons at any one time, to mean "busy, or engaged in rendering service"—in other words, "working" in the retail store as distinguished from one who is either a proprietor or employee of the establishment but not then actually working.

Consideration will now be given to the phrase "at any one time" as it is used in section 2 of the act relating to the number of proprietors and other persons employed. The case of *Thomas vs. Genevieve Mueller et al*, 106 Ill. 36, involved the interpretation of the phrase "at any time hereafter" in a power of attorney authorizing the confession of judgment. The power of attorney was not dated, but appellant asked the court to presume that it was executed on the same day upon which it was filed which was the day the judgment was entered, and urged that the judgment was invalid on the ground that the attorney was not authorized to confess judgment on that day. In rejecting such contention the court stated at pages 43-44:

"* * * The papers do not show, nor do the allegations in the bill, that it was executed on that day. But concede it was, does the language of the warrant preclude the confession on the day it was executed? The language is, to enter the appearance of Henry E. Mueller, in term time or in vacation, 'at any time hereafter,' and file a *cognovit*,

and confess judgment, etc. The obvious meaning is, at any time after the warrant was executed. It was confined to no day or time, except it was after the execution of the warrant of attorney. That, by its terms, was the only limitation as to the time these acts should be performed. There is no computation of time involved. The only question is, when was the attorney in fact empowered to act? And the warrant says, at any time after it is executed. This is the only interpretation the language will bear. * * *"²

In order to come within such exemption a store may not employ more than the designated number "at any one time." This requires the number of persons employed, i.e. rendering service, or working therein to be computed as of a given time, and includes in the count both the proprietors and any other persons. Thus, if A is employed in the store during only three days each week and B is employed during only the remaining four days, both A and B would not be counted because they were not employed therein at the same time. The fact that both A and B are on the payroll of the store and working therein at some time during a given week or other period does not require counting them both so long as their respective periods of employment or actual rendering of service therein do not overlap. However, if at any time both A and B are working therein simultaneously both would be counted and the store could not qualify. For example, if A and B each worked four days a week and both of them worked there on Saturdays, or at some other time, the store could not qualify for exemption upon this ground. The restriction placed upon such exemption does not permit two employees to work in the store during rush hours regardless of the shortness of such periods. The foregoing interpretation gives effect to the language employed and the legislative intent as expressed thereby.

If not otherwise exempt³ under the provisions of the act, an establishment which employs at any one time more than two proprietors and one other person is subject to the provisions of Act No. 128, P.A. 1962.

Consideration will not be given to your second question.

Section 3 contemplates that persons, firms or corporations engaged in the sale, trade or exchange, or offer for sale, trade or exchange, of tangible personal property as enumerated in section 1 of the act, shall select either Saturday or Sunday as the day on which they shall refrain from the prohibited transactions. A corporation, partnership or natural person owning, operating or managing several places of business within this state could, in the absence of statutory restriction, elect to refrain from prohibited transactions in one store on Saturday and in another store on Sunday. Apparently the legislature foresaw this possibility and specified that a single owner or manager of several business establishments subject to the provi-

² See also *The Merchants National Bank vs. Stone*, 296 Mass. 243, 5 NE 2d 430, 433, involving the phrase "at any one time outstanding"; and *The Wellfleet Savings Bank vs. Swift*, 340 Mass. 62, 162 NE 2d 799, involving the phrase "at any one time."

³ An establishment would otherwise be exempt if (1) the food for consumption away from the premises is grown on the premises of which the place of sale is a part, or (2) the floor area customarily open to the public is 4,000 square feet, or less.

sions of Act No. 128 can make but one selection between Saturday and Sunday, which would be applicable uniformly to all of his stores subject to the act. The selection of either Saturday or Sunday for one place of business is binding upon all other places of business within the state owned or managed by the same entity. The result indicated is based upon the ordinary and usual meaning of the statutory language employed and gives full effect to legislative intent.

In answer to your second question, it is my opinion that several places of business where food is sold for consumption away from the premises owned or managed by a natural person or legal entity are only deemed a single entity for the purposes of selecting Saturday or Sunday as the day of refraining from prohibited transactions, and the right to exemption is determined on the basis of each separate location.

I now turn to your third question.

For the purposes of the act single ownership of several establishments is subject to the restriction that all of the establishments of the single owner must refrain from the prohibited transactions on the same day. Only for the purpose of selecting between Saturday and Sunday are they considered a "single entity." Such establishments, although owned by a single owner as defined in section 3, are distinct and separate establishments for purposes of section 2 of the act. In other words, if one person should own two establishments where food for consumption away from the premises is sold, we must determine at each separate location whether the food was grown on the premises; if not, then whether the store contains not more than 4,000 square feet in floor area customarily open to the public; or employs not more than two proprietors and one other person at any one time.

Your third question is answered as follows:

Although several establishments engaged in the sale of food for consumption away from the premises are owned or managed by the same natural person or legal entity, whether a store is exempt from the provisions of this act is to be determined at each separate location by application of the tests for exemption.

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