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 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

[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.

[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.

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 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]

[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.

[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.