''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 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,

[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.

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 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

[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.