

inquiry received from a particular employer, sends him a letter, in which the 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upon the letter during the period after the effective date of the public statement, because the letter, having been rescinded, was no longer an "administrative \* \* \* ruling \* \* \* or interpretation" within the meaning of sections 9 and 10.<sup>110</sup>

<sup>110</sup>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

**§ 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<sup>111</sup> in the administration and enforcement of a statute, either generally, or with respect to specific classes of situations.<sup>112</sup> Administrative practices and enforcement policies may be set forth in statements addressed by the agency to the public.<sup>113</sup> 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

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.

<sup>111</sup>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.

<sup>112</sup>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.

<sup>113</sup>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.

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and Hour Division issues a general 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 non-exempt 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 non-exempt 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."<sup>114</sup> Thus where an enforcement policy has been announced pertaining to laundries and linen-supply companies serving industrial or commercial

<sup>114</sup>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.<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup> 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

<sup>115</sup>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.

<sup>116</sup>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.

<sup>117</sup>*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.

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.<sup>118</sup> 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."<sup>119</sup>

<sup>118</sup>See § 790.17 (h) and (i), and footnotes 111 and 112.

<sup>119</sup>The differences in the provisions of the two sections are explained and illustrated in § 790.13.