

No written statement concerning the production of the goods is made to the purchaser by the producer. The producer ships the goods which the purchaser has ordered.

(b) The purchaser stamps the above statement on his purchase order and in addition notifies the producer that shipment of the goods so ordered will be construed by the purchaser as a guarantee by the producer that the goods were produced in compliance with the Act. The producer ships the goods to the purchaser.

In neither of these situations can the purchase order be deemed to contain a written assurance from the producer to the purchaser. A statement concerning the circumstances under which the order will be valid is sent to the producer, but no written instrument at all is given the purchaser by the producer. Although, in these situations, the shipment of the goods by the producer may establish a contractual relationship between the parties, the conditions of the statute are not satisfied because there is in neither situation any written assurance from the producer to the purchaser that the goods were produced in compliance with applicable provisions of the Act referred to in sections 12(a) and 15(a)(1).

§ 789.3 “* * * goods were produced in compliance with” * * * the requirements referred to.

It is apparent from the language of the statute and the statement appended to the Conference Report⁵ that the written assurance referred to is one with respect to specific goods in being, assuring the purchaser that the “goods in question were produced in compliance” with the requirements referred to in sections 12(a) and 15(a)(1). A written statement made prior to production of the particular goods is not the type of assurance contemplated by the statute.

A so-called “general and continuing” assurance or “blanket guarantee” stating, for instance, that all goods to be shipped to the purchaser during a twelve-month period following a certain date “will be or were produced” in compliance with applicable provisions

of the Act would not afford the purchaser the statutory protection with respect to any production of such goods after the assurance is given. This type of assurance attempts to assure the purchaser concerning the future production of goods. With respect to any production of goods after the assurance is given, this “general and continuing” assurance would, at most, be an assurance that the goods will be produced in compliance with the Act.

The definitions of the terms “goods” and “produced” in sections 3(i) and 3(j) of the Act⁶ respectively, should be considered in interpreting the requirement that the written assurance must relate to goods which were produced in compliance with applicable provisions of the Act. These definitions make it apparent, for instance that the raw materials from which a machine has been made retain their identity as “goods” even though these raw materials have been converted into an entirely different finished product in which the raw materials are merely a part.

Since “goods,” as defined in the Act, “does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturing, or processor thereof,” the “hot goods” restrictions of section 12(a) and section 15(a)(1) do not apply to such ultimate consumers. There appears to be no need, therefore, for such consumers to

⁶Section 3(i) defines “goods” to mean “goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.”

Section 3(j) defines “produced” to mean “produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.”

⁵H. Rept. No. 1453, 81st Cong., 1st sess., p. 31.

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secure these written assurances from their suppliers.

§ 789.4 Scope and content of assurances of compliance.

A question frequently asked is whether a single written assurance of compliance will suffice for purposes both of section 12(a), relating to child labor, and section 15(a)(1), relating to wage and hour standards. A single assurance would appear to be sufficient, provided it is specific enough to meet all the conditions of the two sections. Although it is possible that the courts might find assurances referring generally to compliance "with the requirements of the Act" adequate for all purposes, the safer course to pursue would be to phrase the assurance in terms of compliance with the specific sections of the Act whose violation would bar the goods from interstate or foreign commerce.

The language of the statute gives support to this view. It will be noted that the written assurance referred to in section 15(a)(1) is described as one of "compliance with the requirements of the Act * * *," whereas the written assurance referred to in section 12(a) is described as one of "compliance with this section." In view of the differences in wording of the two sections, a court might conclude that a general assurance of compliance with the Act is not sufficient to include a specific assurance of compliance with section 12, on the theory that if Congress had intended an assurance of compliance with the Act to be sufficient under the child-labor provisions, there would have been no reason for the use of the more specific language which it placed in section 12. Also, it is possible that a court might conclude that Congress intended, under section 15(a)(1), that the assurance should refer specifically to the particular sections of the Act mentioned therein, since unless there is some violation of one of those sections in the production of goods, a subsequent purchaser is not prohibited from putting them in commerce.

There is no prescribed form or language that must be followed in order for the written assurance of compliance to afford the desired protection. However, in view of the considerations

mentioned above, the following is suggested as a guide for the type of language which would appear to provide the maximum degree of certainty that a purchaser who acquired the goods in good faith in reliance on the written assurance would receive the protection intended by the amendments:

We hereby certify that these goods were produced in compliance with all applicable requirements of sections 6, 7, and 12 of the Fair Labor Standards Act, as amended, and of regulations and orders of the United States Department of Labor issued under section 14 thereof:

The question has also arisen as to what method should be used to give a purchaser a proper written assurance which would adequately identify the particular goods to which such assurance relates. Although other means of giving proper written assurances may be found to be more practical and convenient, it appears that one simple and feasible method of giving such assurance is for the producer to stamp or print the assurance on the invoice which covers the particular goods and which is given to the purchaser as a part of the transaction whereby the goods are acquired.

§ 789.5 " * * * acquired * * * in good faith * * * for value without notice * * *."

Section 12(a) and section 15(a)(1) of the Act provide that a purchaser must acquire the goods in good faith in reliance on the specified written assurance in order to be accorded the statutory protection.

The legislative history of the amendments indicates that a purchaser's good faith is not to be determined merely from the actual state of his mind but that good faith also depends upon an objective test—that of what a "reasonable, prudent man, acting with due diligence, would have done in the circumstances." This good faith requirement is, in the words of the House Managers, "comparable to similar requirements imposed on purchasers in other fields of law." The final determination of what will amount to good faith can be made only upon the basis of the pertinent facts in each situation.