PART 790—GENERAL STATEMENT AS TO THE EFFECT OF THE PORTAL-TO-PORTAL ACT OF 1947 ON THE FAIR LABOR STANDARDS ACT OF 1938

GENERAL

Sec.

PROVISIONS RELATING TO CERTAIN ACTIVITIES ENGAGED IN BY EMPLOYEES ON OR AFTER MAY 14, 1947

DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

RESTRICTIONS AND LIMITATIONS ON EMPLOYEE SUITS

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*

SOURCE: 12 FR 7655, Nov. 18, 1947, unless otherwise noted.

GENERAL

§ 790.1 Introductory statement.

(a) The Portal-to-Portal Act of 1947 was approved May 4, 1947.[1] It contains provisions which, in certain circumstances, affect the rights and liabilities of employees and employers with regard to alleged underpayments of minimum or overtime wages under the provisions of the Fair Labor Standards Act of 1938,[2] the Walsh-Healey Public Contracts Act, and the Bacon-Davis Act. The Portal Act also establishes time limitations for the bringing of certain actions under these three Acts, limits the jurisdiction of the courts with respect to certain claims, and in other respects affects employee suits and proceedings under these Acts.

For the sake of brevity, this Act is referred to in the following discussion as the Portal Act.

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the Act. These provisions are not discussed at length in this part,[3]

[1] An act to relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes (61 Stat. 84; 29 U.S.C., Sup., 251 *et seq.*).

[2] 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.* In the Fair Labor Standards Act, the Congress exercised its power over interstate commerce to establish basic standards with respect to minimum and overtime wages and to bar from interstate commerce goods in the production of which these standards were not observed. For the nature of liabilities under this Act, see footnote 17.

[3] Sections 790.23 through 790.29 in the prior edition of this part 790 have been omitted in this revision because of their obsolescence in that they dealt with those sections of the Act concerning activities prior to May 14, 1947, the effective date of the Portal-to-Portal Act.

because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

(c) The correctness of an interpretation of the Portal Act, like the correctness of an interpretation of the Fair Labor Standards Act, can be determined finally and authoritatively only by the courts. It is necessary, however, for the Administrator to reach informed conclusions as to the meaning of the law in order to enable him to carry out his statutory duties of administration and enforcement. It would seem desirable also that he makes these conclusions known to persons affected by the law.[4] Accordingly, as in the case of the interpretative bulletins previously issued on various provisions of the Fair Labor Standards Act, the interpretations set forth herein are intended to indicate the construction of the law which the Administration believes to be correct[5] and which will guide him in the performance of his administrative duties under the Fair Labor Standards Act, unless and until he is directed otherwise by authoritative rulings of the courts or concludes, upon reexamination of an interpretation, that it is incorrect. As the Supreme Court has pointed out, such interpretations provide a practical guide to employers and employees as to how the office representing the public interest in[6] enforcement of the law will seek to apply it. As has been the case in the past with respect to other interpretative bulletins, the Administrator will receive and consider statements suggesting change of any interpretation contained in this part.

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

§ 790.2 Interrelationship of the two acts.

(a) The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interelated parts of the entire statutory scheme for the establishment of basic fair labor standards.[7] The Portal Act contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the Fair Labor Standards Act.[8] But the act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions ''detrimental to the maintenance of the minimum standard of living necessary for health, efficiency,

[4] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; Portal-to-Portal Act, sec. 10.

[5] The interpretations expressed herein are based on studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two Acts. These interpretations have been adopted by the Administrator after due consideration of relevant knowledge and experience gained in the administration of the Fair Labor Standards Act of 1938 and after consultation with the Solicitor of Labor.

[6] *Skidmore* v. *Swift & Co.*, 323 U.S. 134. See also *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *United States* v. *American Trucking Assn.*, 310 U.S. 534; *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572.

[7] As appears more fully in the following sections of this part, the several provisions of the Portal Act relate, in pertinent part, to actions, causes of action, liabilities, or punishments based on the nonpayment by employers to their employees of minimum or overtime wages under the provision of the Fair Labor Standards Act. Section 13 of the Portal Act provides that the terms, ''employer,'' ''employee,'' and ''wage'', when used in the Portal Act, in relation to the Fair Labor Standards Act, have the same meaning as when used in the latter Act.

[8] Portal Act, sections 1, 2, 4, 6, 9, 10, 11, 12. Sponsors of the legislation asserted that the provisions of the Portal Act do not deprive any person of a contract right or other right which he may have under the common law or under a State statute. See colloquy between Senators Donnell, Hatch and Ferguson, 93 Cong. Rec. 2098; colloquy between Senators Donnell and Ferguson, 93 Cong. Rec. 2127; statement of Representative Gwynne, 93 Cong. Rec. 1557.

and general well-being of workers.'' The legislative history indicates that the Portal Act was not intended to change this general policy.[9] The Congressional declaration of policy in section 1 of the Portal Act is explicitly directed to the meeting of the existing emergency and the correction, both retroactively and prospectively, of existing evils referred to therein.[10] Sponsors of the legislation in both Houses of Congress asserted that it ''in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act'' [11] that it ''protects the legitimate claims'' under that Act,[12] and that one of the objectives of the sponsors was to ''preserve to the worker the rights he has gained under the Fair Labor Standards Act.''[13] It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation [14] and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come ''plainly and unmistakably within (the) terms and spirit'' of such an exemption.[15]

(b) It is clear from the legislative history of the Portal Act that the major provisions of the Fair Labor Standards Act remain in full force and effect, although the application of some of them is affected in certain respects by the 1947 Act. The provisions of the Portal Act do not directly affect the provisions of section 15(a)(1) of the Fair Labor Standards Act banning shipments in interstate commerce of ''hot'' goods produced by employees not paid in accordance with the Act's requirements, or the provisions of section 11(c) requiring employers to keep records in accordance with the regulations prescribed by the Administrator. The Portal Act does not affect in any way the provision in section 15(a)(3) banning discrimination against employees who assert their rights under the Fair Labor Standards Act, or the provisions of section 12(a) of the Act banning from interstate commerce goods produced in establishments in or about which oppressive child labor is employed. The effect of the Portal Act in relation to the minimum and overtime wage requirements of the Fair Labor Standards Act is considered in this part in connection with the discussion of specific provisions of the 1947 Act.

Provisions Relating to Certain Activities Engaged in by Employees on or After May 14, 1947

§ 790.3 Provisions of the statute.

Section 4 of the Portal Act, which relates to so-called ''portal-to-portal'' activities engaged in by employees on or after May 14, 1947, provides as follows:

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * on account of

[9] See references to this policy at page 5 of the Senate Committee Report on the bill (Senate Rept. 48, 80th Cong., 1st sess.), and in statement of Senator Donnell, 93 Cong. Rec. 2177; see also statement of Senator Morse, 93 Cong. Rec. 2274; statement of Representative Walter, 93 Cong. Rec. 4389.

[10] Cf. House Rept. No. 71; Senate Rept. No. 48; House (Conf.) Rept. No. 326, 80th Cong., 1st sess. (referred to hereafter as House Report, Senate Report, and Conference Report); statement of Representative Michener, 93 Cong. Rec. 4390; statement of Senator Wiley, 93 Cong. Rec. 4269, 4270; statement of Representative Gwynne, 93 Cong. Rec. 1572; statements of Senator Donnell, 93 Cong. Rec. 2133–2135, 2176–2178; statement of Representative Robison, 93 Cong. Rec. 1499; Message of the President to Congress, May 14, 1947 on approval of the Act (93 Cong. Rec. 5281).

[11] Statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 and 4371. See also statement of Senator Cooper, 93 Cong. Rec. 2295; statement of Representative Robsion, 93 Cong. Rec. 1499, 1500.

[12] Statement of Representative Michener, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4391. See also statement of Representative Keating, 93 Cong. Rec. 1512.

[13] Statement of Senator Cooper, 93 Cong. Rec. 2300; see also statements of Senator Donnell, 93 Cong. Rec. 2361, 2362, 2364; statements of Representatives Walter and Robsion, 93 Cong. Rec. 1496, 1498.

[14] *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *United States* v. *Rosenwasser*, 323 U.S. 360; *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697.

[15] See *Phillips Co.* v. *Walling*, 324 U.S. 490; *Walling* v. *General Industries Co.*, 330 U.S. 545.

the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act:

(1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) Activities which are preliminary to or postliminary to said principal activity or activities

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either:

(1) An express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) A custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purpose of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

§ 790.4 Liability of employer; effect of contract, custom, or practice.

(a) Section 4 of the Portal Act, quoted above, applies to situations where an employee, on or after May 14, 1974, has engaged in activities of the kind described in this section and has not been paid for or on account of these activities in accordance with the statutory standards established by the Fair Labor Standards Act.[16] Where, in these circumstances such activities are not compensable by contract, custom, or practice as described in section 4, this section relieves the employer from certain liabilities or punishments to which he might otherwise be subject under the provisions of the Fair Labor Standards Act.[17] The primary Congressional objectives in enacting section 4 of the Portal Act, as disclosed by the statutory language and legislative history were:

(1) To minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the Fair Labor Standards Act of such preliminary or postliminary activities should continue to be tested solely by existing criteria[18] for determining compensable

[16] The Fair Labor Standards Act, as amended, requires the payment of the applicable minimum wage for all hours worked and overtime compensation for all hours in excess of 40 in a workweek at a rate not less than one and one-half times the employees regular rate of pay, unless a specific exemption applies.

[17] The failure of an employer to compensate employees subject to the Fair Labor Standards Act in accordance with its minimum wage and overtime requirements makes him liable to them for the amount of their unpaid minimum wages and unpaid overtime compensation together with an additional equal amount (subject to section 11 of the Portal-to-Portal Act, discussed below in § 790.22) as liquidated damages (section 16(b) of the Act); and, if his Act or omission is willful, subjects him to criminal penalties (section 16(a) of the Act). Civil actions for injunction can be brought by the Administrator (sections 11(a) and 17 of the Act).

[18] Employees subject to the minimum and overtime wage provisions of the Fair Labor Standards Act have been held to be entitled to compensation in accordance with the statutory standards, regardless of contrary custom or contract, for all time spent during the workweek in ''physical or mental exertion (whether burdensome or not), controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business'' (*Tennessee Coal Iron & R.R. Co.* v. *Muscoda Local*, 321 U.S. 590, 598), as well as for all time spent in active or

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worktime, independently of contract, custom, or pratice; [19] and

(2) To leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to the compensability of activities and time to be included in computing hours worked. [20]

(b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:

(1) They constitute ''walking, riding, or traveling'' of the kind described in the statute, or other activities ''preliminary'' or ''postliminary'' to the ''principal activity or activities'' which the employee is employed to perform; and

(2) They take place before or after the performance of all the employee's ''principal activities'' in the workday; and

(3) They are not compensable, during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

(c) It will be observed that section 4 of the Portal Act relieves an employer of liability or punishment only with respect to activities of the kind described, which have not been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are performed. The statute states that ''the employer shall not be so relieved'' if such activities are so compensable; [21] it does not matter in such a situation that they are so-called ''portal-to-portal'' activities. [22]

Accordingly, an employer who fails to take such activities into account in paying compensation to an employee who is subject to the Fair Labor Standards Act is not protected from liability or punishment in either of the following situations.

(1) Where, at the time such activities are performed there is a contract, whether written or not, in effect between the employer and the employee (or the employee's agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for; [23] or

(2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties. [24]

In applying these principles, it should be kept in mind that under the provisions of section 4(c) of the Portal-to-Portal Act, ''preliminary'' or ''postliminary'' activities which take place outside the workday ''before the morning whistle'' or ''after the evening whistle'' are, for purposes of the statute, not to be considered compensable by a contract, custom or practice if such contract, custom or practice makes them compensable only during some other portion of the day. [25]

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

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inactive duties which such employees are engaged to perform (*Armour & Co.* v. *Wantock*, 323 U.S. 126, 132–134; *Skidmore* v. *Swift & Co.*, 323, U.S. 134, 136–137).

[19] Portal Act, section 1: Senate Report, pp. 41, 42, 46–49; Conference Report, pp. 12, 13; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269–4270; statements of Senator Donnell, 93 Cong. Rec. 2089, 2121, 2122, 2181, 2182, 2362, 2363; statements of Senator Cooper, 93 Cong. Rec. 2292–2300.

[20] Senate Report, pp. 46–49; Conference Report, pp. 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362; statements of Senator Cooper, 93 Cong. Rec. 2294, 2296, 2297, 2299, 2300; statement of Representative Gwynne, 93 Cong. Rec. 4388; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269–4270.

[21] Section 4(b) of the Act (quoted in § 790.3).

[22] Conference Report, pp. 12, 13; colloquy between Senators Donnell and Hakes, 93 Cong. Rec. 2181–2182; colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297–2298, cf. colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[23] Statements of Senator Donnell, 93 Cong. Rec. 2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298, 2299.

[24] Statements of Senator Donnell, 93 Cong. Rec. 2181, 2182.

[25] Conference Report, pp. 12, 13. See also § 790.12.

§ 790.5 Effect of Portal-to-Portal Act on determination of hours worked.

(a) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4(d). This section requires that:

> . . . in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described (in section 4(a)) there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable (under contract, custom, or practice within the meaning of section 4 (b), (c)).[26]

This provision is thus limited to the determination of whether time spent in such ''preliminary'' or ''postliminary'' activities, performed before or after the employee's ''principal activities'' for the workday[27] must be included or excluded in computing time worked.[28] If time spent in such an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,[29] then the question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activity is to be excluded in computing the time worked if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice within the meaning of section 4; otherwise it must be included as worktime in calculating minimum or overtime wages due.[30] Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an employee engages in such activities thus compensable by contract, custom, or practice.[31] But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4(d) of the Portal Act.

(b) The operation of section 4(d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel which is so made compensable.[32] But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the Act. And under the provisions of section 4(c) of the Portal Act,[33] if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

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[26] The full text of section 4 of the Act is set forth in § 790.3.

[27] See § 709.6. Section 4(d) makes plain that subsections (b) and (c) of section 4 likewise apply only to such activities.

[28] Conference Report, p. 13.

[29] See footnote 18.

[30] See Conference Report, pp. 10, 13.

[31] Conference Report, p. 10.

[32] Cf. colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181, 2182; colloquy between Senators Ellender and Cooper, 83 Cong. Rec. 2296–2297; colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2297–2298. See also Senate Report, p. 48.

[33] See § 790.3 and Conference Report pp. 12, 13. See also Senate Report, p. 48.

§ 790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the ''workday'' proper, roughly described as the period ''from whistle to whistle,'' and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under the provisions of section 4, one of the conditions that must be present before ''preliminary'' or ''postliminary'' activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the ''workday'' proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the ''workday'' in activities of the kind described in section 4.[37]

(b) ''Workday'' as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the ''workday'', and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his ''workday'' commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

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[34] The report of the Senate Judiciary Committee states (p. 47), ''Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section.''

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293–2294, 2296–2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

§ 790.7 "Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in ''preliminary'' or ''postliminary'' activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not ''preliminary'' or ''postliminary'' activities outside the workday.[41] And even where there is a contract, custom, or practice to pay for time spent in such a ''preliminary'' or ''postliminary'' activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words ''preliminary activity'' mean an activity engaged in by an employee before the commencement of his ''principal'' activity or activities, and the words ''postliminary activity'' means an activity engaged in by an employee after the completion of his ''principal'' activity or activities. No categorical list of ''preliminary'' and ''postliminary'' activities except those named in the Act can be made, since activities which under one set of circumstances may be ''preliminary'' or ''postliminary'' activities, may under other conditions be ''principal'' activities. The following ''preliminary'' or ''postliminary'' activities are expressly mentioned in the Act: ''Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform.''[43]

(c) The statutory language and the legislative history indicate that the ''walking, riding or traveling'' to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of ''walking, riding or traveling'' described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel

[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178–2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4 and 790.5.

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

[44] These conclusions are supported by the limitation, ''to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform,'' which follows the term ''walking, riding or traveling'' in section 4(a), and by the additional limitation applicable to all ''preliminary'' and ''postliminary'' activities to the effect that the Act may affect them only if they occur ''prior to'' or ''subsequent to'' the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

would not ordinarily be ''walking, riding, or traveling'' of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this Act, without reference to the Portal Act.[46]

(d) An employee who walks, rides or otherwide travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel ''to and from the actual place of performance'' of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as ''Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out.'' The phrase, actual place of performance,'' as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a ''trouble-shooter'' in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered ''preliminary'' or ''postliminary'' activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the Act ''does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday.''

[46] These principles are discussed in part 785 of this chapter.

[47] Senator Cooper, after explaining that the ''principal'' activities referred to include activities which are an integral part of a ''principal'' activity (Senate Report, pp. 47, 48), that is, those which ''are indispensable to the performance of the productive work,'' summarized this provision as it appeared in the Senate Bill by stating: ''We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer.'' 93 Cong. Rec. 2299.

[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

and, when performed under the conditions normally present, would be considered ''preliminary'' or ''postliminary'' activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

(h) As indicated above, an activity which is a ''preliminary'' or ''postliminary'' activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's ''principal activity''. See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297–2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 7 WHR 1165.

§ 790.8 "Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the ''principal'' activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is ''preliminary or postliminary to (the) principal activity or activities'' which the employee is employed to perform, it is generally necessary to determine what are such ''principal'' activities.[54]

The use by Congress of the plural form ''activities'' in the statute makes it clear that in order for an activity to be a ''principal'' activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several ''principal'' activities during the workday. The ''principal'' activities referred to in the statute are activities which the employee is ''employed to perform'';[56] they do not include noncompensable ''walking, riding, or traveling'' of the type referred to in section 4 of the Act.[57] Several guides to determine what constitute ''principal activities'' was suggested in the legislative debates. One of the members of the

[53] See §§ 790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

[54] Although certain ''preliminary'' and ''postliminary'' activities are expressly mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as ''principal'' activities is necessary.

[55] Cf. *Edward F. Allison Co., Inc.* v. *Commissioner of Internal Revenue*, 63 F. (2d) 553 (C.C.A. 8, 1933).

[56] Cf. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132–134; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136–137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

conference committee stated to the House of Representatives that ''the realities of industrial life,'' rather than arbitrary standards, ''are intended to be applied in defining the term 'principal activity or activities','' and that these words should ''be interpreted with due regard to generally established compensation practices in the particular industry and trade.'' [58] The legislative history further indicates that Congress intended the words ''principal activities'' to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed. [59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered ''sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work.'' [60]

(b) The term ''principal activities'' includes all activities which are an integral part of a principal activity. [61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill. [62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract. [63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. [64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, [65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. [66] On the other hand, if

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

[59] See statements of Senator Cooper, 93 Cong. Rec. 2296–2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297–2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that ''There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes.'' In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297–2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297–2298.

changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a ''preliminary'' or ''postliminary'' activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

[12 FR 7655, Nov, 18, 1947, as amended at 35 FR 7383, May 12, 1970]

§ 790.9 "Compensable * * * by an express provision of a written or nonwritten contract."

(a) Where an employee engages in a ''preliminary'' or ''postliminary'' activity of the kind described in section 4(a) of the Portal Act and this activity is ''compensable * * * by an express provision of a written or nonwritten contract'' applicable to the employment, section 4 does not operate to relieve the employer of liability or punishment under the Fair Labor Standards Act with respect to such activity,[68] and does not relieve the employer of any obligation he would otherwise have under that Act to include time spent in such activity in computing hours worked.[69]

(b) The word ''compensable,'' is used in subsections (b), (c), and (d) of section 4 without qualification.[70] It is apparent from these provisions that ''compensable'' as used in the statute, means compensable in any amount.[71]

(c) The phrase ''compensable by an express provision of a written or nonwritten contract'' in section 4(b) of the Portal Act offers no difficulty where a written contract states that compensation shall be paid for the specific activities in question, naming them in explicit terms or identifying them through any appropriate language. Such a provision clearly falls within the statutory description.[72] The existence or nonexistence of an express provision making an activity compensable is more difficult to determine in the case of a nonwritten contract since there may well be conflicting recollections as to the exact terms of the agreement. The words ''compensable by an express provision'' indicate that both the intent of the parties to contract with respect to the activity in question and their intent to provide compensation for the employee's performance of the activity must satisfactorily appear from the express terms of the agreement.

(d) An activity of an employee is not ''compensable by * * * a written or nonwritten contract'' within the meaning of section 4(b) of the Portal Act unless the contract making the activity compensable is one ''between such employee,[72] his agent, or collective-bargaining representative and his employer.''[73] Thus, a provision in a contract between a government agency and the employer, relating to compensation of the contractor's employees, would not in itself establish the compensability by ''contract'' of an activity, for purposes of section 4.

§ 790.10 "Compensable * * * by a custom or practice."

(a) A ''preliminary'' or ''postliminary'' activity of the type described in section 4(a) of the Portal Act may be ''compensable'' within the meaning of section 4(b), by a custom or practice as well as by a contract. If it is so compensable, the relief afforded by section 4 is not available to the employer with respect to such activity,[74] and section 4(d) does not operate to exclude the time spent in such activity from hours worked under the Fair

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305–2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296–2297, 2298.

[68] See § 790.4.

[69] See §§ 790.5 and 790.7.

[70] The word is also so used throughout section 2 of the Act which relates to past claims. See §§ 790.28–790.25.

[71] Cf. Conference Report, pp. 9, 10, 12, 13; message of the President to the Congress on approval of the Portal-to-Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[72] See colloquy between Senators Donnell and Lodge, 93 Cong. Rec. 2178; colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181–2182.

[73] The terms ''employee'' and ''employer'' have the same meaning as when used in the Fair Labor Standards Act. Portal-to-Portal Act, section 13(a).

[74] See § 790.4.

Labor Standards Act.[75] Accordingly, in the event that no ''express provision of a written or nonwritten contract'' makes compensable the activity in question, it is necessary to determine whether the activity is made compensable by a custom or practice, not inconsistent with such a contract, in effect at the establishment or other place where the employee was employed.[76]

(b) The meaning of the word ''compensable'' is the same, for purposes of the statute, whether a contract or a custom or practice is involved.[77]

(c) The phrase, ''custom or practice,'' is one which, in common meaning, is rather broad in scope. The meaning of these words as used in the Portal Act is not stated in the statute; it must be ascertained from their context and from other available evidence of the Congressional intent, with such aid as may be had from the many judicial decisions interpreting the words ''custom'' and ''practice'' as used in other connections. Although the legislative history casts little light on the precise limits of these terms, it is believed that the Congressional reference to contract, custom or practice was a deliberate use of non-technical words which are commonly understood and broad enough to cover every normal situation under which an employee works or an employer for compensation.[78] Accordingly, ''custom'' and ''practice,'' as used in section 4(b) of the Portal Act, may be said to be descriptive generally of those situations where an employer, without being compelled to do so by an express provision of a contract, has paid employees for certain activities performed. One of the sponsors of the legislation in the House of Representatives indicated that the intention was not only ''to protect every collective bargaining agreement about these activities'' but ''to protect the agreement between one workman and his employer'' and ''every practice or custom which we assume must have entered into the minds of the people when they made the contract.'' [79]

(d) The words, ''custom or practice,'' as used in the Portal Act, do not refer to industry custom or the habits of the community which are familiar to the people; these words are qualified by the phrase ''in effect * * * at the establishment or other place where such employee was employed.'' The compensability of an activity under custom or practice, for purposes of this Act, is tested by the custom or the practice at the ''particular place of business,'' ''plant,'' ''mine,'' ''factory,'' ''forest,'' etc.[80]

(e) ''The custom or practice'' by which compensability of an activity is tested under the statute is one ''covering such activity.'' Thus, a custom or practice to pay for washing up in the plant after the end of the workday, for example, would not necessarily establish the compensability of walking time thereafter from the washroom in the plant to the plant gate. It is enough, however, if there is a custom or practice covering ''such activity''; there is no provision, as there is with regard to contracts, that the custom or practice be one ''between such employee, his agent, or collective-bargaining representative, and his employer.'' [81]

(f) Another qualification of the ''custom or practice'' referred to in the statute is that it be ''not inconsistent with a written or non-written contract'' of the kind mentioned therein. If the contract is silent on the question of compensability of the activity, a custom or practice to pay for it would

[75] See §§ 790.5 and 790.7.

[76] See Senate Report, p. 49.

The same is true with respect to the activities referred to in section 2 of the Portal Act in an action or proceeding relating to activities performed before May 14, 1947. See Senate Report, p. 45. See also § 790.23.

[77] See § 790.9(b).

[78] See colloquy between Senators Donnell and Tydings, 93 Cong. Rec. 2125, 2126; colloquy between Senators Donnell, Lodge, and Hawkes, 93 Cong. Rec. 2178, 2179; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2181, 2182. Statements of Senator Cooper, 93 Cong. Rec. 2293.

[79] Statements of Representative Gwynne, 93 Cong. Rec. 1566.

[80] Senate Report, p. 45; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[81] See § 790.9(d).

not be inconsistent with the contract.[82] However, the intent of the provision is that a custom or practice which is inconsistent with the terms of any such contract shall not be taken into account in determining whether such an activity is compensable.[83]

§ 790.11 Contract, custom or practice in effect "at the time of such activity."

The ''contract,'' ''custom'' or ''practice'' on which the compensability of the activities referred to in section 4 of the Portal Act may be based, is a contract, custom or practice in effect ''at the time of such activity.'' Thus, the compensability of such an activity, and its inclusion in computation of hours worked, is not determinable by a custom or practice which had been terminated before the activity was engaged in or was adopted some time after the activity was performed. This phrase would also seem to permit recognition of changes in customs, practices and agreements which reflect changes in labor-management relations or policies.

§ 790.12 "Portion of the day."

A ''preliminary'' or ''postliminary'' activity of the kind referred to in section 4 of the Portal Act is compensable under a contract, custom, or practice within the meaning of that section ''only when it is engaged in during the portion of the day with respect to which it is so made compensable.''[84] This provision in no way affects the compensability of activities performed within the workday proper or the computation of hours worked within such workday for purposes of the Fair Labor Standards Act;[85] the provision is applicable only to walking, riding, traveling or other ''preliminary'' or ''postliminary'' activities of the kind described in section 4(a) of the Portal Act,[86] which are engaged in outside the workday, during the portions of the day before performance of the first principal activity and after performance of the last principal activity of the employee.[87]

DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

§ 790.13 General nature of defense.

(a) Under the provisions of sections 9 and 10 of the Portal Act, an employer has a defense against liability or punishment in any action or proceeding brought against him for failure to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act, where the employer pleads and proves that ''the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation'' or ''any administrative practice or enforcement policy * * * with respect to the class of employers to which he belonged.'' In order to provide a defense with respect to acts or omissions occurring on or after May 14, 1947 (the effective date of the Portal Act), the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of the ''Administrator of the Wage and Hour Division of the Department of Labor,'' and a regulation, order, ruling, approval, or interpretation of the Administrator may be relied on only if it is in writing.[88] But where the acts or omissions complained of occurred before May 14, 1947, the employer may show that they were in good faith in conformity with and in reliance on ''any'' (written or nonwritten) administrative

[82] Senate Report, pp. 45, 49; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[83] Senate Report, pp. 45, 49.

[84] Section 4(c) of the Portal Act (set out in full in § 790.3).

[85] See §§ 790.4–790.6.

[86] Conference Report, pp. 12, 13.

[87] See Conference Report, p. 13; §§ 790.4(c) and 790.5(b).

The scope of section 4(c) is narrower in this respect than that of section 2(b), which is couched in identical language. Cf. Conference Report, pp. 9, 10; pp. 12, 13. See also § 790.23.

[88] Portal Act, sec. 10; Conference Report, p. 16; statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388, 4389. See also §§ 790.17 and 790.19.

regulation, order, ruling, or interpretation of ''any agency of the United States,'' or any administrative practice or enforcement policy of ''any such agency'' with respect to the class of employers to which he belonged.[89] In all cases, however, the act or omission complained of must be both ''in conformity with'' [90] and ''in reliance on'' [91] the administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy, as the case may be, and such conformance and reliance and such act or omission must be ''in good faith.'' [92] The relief from liability or punishment provided by sections 9 and 10 of the Portal Act is limited by the statute to employers who both plead and prove all the requirements of the defence.[93]

(b) The distinctions mentioned in paragraph (a) of this section, depending on whether the acts or omissions complained of occurred before or after May 14, 1947, may be illustrated as follows: Assume that an employer, on commencing performance of a contract with X Federal Agency extending from January 1, 1947 to January 1, 1948, received an opinion from the agency that employees working under the contract were not covered by the Fair Labor Standards Act. Assume further that the employer may be said to have relied in good faith upon this opinion and therefore did not compensate such employees during the period of the contract in accordance with the provisions of the Act. After completion of the contract on January 1, 1948, the employees, who have learned that they are probably covered by the Act, bring suit against their employer for unpaid overtime compensation which they claim is due them. If the court finds that the employees were performing work subject to the Act, they can recover for the period commencing May 14, 1947, even though the employer pleads and proves that his failure to pay overtime was in good faith in conformity with and in reliance on the opinion of X Agency, because for that period the defense would, under section 10 of the Portal Act, have to be based upon written administrative regulation, order, ruling, approval, or interpretation, or an administrative practice or enforcement policy of the Administrator of the Wage and Hour Division. The defense would, however, be good for the period from January 1, 1947 to May 14, 1947, and the employer would be freed from liability for that period under the provisions of section 9 of the statute.

§ 790.14 "In conformity with."

(a) The ''good faith'' defense is not available to an employer unless the acts or omissions complained of were ''in conformity with'' the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy upon which he relied.[94] This is true even though the employer erroneously believes he conformed with it and in good faith relied upon it; actual conformity is necessary.

(b) An example of an employer not acting ''in conformity with'' an administrative regulation, order, ruling, approval, practice, or enforcement policy is a situation where an employer receives a letter from the Administrator of the Wage and Hour Division, stating that if certain specified circumstances and facts regarding the work performed

[89] Portal Act, sec. 10; Conference Report, p. 16; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, 93 Cong. Rec. 4388, 4389. See also § 790.19.

[90] See § 790.14.

[91] See § 790.16.

[92] See § 790.15.

[93] Conference Report, pp. 15, 16; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388, 4389; statements of Senators Cooper and Donnell, 93 Cong. Rec. 4372, 4451, 4452. See also the President's message of May 14, 1947, to the Congress on approval of the Act (93 Cong. Rec. 5281).

The requirements of the statute as to pleading and proof emphasize the continuing recognition by Congress of the remedial nature of the Fair Labor Standards Act and of the need for safeguarding the protection which Congress intended it to afford employees. See § 790.2; of. statements of Senator Wiley, 93 Cong. Rec. 4270; Senator Donnell, 93 Cong. Rec. 4452, and Representative Walter, 93 Cong. Rec. 4388, 4389.

[94] Statement of Senator Cooper, 93 Cong. Rec. 4451; message of the President to Congress on approval of the Act, May 14, 1947, 93 Cong. Rec. 5281.

by the employer's employees exist, the employees are, in his opinion, exempt from provisions of the Fair Labor Standards Act. One of these hypothetical circumstances upon which the opinion was based does not exist regarding these employees, but the employer, erroneously assuming that this circumstance is irrelevant, relies upon the Administrator's ruling and fails to compensate the employees in accordance with the Act. Since he did not act ''in conformity'' with that opinion, he has no defense under section 9 or 10 of the Portal Act.

(c) As a further example of the requirement of conformity, reference is made to the illustration given in § 790.13(b), where an employer, who had a contract with the X Federal Agency covering the period from January 1, 1947 to January 1, 1948, received an opinion from the agency that employees working on the contract were not covered by the Fair Labor Standards Act. Assume (1) that the X Agency's opinion was confined solely and exclusively to activities performed under the particular contract held by the employer with the agency and made no general statement regarding the status under the Act of the employer's employees while performing other work; and (2) that the employer, erroneously believing the reasoning used in the agency's opinion also applied to other and different work performed by his employees, did not compensate them for such different work, relying upon that opinion. As previously pointed out, the opinion from the X Agency, if relied on and conformed with in good faith by the employer, would form the basis of a ''good faith'' defense for the period prior to May 14, 1947, insofar as the work performed by the employees on this particular contract with that agency was concerned. The opinion would not, however, furnish the employer a defense regarding any other activities of a different nature performed by his employees, because it was not an opinion concerning such activities, and insofar as those activities are concerned, the employer could not act ''in conformity'' with it.

§ 790.15 "Good faith."

(a) One of the most important requirements of sections 9 and 10 is proof by the employer that the act or omission complained of and his conformance with and reliance upon an administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy, were in good faith. The legislative history of the Portal Act makes it clear that the employer's ''good faith'' is not to be determined merely from the actual state of his mind. Statements made in the House and Senate indicate that ''good faith'' also depends upon an objective test—whether the employer, in acting or omitting to act as he did, and in relying upon the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy, acted as a reasonably prudent man would have acted under the same or similar circumstances.[95] ''Good faith'' requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.[96]

(b) Some situations illustrating the application of the principles stated in paragraph (a) of this section may be mentioned. Assume that a ruling from the Administrator, stating positively that the Fair Labor Standards Act does not apply to certain employees, is received by an employer in response to a request which fully described the duties of the employees and the circumstances surrounding their employment. It is clear that the employer's employment of such employees in such duties and under such circumstances in reliance on the Administrator's ruling, without compensating them in accordance with the Act, would be in good faith so long as the ruling remained unrevoked and the employer had no notice of any facts or circumstances which would lead a reasonably prudent man to make further inquiry as to

[95] Colloquy between Representatives Reeves and Devitt, 93 Cong. Rec. 1593; colloquy between Senators Ferguson and Donnell, 93 Cong. Rec. 4451–4452.

[96] See statement of Senator McGrath, 93 Cong. Rec. 2254–2255; statement of Representative Keating, 93 Cong. Rec. 4391; statement of Representative Walter, 93 Cong. Rec. 4389.

whether the employees came within the Act's provisions. Assume, however, that the Administrator's ruling was expressly based on certain court decisions holding that employees so engaged in commerce or in the production of goods for commerce, and that the employer subsequently learned from his attorney that a higher court had reversed these decisions or had cast doubt on their correctness by holding employees similarly situated to be engaged in an occupation necessary to the production of goods for interstate commerce. Assume further that the employer, after learning of this, made no further inquiry but continued to pay the employees without regard to the requirements of the Act in reliance on the Administrator's earlier ruling. In such a situation, if the employees later brought an action against the employer, the court might determine that they were entitled to the benefits of the Act and might decide that the employer, after learning of the decision of the higher court, knew facts which would put a reasonably prudent man upon inquiry and therefore had not provided his good faith in relying upon the Administrator's ruling after receiving this advice.

(c) In order to illustrate further the test of ''good faith,'' suppose that the X Federal Agency published a general bulletin regarding manufacturing, which contained the erroneous statement that all foremen are exempt under the Fair Labor Standards Act as employed in a ''bona fide executive * * * capacity.'' Suppose also that an employer knowing that the Administrator of the Wage and Hour Division is charged with the duties of administering the Fair Labor Standards Act and of defining the phrase ''bona fide executive * * * capacity'' in that Act, nevertheless relied upon the above bulletin without inquiring further and, inconformity with this advice, failed to compensate his nonexempt foremen in accordance with the overtime provisions of the Fair Labor Standards Act for work subject to that Act, performed before May 14, 1947. If the employer had inquired of the Administrator or had consulted the Code of Federal Regulations, he would have found that his foremen were not exempt. In a subsequent action brought by employees under section 16(b) of the Fair Labor Standards Act, the court may decide that the employer knew facts which ought to have put him as a reasonable man upon further inquiry, and, consequently, that he did not rely ''in good faith'' within the meaning of section 9, upon the bulletin published by the X Agency.[97]

(d) Insofar as the period prior to May 14, 1947, is concerned, the employer may have received an interpretation from an agency which conflicted with an interpretation of the Administrator of the Wage and Hour Division of which he was also aware. If the employer chose to reply upon the interpretation of the other agency, which interpretation worked to his advantage, considerable weight may well be given to the fact that the employer ignored the interpretation of the agency charged with the administration of the Fair Labor Standards Act and chose instead to rely upon the interpretation of an outside agency.[98] Under these circumstances ''the question could properly be considered as to whether it was a good faith reliance or whether the employer was simply choosing a course which was most favorable to him.''[99]

[97] See statement of Representative Gwynne, 93 Cong. Rec. 1563, and colloquy between Senators Connally and Donnell, 93 Cong. Rec. 4453.

[98] This view was expressed several times during the debates. See statements of Representative Keating, 93 Cong. Rec. 1512 and 4391; colloquy between Representatives Keating and Devitt, 93 Cong. Rec. 1515; statement of Representative Walter, 93 Cong. Rep. 4389; statement of Representative MacKinnon, 93 Cong. Rec. 4391; statement of Representative Gwynne, 93 Cong. Rec. 1563; statement of Senator Cooper, 93 Cong. Rec. 4451; colloquy between Senators Connally and Donnell, 93 Cong. Rec. 4452–4453.

[99] Statement of Senator Cooper, 93 Cong. Rec. 4451. Representative Walter, a member of the Conference Committee, made the following explanatory statement to the House of Representatives (93 Cong. Rec. 4390): ''The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by Government agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting

This problem will not arise in regard to any acts or omissions by the employer occurring on or after May 14, 1947, because section 10 provides that the employer, insofar as the Fair Labor Standards Act is concerned, may rely only upon regulations, orders, rulings, approvals, interpretations, administrative practices and enforcement policies of the Administrator of the Wage and Hour Division.[100]

§ 790.16 "In reliance on."

(a) In addition to acting (or omitting to act) in good faith and in conformity with an administrative regulation, order, ruling, approval, interpretation, enforcement policy or practice, the employer must also prove that he actually relied upon it.[101]

(b) Assume, for example, that an employer failed to pay his employees in accordance with the overtime provisions of the Fair Labor Standards Act. After an employee suit has been brought against him, another employer calls his attention to a letter that had been written by the Administrator of the Wage and Hour Division, in which the opinion was expressed that employees of the type employed by the defendant were exempt from the overtime provisions of the Fair Labor Standards Act. The defendant had no previous knowledge of this letter. In the pending employee suit, the court may decide that the opinion of the Administrator was erroneous and that the plaintiffs should have been paid in accordance with the overtime provisions of the Fair Labor Standards Act. Since the employer had no knowledge of the administrator's interpretation at the time of his violations, his failure to comply with the overtime provisions could not have been ''in reliance on'' that interpretation; consequently, he has no defense under section 9 or section 10 of the Portal Act.

§ 790.17 "Administrative regulation, order, ruling, approval, or interpretation."

(a) Administrative regulations, orders, rulings, approvals, and interpretations are all grouped together in sections 9 and 10, with no distinction being made in regard to their function under the ''good faith'' defense. Accordingly, no useful purpose would be served by an attempt to precisely define and distinguish each term from the others, especially since some of these terms are often employed interchangeably as having the same meaning.

(b) The terms ''regulation'' and ''order'' are variously used to connote the great variety of authoritative rules issued pursuant to statute by an administrative agency, which have the binding effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[102]

(c) The term ''interpretation'' has been used to describe a statement ''ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language.''[103] This would include bulletins, releases, and other statements issued by an agency which indicate its interpretation of the provisions of a statute.

(d) The term ''ruling'' commonly refers to an interpretation made by an agency ''as a consequence of individual

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rules and chose to act in accordance with the one most favorable to him.'' Representative Gwynne made a similar statement (93 Cong. Rec. 1563).

[100] Statement of Senator Wiley explaining Conference agreement to the Senate, 93 Cong. Rec. 4270; statement of Representative Walter, 93 Cong. Rec. 4389.

[101] In a colloquy between Senators Thye and Cooper (93 Cong. Rec. 4451), Senator Cooper pointed out that the purpose of section 9 was to provide a defense for an employer who pleads and proves, among other things, that his failure to bring himself under the Act ''grew out of reliance upon'' the ruling of an agency. See also statement of Representative Keating, 93 Cong. Rec. 1512; colloquy between Representatives Keating and Devitt, 93 Cong. Rec. 1515; cf. colloquy between Senators Donnell and Ball, 93 Cong. Rec. 4372.

[102] See Final Report of Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong. 1st sess. (1941) p. 27; 1 Vom Baur, Federal Administrative Law (1942) p. 486; sections 2(c), 2(d) and 10(e) of the Administrative Procedure Act, 5 U.S.C.A. section 1001.

[103] Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st sess. (1941), p. 27.

requests for rulings upon particular questions.''[104] Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries fall within this description.

(e) The term ''approval'' includes the granting of licenses, permits, certificates or other forms of permission by an agency, pursuant to statutory authority.[105]

(f) The terms ''administrative regulation order, ruling, approval, or interpretation'' connote affirmative action on the part of an agency.[106] A failure to act or a failure to reply to an inquiry on the part of an administrative agency is not a ''regulation, order, ruling, approval, or interpretation'' within the meaning of sections 9 and 10.[107] Thus, suppose that an employer writes a letter to the Administrator of the Wage and Hour Division, setting forth the facts concerning his business. He goes on to state in his letter that he believes his employees are not covered by the Fair Labor Standards Act, and that unless he hears to the contrary from the Administrator, he will not pay them in accordance with its provisions. When the employer does not receive a reply to his letter within what he regards as a reasonable time, he assumes that the Administrator agrees with his (the employer's) interpretation of the Act and he acts accordingly. The employer's reliance under such circumstances is not a reliance upon an administrative regulation, order, ruling, approval or interpretation, within the meaning of sections 9 and 10.

(g) The affirmative action taken by the agency must be one which actually results in a ''regulation, order, ruling, approval, or interpretation.'' If for example, the agency declines to express an opinion as to the application of the law in a particular fact situation, the agency is refraining from interpreting the law rather than giving an interpretation.[108]

(h) An employer does not have a defense under these two sections unless the regulation, order, ruling, approval, or interpretation, upon which he relies, is in effect and operation at the time of his reliance. To the extent that it has been rescinded, modified, or determined by judicial authority to be invalid, it is no longer a ''regulation, order, ruling, approval, or interpretation,'' and, consequently, an employer's subsequent reliance upon it offers him no defense under section 9 and 10.[109] On the other hand, the last sentence in section 9 and in section 10 expressly provides that where the employer's good faith reliance on a regulation, order, ruling, approval or interpretation occurs before it is rescinded, modified, or determined by judicial authority to be invalid, his claim of a ''good faith'' defense for such earlier period is not defeated by the subsequent rescission or modification or by the subsequent determination of invalidity.

(i) To illustrate these principles, assume that the Administrator of the Wage and Hour Division, in reply to an inquiry received from a particular employer, sends him a letter, in which the

[104] Final Report of the Attorney General's Committee, page 27. To the same effect in 1 Vom Baur, Federal Administrative Law (1942), p. 492.

[105] See section 2(e) of the Administrative Procedure Act, 5 U.S.C.A. sec. 1001.

[106] See Final Report of Attorney General's Committee, p. 27; 1 Vom Baur, Federal Administrative Law, pp. 486, 492; Conference Report, p. 16; statements of Representative Walter, 93 Cong. Rec. 4389; statements of Representative Gwynne, 93 Cong. Rec. 1491; statements of Senator Donnell, 93 Cong. Rec. 2185; President's message of May 14, 1947, on approval of the Portal-to-Portal Act (93 Cong. Rec. 5281).

[107] That this is true on and after the effective date of the Act is clear from the requirement in section 10 that the regulation, order, ruling, approval or interpretation relied on must be that of the Administrator in writing. As to section 9, the terms appear to have no different meaning.

[108] See Final Report of Attorney General's Committee on Administrative Procedure, p. 33.

[109] See House Report, p. 7, and statements of Representative Gwynne, 93 Cong. Rec. 1491, 1492, 1563. It will be noted that the provisions of section 12 of the Act, affording relief of employers who acted in conformity with the invalidated ''area of production'' regulations, would have been unnecessary if reliance could be placed on a regulation no longer in effect. See statement of Representative Gwynne, 93 Cong. Rec. 4388, and cf. remarks of Senator McCarran, discussing the bill before section 12 was added by the conference committee, 93 Cong. Rec. 2247.

opinion is expressed that employees performing a particular type of work are not covered by the Fair Labor Standards Act. The employer relied upon the Administrator's letter and did not pay his employees who were engaged in such work, in accordance with the provisions of the Fair Labor Standards Act. Several months later the Administrator issues a general statement, published in the FEDERAL REGISTER and given general distribution, that recent court decisions have persuaded him that the class of employees referred to above are within the coverage of the Fair Labor Standards Act. Accordingly, the statement continues, the Administrator hereby rescinds all his previous interpretations and rulings to the contrary. The employer who had received the Administrator's letter, not learning of the Administrator's subsequent published statement rescinding his contrary interpretations, continued to rely upon the Administrator's letter after the effective date of the published statement. Under these circumstances, the employer would, from the date he received the Administrator's letter to the effective date of the published statement rescinding the position expressed in the letter, have a defense under section 9 or 10, assuming he relied upon and conformed with that letter in good faith. However, in spite of the fact that this employer did not receive actual notice of the subsequent published statement, he has no defense for his reliance upon the letter during the period after the effective date of the public statement, because the letter, having been rescinded, was no longer an ''administrative * * * ruling * * * or interpretation'' within the meaning of sections 9 and 10.[110]

[110] See Final Report of Attorney General's Gwynne, 93 Cong. Rec. 1563; colloquy between Representative Gwynne and Lee Pressman, Hearings before House Subcommittee on the Judiciary, pp. 156–7.

The fact that an employer has no defense under section 9 or 10 of the Portal Act in the situation stated in the text would not, of course, preclude a court from finding that he acted in good faith having reasonable grounds to believe he was not in violation of the law. In such event, section 11 of the Act would permit the court to reduce or eliminate the employer's liability for liquidated damages in an employee suit. See § 790.22.

§ 790.18 "Administrative practice or enforcement policy."

(a) The terms ''administrative practice or enforcement policy'' refer to courses of conduct or policies which an agency has determined to follow[111] in the administration and enforcement of a statute, either generally, or with respect to specific classes of situations.[112] Administrative practices and enforcement policies may be set forth in statements addressed by the agency to the public.[113] Although they may be, and frequently are, based upon decisions or views which the agency has set forth in its regulations, orders, rulings, approvals, or interpretations, nevertheless administrative practices and enforcement policies differ from these forms of agency action in that such practices or policies are not limited to matters concerned with the meaning or legal effect of the statutes administered by the agency and may be based wholly or in part on other considerations.

(b) To illustrate this distinction, suppose the Administrator of the Wage and Hour Division issues a general

[111] The agency may have determined to follow the course of conduct or policy for a limited time only (see paragraphs (c) and (f), this section) or for an indefinite time (see paragraph (b), this section), or for a period terminable by the happening of some contingency, such as a final decision in pending litigation.

[112] See *United States* v. *Minnesota*, 270 U.S. 181 (1926); *United States* v. *Boston & Maine R.R. Co.*, 279 U.S. 732 (1929); *Lucas* v. *American Code Co.*, 280 U.S. 445 (1930); *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U.S. 39 (1939). See also Final Report of Attorney General's Committee on Administrative Procedure in Government Agencies, pp. 26–29; 1 Von Baur, Federal Administrative Law (1942), p. 474.

As to requirement that practice or policy be one with respect to a ''class of employers,'' see paragraph (g) of this section.

[113] Pursuant to section 3 of the Administrative Procedure Act, statements of general policy formulated and adopted by the agency for the guidance of the public are published in the FEDERAL REGISTER. An example is the statement of the Secretary of Labor and the Administrator of the Wage and Hour Division, dated June 16, 1947, published in 12 FR 3915.

statement indicating that in his opinion a certain class of employees come within a specified exemption from provisions of the Fair Labor Standards Act in any workweek when they do not engage in a substantial amount of nonexempt work. Such a statement is an ''interpretation'' within the meaning of sections 9 and 10 of the Portal Act. Assume that at the same time, the Administrator states that for purposes of enforcement, until further notice such an employee will be considered as engaged in a substantial amount of nonexempt work in any workweek when he spends in excess of a specified percentage of his time in such nonexempt work. This latter type of statement announces an ''administrative practice or enforcement policy'' within the meaning of sections 9 and 10 of the Portal Act.

(c) An administrative practice or enforcement policy may, under certain circumstances be at variance with the agency's current interpretation of the law. For example, suppose the Administrator announces that as a result of court decisions he has changed his view as to coverage of a certain class of employees under the Fair Labor Standards Act. However, he may at the same time announce that in order to give affected employers an opportunity to make the adjustments necessary for compliance with the changed interpretation, the Wage and Hour Division will not commence to enforce the Act on the basis of the new interpretation until the expiration of a specified period.

(d) In the statement of the managers on the part of the House, accompanying the report of the Conference Committee on the Portal-to-Portal Act, it is indicated (page 16) that under sections 9 and 10 ''an employer will be relieved from liability, in an action by an employee, because of reliance in good faith on an administrative practice or enforcement policy only (1) where such practice or policy was based on the ground that an act or omission was not a violation of the (Fair Labor Standards) Act, or (2) where a practice or policy of not enforcing the Act with respect to acts or omissions led the employer to believe in good faith that such acts or omissions were not violations of the Act.''

(e) The statement explaining the Conference Committee Report goes on to say, ''However, the employer will be relieved from criminal proceedings or injunctions brought by the United States, not only in the cases described in the preceding paragraph, but also where the practice or policy was such as to lead him in good faith to believe that he would not be proceeded against by the United States.''

(f) The statement explaining the Conference Committee Report gives the following illustrations of the above rules:

> An employer will not be relieved from liability under the Fair Labor Standards Act of 1938 to his employees (in an action by them) for the period December 26, 1946, to March 1, 1947, if he is not exempt under the ''Area of Production'' regulations published in the FEDERAL REGISTER of December 25, 1946, notwithstanding the press release issued by the Administrator of the Wage and Hour Division of the Department of Labor, in which he stated that he would not enforce the Fair Labor Standards Act of 1938 on account of acts or omissions occurring prior to March 1, 1947. On the other hand, he will, by reason of the enforcement policy set forth in such press releases, have a good defense to a criminal proceeding or injunction brought by the United States based on an act or omission prior to March 1, 1947.

(g) It is to be noted that, under the language of sections 9 and 10, an employer has a defense for good faith reliance on an administrative practice or an enforcement policy only when such practice or policy is ''with respect to the class of employers to which he belonged.'' [114] Thus where an enforcement policy has been announced pertaining to laundries and linen-supply companies serving industrial or commercial

[114] This provision, which appeared for the first time in the conference bill, to which the term ''practice'' was restored after elimination by the Senate, was apparently designed to meet some of the objections which led to elimination of the word ''practice'' from the bill reported by the Senate judiciary Committee. Cf. remarks of Senator Murray, 93 Cong. Rec. 2238; remarks of Senator Johnston, 93 Cong. Rec. 2373; colloquy between Senators Lucas and Donnell, 93 Cong. Rec. 2185; remarks of Senator McGrath, 93 Cong. Rec. 2254–2256.

establishments the operator of an establishment furnishing window-washing service to industrial and commercial concerns, who relied upon that policy in regard to his employees, has no defense under sections 9 and 10. The enforcement policy upon which he claimed reliance did not pertain to ''the class of employers to which he belonged.''

(h) Administrative practices and enforcement policies, similar to administrative regulations, orders, rulings, approvals and interpretations required affirmative action by an administrative agency.[115] This should not be construed as meaning that an agency may not have administrative practices or policies to refrain from taking certain action as well as practices or policies contemplating positive acts of some kind.[116] But before it can be determined that an agency actually has a practice or policy to refrain from acting, there must be evidence of its adoption by the agency through some affirmative action establishing it as the practice or policy of the agency.[117] Suppose, for example, that shoe factories in a particular area were not investigated by Wage and Hour Division inspectors operating in the area. This fact would not establish the existence of a practice or policy of the Administrator to treat the employees of such establishments, for enforcement purposes, as not subject to the provisions of the Fair Labor Standards Act, in the absence of proof of some affirmative action by the Administrator adopting such a practice or policy. A failure to inspect might be due to any one of a number of different reasons. It might, for instance, be due entirely to the fact that the inspectors' time was fully occupied in inspections of other industries in the area.

(i) It was pointed out above that sections 9 and 10 do not offer a defense to the employer who relies upon a regulation, order, ruling, approval or interpretation which at the time of his reliance has been rescinded, modified or determined by judicial authority to be invalid. The same is true regarding administrative practices and enforcement policies.[118] However, a plea of a ''good faith'' defense is not defeated by the fact that after the employer's reliance, the practice or policy is rescinded, modified, or declared invalid.

§ 790.19 "Agency of the United States."

(a) In order to provide a defense under section 9 or section 10 of the Portal Act, the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of an ''agency of the United States.'' Insofar as acts or omissions occurring on or after May 14, 1947 are concerned, it must be that of the ''agency of the United States specified in'' section 10(b), which, in the case of the Fair Labor Standards Act, is ''the Administrator of the Wage and House Division of the Department of Labor.'' However, with respect to acts or omissions occurring prior to May 14, 1947, section 9 of the Act permits the employer to show that he relied upon and conformed with a regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy of ''any agency of the United States.''[119]

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[115] See *Union Stockyards & Transit Co.* v. *United States*, 308 U.S. 213, 223 (1939); and *United States* v. *American Union Transport, Inc.*, 327 U.S. 437, 454 (1946). Cf. *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351 (1941). See also President's message of May 14, 1947, 93 Cong. Rec. 5281.

[116] See, for example, *Mintz* v. *Baldwin*, 289 U.S. 346, 349 (1933), where the Department of Agriculture announced ''its policy for the present is to leave the control (of Bang's disease) with the various States.'' See also in this connection the statement of June 23, 1947, by the Senate Committee on the Judiciary regarding the President's message of May 14, 1947, on the Portal-to-Portal Act, 93 Cong. Rec. 5281.

[117] *Union Stockyards & Transit Co.* v. *United States*, supra. It may be noted in this connection that examples given by the sponsors of the legislation, in discussing the terms ''administrative practice or enforcement policy,'' involved situations in which affirmative action had been taken by the agency. Conference Report, p. 16; 93 Cong. Rec. 2185, 2198, 4389–4391.

[118] See § 790.17 (h) and (i), and footnotes 111 and 112.

[119] The differences in the provisions of the two sections are explained and illustrated in § 790.13.

(b) The Portal Act contains no comprehensive definition of ''agency'' as used in sections 9 and 10, but an indication of the meaning intended by Congress may be found in section 10. In that section, where the ''agency'' whose regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy may be relied on is confined to ''the agency of the United States'' specified in the section, the Act expressly limits the meaning of the term to the official or officials actually vested with final authority under the statutes involved.[120] Similarly, the definitions of ''agency'' in other Federal statutes[121] indicate that the term has customarily been restricted in its usage by Congress to the persons vested under the statutes with the real power to act for the Government—those who actually have the power to act as (rather than merely for) the highest administrative authority of the Government establishment.[122] furthermore, it appears from the statement of the managers on the part of the House accompanying the Conference Committee Report, that the term ''agency'' as appearing in the Portal Act was employed in this sense. As there stated (p. 16), the regulations, orders, ruling, approvals, interpretations, administrative practices and enforcement policies relied upon and conformed with ''must be those of an 'agency' and not of an individual officer or employee of the agency. Thus, if inspector A tells the employer that the agency interpretation is that the employer is not subject to the (Fair Labor Standards) Act, the employer is not relieved from liability, despite his reliance in good faith on such interpretations, unless it is in fact the interpretation of the agency.''[123] Similarly, the Chairman of the Senate Judiciary Committee, in explaining the conference agreement to the Senate, made the following statement concerning the ''good faith'' defense. ''It will be noted that the relief from liability must be based on a ruling of a Federal agency, and not a minor official thereof. I, therefore, feel that the legitimate interest of labor will be adequately protected under such a provision, since the agency will exercise due care in the issuance of any such ruling.''[124]

(c) Accordingly, the defense provided by sections 9 and 10 of the Portal Act is restricted to those situations where the employer can show that the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy with which he conformed and on which he relied in good faith was actually that of the authority vested with power to issue or adopt regulations, orders, rulings, approvals, interpretations, administrative practices or enforcement policies of a final nature as the official act or policy of the agency.[125] Statements made by other officials or employees are not regulations, orders, rulings, approvals, interpretations, administrative practices or enforcement policies of the agency within the meaning of sections 9 and 10.

[120] In regard to the Walsh-Healey Act, ''agency'' is defined in section 10 of the Portal-to-Portal Act as including, in addition to the Secretary of Labor, ''any Federal officer utilized by him in the administration of such Act.'' The legislative history of the Portal-to-Portal Act (93 Cong. Rec. 2239–2240) reveals that this clause was added because of the language in the Walsh-Healey Act authorizing the Secretary of Labor to administer the Act ''and to utilize such Federal officers and employees * * * as he may find necessary in the administration.''

[121] FEDERAL REGISTER Act, 44 U.S.C. 304; Federal Reports Act, 5 U.S.C. 139; Administrative Procedure Act, 5 U.S.C. 1001.

[122] See *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (1942); *United States* v. *Watashe*, 102 F. (2d) 428 (C.A. 10, 1939); 39 Opinions Attorney General 15 (1925). Cf. *Keyser* v. *Hitz*, 133 U.S. 138 (1890); 39 Opinions Attorney General 541 (1933); 13 George Washington Law Review 144 (1945).

[123] See also statement by Representative Gwynne, 93 Cong. Rec. 1563; and statement by Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4270.

[124] Statement of Senator Wiley, 93 Cong. Rec. 4270.

[125] Statement by Representative Gwynne, 93 Cong. Rec. 1563; statements by Representative Walter, 93 Cong. Rec. 1496–1497, 4389; statement by Representative Robsion, 93 Cong. Rec. 1500; statement by Senator Thye, 93 Cong. Rec. 4452.

RESTRICTIONS AND LIMITATIONS ON EMPLOYEE SUITS

§ 790.20 Right of employees to sue; restrictions on representative actions.

Section 16(b) of the Fair Labor Standards Act, as amended by section 5 of the Portal Act, no longer permits an employee or employees to designate an agent or representative (other than a member of the affected group) to maintain, an action for and in behalf of all employees similarly situated. Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may still be brought in accordance with the provisions of section 16(b). With respect to these actions, the amendment provides that no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The amendment is expressly limited to actions which are commenced on or after the date of enactment of the Portal Act. Representative actions which were pending on May 14, 1947 are not affected by this amendment.[126] However, under sections 6 and 8 of the Portal Act, a collective or representative action commenced prior to such date will be barred as to an individual claimant who was not specifically named as a party plaintiff to the action on or before September 11, 1947, if his written consent to become such a party is not filed with the court within a prescribed period.[127]

§ 790.21 Time for bringing employee suits.

(a) The Portal Act[128] provides a statute of limitations fixing the time limits within which actions by employees under section 16(b) of the Fair Labor Standards Act[129] may be commenced, as follows:

(1) Actions to enforce causes of action accruing on or after May 14, 1947; two years.

(2) Actions to enforce causes of action accruing before May 14, 1947.[130] Two years or period prescribed by applicable State statute of limitations, whichever is shorter.

These are maximum periods for bringing such actions, measured from the time the employee's cause of action accrues to the time his action is commenced.[131]

(b) The courts have held that a cause of action under the Fair Labor Standards Act for unpaid minimum wages or unpaid overtime compensation and for liquidated damages ''accrues'' when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends.[132] The Portal

[126] Conference Report, p. 13.

[127] Conference Report, pp. 14, 15. The claimant must file this consent within the shorter of the following two periods: (1) Two years, or (2) the period prescribed by the applicable State Statute of limitations. See Conference Report, p. 15.

[128] See sections 6–8 inclusive.

[129] Sponsors of the legislation stated that the time limitations prescribed therein apply only to the statutory actions, brought under the special authority contained in section 16(b), in which liquidated damages may be recovered, and do not purport to affect the usual application of State statutes of limitation to other actions brought by employees to recover wages due them under contract, at common law, or under State statutes. Statements of Representative Gwynne, 93 Cong. Rec. 1491, 1557–1588; colloquy between Representative Robsion, Vorys, and Celler, 93 Cong. Rec. 1495.

[130] This refers to actions commenced after September 11, 1947. Such actions commenced on or between May 14, 1947 and September 11, 1947 were left subject to State statutes of limitations. As to collective and representatives actions commenced before May 14, 1947, section 8 of the Portal Act makes the period of limitations stated in the text applicable to the filing, by certain individual claimants, of written consents to become parties plaintiff. See Conference Report, p. 15; § 790.20 of this part.

[131] Conference Report, pp. 13–15.

[132] *Reid* v. *Solar Corp.*, 69 F. Supp. 626 (N.D. Iowa); *Mid-Continent Petroleum Corp.* v. *Keen*, 157 F. (2d) 310, 316 (C.A. 8). See also *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697; *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C.A. 2).

In some instances an employee may receive, as a part of his compensation, extra payments under incentive or bonus plans, based on factors which do not permit computation and payment of the sums due for a particular workweek or pay period until some time after the pay day for that period.

Continued

Act[133] provides that an action to enforce such a cause of action shall be considered to be ''commenced'':

(1) In individual actions, on the date the complaint is filed;

(2) In collective or class actions, as to an individual claimant.

(i) On the date the complaint is filed, if he is specifically named therein as a party plaintiff and his written consent to become such is filed with the court on that date, or

(ii) On the subsequent date when his written consent to become a party plaintiff is filed in the court, if it was not so filed when the complaint was filed or if he was not then named therein as a party plaintiff.[134]

(c) The statute of limitations in the Portal Act is silent as to whether or not the running of the two-year period of limitations may be suspended for any cause.[135] In this connection, attention is directed to section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940,[136] as amended, which provides that the period of military service shall not be included in the period limited by law for the bringing of an action or proceeding, whether the cause of action shall have accrued prior to or during the period of such service.

§ 790.22 Discretion of court as to assessment of liquidated damages.

(a) Section 11 of the Portal Act provides that in any action brought under the Fair Labor Standards Act to recover unpaid minimum wages, unpaid overtime, compensation, or liquidated damages, the court may, subject to prescribed conditions, in its sound discretion award no liquidated damages or award any amount of such damages not to exceed the amount specified in section 16 (b) of the Fair Labor Standards Act.[137]

(b) The conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) The employers must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. If

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In such cases it would seem that an employee's cause of action, insofar as it may be based on such payments, would not accrue until the time when such payment should be made. Cf. *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427.

[133] Section 7. See also Conference Report, p. 14.

[134] This is also the rule under section 8 of the Portal Act as to individual claimants, in collective or representative actions commenced before May 14, 1947, who were not specifically named as parties plaintiff on or before September 11, 1947.

[135] A limited suspension provision was contained in section 2(d) of the House bill, but was eliminated by the Senate. Neither the Senate debates, the Senate committee report, nor the conference committee report, indicate the reason for this. While the courts have held that in a proper case, a statute of limitations may be suspended by causes not mentioned in the statute itself (*Braun* v. *Sauerwein*, 10 Wall. 218, 223; see also *Richards* v. *Maryland Ins. Co.*, 8 Cranch 84, 92; *Bauserman* v. *Blunt*, 147 U.S. 647), they have also held that when the statute has once commenced to run, its operation is not suspended by a subsequent disability to sue, and that the bar of the statute cannot be postponed by the failure of the creditor (employee) to avail himself of any means within his power to prosecute or to preserve his claim. *Bauserman* v. *Blunt*, 147 U.S. 647, 657; *Smith* v. *Continental Oil Co.*, 59 F. Supp. 91, 94.

[136] Act of October 17, 1940, ch. 888, 54 Stat. 1178, as amended by the act of October 6, 1942, ch. 581, 56 Stat. 769 (50 U.S.C.A. App. sec. 525).

[137] Section 16(b) of the Fair Labor Standards Act provides that an employer who violates the minimum—wage or overtime provisions of the act shall be liable to the affected employees not only for the amount of the unpaid minimum wages or unpaid overtime compensation, as the case may be, but also for an additional equal amount as liquidated damages. The courts have held that this provision is ''not penal in its nature'' but rather that such damages ''constitute compensation for the retention of a workman's pay'' where the required wages are not paid ''on time.'' Under this provision of the law, the courts have held that the liability of an employer for liquidated damages in an amount equal to his underpayments of required wages become fixed at the time he fails to pay such wages when due, and the courts were given no discretion, prior to the enactment of the Portal-to-Portal Act, to relieve him of any portion of this liability. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697; *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572.

these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. This may be done in any action brought under section 16(b) of the Fair Labor Standards Act, regardless of whether the action was instituted prior to or on or after May 14, 1947, and regardless of when the employee activities on which it is based were engaged in. If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages.[138]

(c) What constitutes good faith on the part of an employer and whether he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act are mixed questions of fact and law, which should be determined by objective tests.[139] Where an employer makes the required showing, it is for the court to determine in its sound discretion what would be just according to the law on the facts shown.

(d) Section 11 of the Portal Act does not change the provisions of section 16(b) of the Fair Labor Standards Act under which attorney's fees and court costs are recoverable when judgment is awarded to the plaintiff.

[138] See Conference Report, p. 17; remarks of Representative Walter, 93 Cong. Rec. 1496–1497; President's message of May 14, 1947, to the Congress on approval of the Portal Act, 93 Cong. Rec. 5281.

[139] Cf. §§ 790.13 to 790.16.