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Enforcement of Statutory Rights of Employees of Government Contractors

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I. Introduction

The United States government disburses a vast amount of money each year to meet its contractual obligations. As the size of the federal government and the dimension of the services it provides continue to expand, the importance of federal contract spending in our national economy is likely to reach staggering proportions.[1] Presently there are a great many manufacturing, construction, and brokerage concerns engaged in work on a large number of federal government contracts. The purpose of this note is to discuss in general the major federal statutes which govern rights of employees of those performing government contracts and to discuss in detail the penalties which may be applicable to the contractor-employer in violation of one of these statutes.

II. Background

The unemployment and low wages of the depression era prompted Congress to use the purchasing power of the federal government as a weapon to combat "sweat shop conditions." One method employed was to enact laws regulating the wages of employees and working conditions on certain federal contracts.[2] Prior to the passage of these statutes, which were applicable to almost all federal contracts, the government had been in the somewhat anomalous position of urging the improvement of labor conditions on the one hand, and yet requiring its own contracts to be awarded to the lowest bidder.[3] Earlier governmental attempts to regulate labor standards had been confined to the problem of compensation for overtime work. These statutes have become known cumulatively as the Eight Hour Law.[4] The earliest of these, enacted in 1892, absolutely prohibited work in excess of eight hours per day on government contracts. Later statutes removed this prohibition but imposed the requirement that work in excess of eight hours a day be compensated for at one and a half times the basic rate of pay.

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1. In 1950, the United States government spent $20,000,000,000 in purchasing goods and services. It is estimated that this figure for 1964 will exceed $68,000,000,000. Statistical Abstract of the United States 389, Chart No. 511 (1963).

2. 1 Lyon, Watkins & Abramson, Government & Economic Life Chap. XVII, § IV (1939); See Donahue, *The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions*, 29 Law & Contemp. Prob. 488 (1964).

3. Rev. Stat. § 3721 (1885), as amended, 41 U.S.C. § 1-1.301 (1964).

4. 27 Stat. 340 (1892); 37 Stat. 347 (1912); 37 Stat. 726 (1913); 39 Stat. 1192 (1917); 54 Stat. 884 (1940); 62 Stat. (1948); 40 U.S.C. §§ 321-26 (1964).

In seeking to alleviate the effects of the depression Congress imposed more inclusive control over the labor standards of employers who contracted with the government. The Davis-Bacon Act, which applies to construction contracts, was passed in 1931.[5] The main thrust of this act was to require employers to pay the prevailing wages to laborers and mechanics working on federal contracts for the construction, alteration, and repair of public works. Another act passed to combat the effect of the depression was the Walsh-Healey Public Contracts Act[6] which became effective in 1936. It set labor standards for supply contracts similar to those which Davis-Bacon set for construction contracts. To prevent employees from being pressured into repaying their employers for any part of their wages earned on construction contracts, the Copeland Act,[7] popularly known as the Anti-Kickback Act, was enacted in 1934.

The Work-Hours Act of 1962,[8] as the date reveals, was not concerned with the depression, but it too was passed to insure that the federal government could use its purchasing power to provide for reasonable wages. Other federal statutes which dealt with overtime on public works contracts were replaced by the Wage-Hours Act's provision for payment of time and one-half for overtime work on such contracts.

III. THE WALSH-HEALEY ACT

The Walsh-Healey Public Contracts Act applies to all federal contracts exceeding 10,000 dollars for the manufacture or furnishing of materials, supplies, articles or equipment.[9] The act requires that, in any federal government contract, provisions must be included which require the contractor to "pay not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages"[10] for similar work done by industries currently operating in the locality; to pay overtime at time and one-half the basic hourly wage for hours worked in excess of eight daily or forty weekly;[11] not to employ convicts or underage persons;[12] nor to perform any part of the contract under working conditions which are unsanitary or dangerous to the health or safety of his employees.[13] This act and

5. Act of March 3, 1931, 46 Stat. 1494, as amended, 40 U.S.C. § 276(a) 1-7 (1964).
6. Act of June 30, 1936, 49 Stat. 2036-39, as amended, 41 U.S.C. §§ 35-45 (1964).
7. Act of June 1934, 48 Stat. 948, as amended, 18 U.S.C. § 874 (1964).
8. Act of August 13, 1962, 76 Stat. 357, 40 U.S.C. §§ 327-32 (1964).
9. Walsh-Healey Act, 49 Stat. 2036, as amended, 41 U.S.C. § 35 (1964). The act also applies to the construction, alteration, furnishing, or equiping of naval vessels. 52 Stat. 403 (1938), 10 U.S.C. § 7299 (1964).
10. 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35(b) (1964).
11. 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35(c) (1964).
12. 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35(d) (1964).
13. 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35(e) (1964).

the Fair Labor Standards Act, which sets a minimum wage and regulates conditions of employment on work affecting interstate commerce, are not mutually exclusive. Thus, in any case where products move in interstate commerce, the employer cannot pay less than the federally established minimum wage. Some persons believe that there is no longer any need for Walsh-Healey and advocate its repeal, leaving regulation of government contracts to the FLSA.[14]

The constitutionality of the Walsh-Healey Act was upheld soon after its enactment. In 1940, several steel companies sought to enjoin the Secretary of Labor and subordinate government purchasing agents from continuing in effect a wage determination made by the Secretary for that industry. The companies' complaint was that in order to bid on government contracts they were required to abide by this allegedly arbitrary, capricious, and unauthorized action and as a result, would suffer irreparable loss and damage. In holding that the complainants had no standing to bring the suit as none of their legal rights were violated, the Supreme Court foreclosed the constitutional question by saying,

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. . . .[15] [P]rospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorization.[16]

Congress felt that although this decision was constitutionally correct, it produced harsh results on those persons dealing with the government. Therefore, in 1952, section 43a was passed as an amendment to Walsh Healey, allowing judicial review of wage determinations and of any legal questions which might arise in dealings with the goverment under Walsh-Healey.[17] The effect of this amendment is discussed in detail below.

Rather than considering in detail what actions constitute a breach for which the contractor will be liable, this article proceeds on the assumption that a breach has occurred. Accordingly, primary attention will be focused on the consequences which flow from such a breach. The Walsh-Healey Act has been chosen for more detailed treatment as, for purposes of coherent organization, it is necessary to deal with the various statutes separately. Most of the discussion

14. Note, 31 IND. L.J. 245 (1956).

15. Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940).

16. *Id.* at 129.

17. The legislative history of this amendment, Act of June 30, 1952, 66 Stat. 308, 41 U.S.C. § 43(a) (1964), is collected in 98 CONG. REC. 6531 (1952).

regarding liability for breach of Walsh-Healey will be equally applicable to the other statutes.

A. *Penalties Under Walsh-Healey*

In the event of a breach or violation of any of the regulations in a contract governed by Walsh-Healey the party responsible is rendered liable to the United States for all damages flowing from the breach in addition to the sum of ten dollars per day for each male under sixteen, each female under eighteen, and each convict knowingly employed on the contract. The breaching party will also be liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayments of wages due to any employee engaged in work under the contract. The government agency which entered into the contract has the power to cancel it upon breach, complete it in the open market by recontracting, and charge any additional cost to the original contractor. Furthermore, the statute authorizes the contracting agency to withhold from its contract payments any amount claimed to be due the government because of the breach of the contract and also authorizes court actions against the contractors. The sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages are held in special accounts to be paid on the order of the Secretary of Labor directly to the employees who were paid less than the minimum rates.[18] All suits must be brought by the government. There is no authorization for employee actions,[19] although any "interested party"[20] may report breaches or violations of the act to the Wage and Hour and Public Contract Divisions.

A discussion of the administrative and judical procedures in the order that they are usually applied to a case appears to be the most efficient method of understanding these provisions. The Secretary of Labor has delegated the general administration of the Walsh-Healey Act to the Administrator of the Wage and Hour and Public Contracts Divisions.[21] Upon report of an alleged breach, a formal complaint stating the charges is issued and served. Notice of a hearing before a trial examiner designated by the Secretary follows the issuance of the complaint. The contractor-respondent is given twenty days in which to file a specific answer denying or admitting each charge. For each denial the facts relied upon must be stated. If the respondent admits a charge, but believes there were reasons or circumstances

18. 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 36 (1964).

19. U.S. v. Lovknit Mfg. Co., 189 F.2d 454, 457 (5th Cir. 1951).

20. "Interested party" should be interpreted liberally. A partial list of those deemed "interested" are employees, employers, and labor or trade organizations. 41 C.F.R. § 50-203.1 (1964).

21. *Ibid.*

warranting special consideration, he may state them in his answer.[22]

Soon after the answer is filed a pre-trial hearing may be held before the hearing examiner to simplify the issues and make stipulations to expedite the formal hearing.[23] The hearing in an average case takes place within two months after the filing of the complaint, and there is no default procedure. If the defendant fails to answer or appear, the government must still present a prima facie case before the hearing examiner. In certain instances, the defendant may fail to answer and yet appear at the hearing. The hearing examiner will still allow such defendants to testify and introduce evidence in their behalf. The formal hearing is conducted much like any federal district court nonjury trial with the exception that the rules of evidence are not controlling.[24]

The decision and order of the trial examiner embodying his findings of fact and conclusions of law on all issues as to whether respondent has violated the act and the amounts due therefor is issued shortly after the hearing. It becomes final if there is no petition for review. If the contractor is found guilty, the trial examiner makes a recommendation as to whether he should be relieved from the blacklisting penalty which results in ineligibility to contract with the government for a period of three years.[25] Within twenty days of the decision any interested party may ask for review of the decision by the Administrator. Parties may then file briefs and the Administrator in his discretion may deny or grant such review and later hand down his decision along with his recommendation concerning blacklisting.[26] This is the final administrative review of the case with the exception of the blacklisting penalty. As to that decision the contractor may appeal to the Secretary of Labor.[27]

If the contractor is found to have breached his contract, the usual procedure is for the Attorney General to bring suit based upon the findings of the administrative proceeding in a federal district court.

It is evident, however, that there will be times when enforcement of the governmental agency's determination will not be sought through the courts. The blacklisting penalty is the most obvious example. Another instance is when a contractor feels that the wage determination with which he must comply in his bid on the contract is unreasonably high. *Perkins v. Lukens Steel Co.*[28] held that these determinations were unreviewable, reasoning, as mentioned earlier,

22. 41 C.F.R. §§ 50-203.2-.3 (1964).
23. 41 C.F.R. § 50-203.7 (1964).
24. 41 C.F.R. § 50-203.8 (1964).
25. 41 C.F.R. § 40-203.10 (1964).
26. 41 C.F.R. § 50-203.11 (1964).
27. 41 C.F.R. § 50-203.11(g) (1964).
28. 310 U.S. 113 (1940).

that the federal government had the unrestricted right to fix the terms and conditions upon which it would make its purchases.[29] Congress, of course, has recognized that harmful results could result from judicially uncontrolled statutory interpretation and application by the Department of Labor. Accordingly, in 1952, the Fulbright Amendment to the Walsh-Healey Act was enacted to afford any "interested person" the right to judicial review of many administrative determinations.[30] This action rendered *Perkins* impotent in Walsh-Healey controversies.[31] The interpretation by the Administrator of the terms "locality," "regular dealer," "manufacturer," and "open market" are some of the reviewable determinations.[32] Thus, the amendment replaced the "legal wrong" criterion of *Perkins* with the standard of "any interested person." Under the new standard it has been held that a union representing employees whose wages would be increased by a wage determination of the Secretary of Labor was an interested party.[33] Similarly, a person threatened with blacklisting for violation of the act may seek court relief.[34] If an "interested person" becomes involved in a dispute arising under a government contract covered or alleged to be covered by Walsh-Healey, he may exercise his right to judicial determination of the issue in "any appropriate proceeding."[35] Proceedings for declaratory judgment and for injunctive relief have been held to be appropriate.[36]

When the Attorney General does file a court action based upon the administrative findings the district court performs the function of an appellate court, as it decides only questions of law and whether the findings underlying the government's complaint are supported by a preponderance of the evidence.[37] The action is not one for breach of contract, rather it is to enforce the determination of the Administrator.[38] It is obvious that there can be no judgment on the pleadings as the judge must consider the evidence to determine its weight.

The usual method used by the government is to move for summary judgment after presenting the evidence. The defendant must then

29. *Ibid.*

30. Act of June 1952, 66 Stat. 308, 41 U.S.C. § 43(a) (1964).

31. Senator Fulbright who sponsored the amendment said, "It is our purpose, by this amendment, to overturn that [*Perkins*] decision." 98 CONG. REC. 6531 (1952).

32. Act of June 30, 1952, 66 Stat. 308, 41 U.S.C. § 43(a) (1964).

33. Textile Workers v. Allendal Co., 226 F.2d 765 (D.C. Cir. 1955).

34. George v. Mitchell, 282 F.2d 486 (D.C. Cir. 1960).

35. The quoted words are from the House Conference Report. H.R. CONF. REP. 2352, 82d Cong., 2d Sess. 27 (1952).

36. 282 F.2d 486 (D.C. Cir. 1960). See Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961) (suit for a judgment declaring unlawful the blacklisting of defendant).

37. Ready-Mix Concrete Co. v. United States, 158 F. Supp. 571 (Ct. Cl. 1958).

38. United States v. Davis, 16 CCH Lab. Cas. ¶ 65,095 (N.D. Ill. 1949).

prove that the administrative findings are not based on a preponderance of the evidence. If the findings are not so supported a trial de novo in the district court is available.

In reaching his conclusion as to the amount due from the breaching defendant, the hearing examiner need not support his findings with great detail.[39] The burden is on the employer to inform the court of the incorrectness of any finding by detailing the evidence relating to the point. The test to be applied is "that the adequacy of the findings must be determined with regard to the nature of the case."[40] In *Ready-Mix Concrete Co. v. United States*,[41] the government was excused from detailing the wage and hour computations with respect to 249 employees over a five year period. In support of its decision requiring the defendant to prove the findings erroneous, the court said that "If one fears that . . . Governmental agencies make findings by unauthorized methods, he must remember that detailed findings, as well as more general findings, could be made by such methods. It would only take longer to make them."[42] In effect, the burden of proof as to the incorrectness of the agency's finding is on the contractor.

If the district court rules contrary to an administrative decision, its decision will not be set aside by a higher court unless "clearly erroneous."[43]

Another procedural consideration is that of the applicable statute of limitations. Section 6 of the Portal-to-Portal Act of 1947 provides for a two year limitation on any action commenced on or after the date of the act "to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages under . . . the Walsh-Healey Act or the Bacon-Davis Act." It further provides that "every such action shall be forever barred unless commenced within two years after the cause of action accrued."[44] For some time there was a conflict in the United States Courts of Appeal as to the proper application of this statute. There were different holdings on the questions as to when the statute began to run and what action by the government would result in its being tolled. The Supreme Court in *Unexcelled Chemical Corp. v. United States*,[45] settled these issues by holding that the cause of action accrues when the breach of the statute occurs. Thus, in regard to child labor violations, the statute

39. See United States v. Pierce Auto Lines, 327 U.S. 515, 529 (1946).
40. Ready-Mix Concrete Co. v. United States, *supra* note 37, at 579.
41. *Supra* note 37.
42. *Id.* at 578.
43. United States v. Craddock-Terry Shoe Corp., 178 F.2d 760 (4th Cir. 1949); FED. R. CIV. P. 52(a).
44. Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. §§ 251-62 (1964).
45. 345 U.S. 59 (1953).

begins to run, in the words of the Court, "when the minors were employed."[46] It would appear to be a better and more logical solution to regard the employment as a recurring or continuing violation and to allow the government to recover the liquidated damages of ten dollars a day for each minor knowingly employed by the contractor within the two years prior to the filing of the suit. This reasoning is applied to underpayments of wages (and overtime violations) so that the statute of limitations runs as to each underpayment, not just the first. An employer should not be entirely insulated from liability because a minor working for him at the time of the suit has been continuously employed by him for over two years. Possibly, due to the rarity of this situation or the untenability of the court's position, its language to the effect that the statute begins to run when the minor is employed has not been judicially tested since this 1953 decision. An injunction to assure future compliance with the act is often resorted to when the statute of limitations has run on a violation.

The filing of a complaint in an administrative proceeding does not toll the statute; only a complaint filed in court will have this effect.[47] Many suits would thus be barred by the statute of limitations if it were necessary to get a final administrative decision before resorting to court action. This would be the result if the rule requiring that administrative remedies must be exhausted before judicial process could be sought were applicable. However, this doctrine of exhaustion applies only to claims which are cognizable in the first instance by an administrative agency. Under Walsh-Healey the source of the cause of action is the statute itself, not administrative findings. For this reason the finding of a violation and the imposition of damages by an administrative agency. Under Walsh-Healey, the source of the government to institute and maintain court action for the violation.[48]

To preserve its rights against employers for violations of the act, the government often files a court action before an administrative decision is rendered. As mentioned above, the pendency of administrative proceedings on the same violations will not toll the statute, but it is within the sound discretion of the court whether to stay the court proceedings for a reasonable time to await the administrative findings of fact.[49] Since administrative machinery is available for an expeditious determination of the facts, it is only in rare instances that the court will not stay its action until after the administrative decision is reached.

46. *Id.* at 65.
47. *Id.* at 66.
48. *Id.* at 65; United States v. Winegar, 254 F.2d 693 (10th Cir. 1958).
49. 254 F.2d 696 (10th Cir. 1958); United States v. Pine Township Coal Co., 201 F. Supp. 441 (W.D. Pa. 1962). See Unexcelled Chem. Corp. v. United States, *supra* note 45, at 66.

Several other problems have arisen in regard to the Portal-to-Portal Act's statute of limitations and Walsh-Healey controversies. The Secretary of Labor has consistently held, with court approval, that the statute of limitation does not apply to administrative proceedings. Consequently, if it is not necessary for the government to seek court action to make an administrative decision effective, a contractor who violates the act is never freed from the possibility of certain administrative actions which might be brought against him, resulting in blacklisting.[50]

Furthermore, the blacklisting period dates from the decision of the Secretary of Labor that the contract was breached, not from the date of actual violation.[51]

Another governmental sanction which is never barred by the statute of limitations is the government's right to withhold contract payments due a breaching contractor. Usually the government withholds payments from the time it is determined that the contract has been breached. The money withheld for wage underpayments is placed in trust and by express statutory direction is paid direetly to the employees who were wrongfully denied their full emolument.[52] In accordance with the general rule that administrative action is not barred by the statute of limitations, it was held in *Ready Mix Concrete Co. v. United States*[53] that this right of withholding remains regardless of the passage of time. In that case, the court further held that Walsh-Healey authorized the withholding of amounts from *any* contract which the contractor had with the government. The language of the statute is: "Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulation of *said contract* set forth in section 35 of this title may be withheld from any amounts due on *any such contracts*. . . ."[54] The decided cases deal with situations where several contracts were in existence at the same time, but it would not be straining the statute and the decisions thereunder to apply this rule to contracts made long after the earlier breach. Thus, a contractor would not be insulated from this governmental sanction even after he had received full payment for the contract and the statute had run. If he later enters into a Walsh-Healey contract with the government, there would appear to be no bar to the government's withholding of sums from this later contract and applying these funds to damages administratively found

50. Ready-Mix Concrete Co. v. United States, 130 F. Supp. 390 (Ct. Cl. 1955).
51. 7 McBride & Wachtel, Government Contracts, § 45.80(6) (1964).
52. 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 36 (1964).
53. Ready-Mix Conerete Co. v. United States, *supra* note 50.
54. 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35 (1964).

to be due under prior Walsh-Healey contracts.[55] The validity of the withholding is usually determined when the contractor sues to recover the withheld funds. Thus, although the withholding may be stringent and in opposition to the general policy underlying limitations of actions, *i.e.*, keeping stale litigation out of the courts, the administrative action remains subject to the safeguard of judicial review.

One consolation to the contractor is that he may not be subjected to this treatment if his later contracts are not subject to Walsh-Healey. The Secretary of Labor pressed for this additional right, but has been denied it by the Court of Claims.[56] The statute clearly limits the withholding right to contracts covered by Walsh-Healey as the provision for withholding speaks of "such" contracts and the whole context relates only to contracts covered by Walsh-Healey.[57] In summary, it can be said that the withholding provision of section 36 is a codification of the common law doctrine of recoupment extending the right to withhold beyond the breached contract to other contracts of the same species. Since the Portal-to-Poral Act's statute of limitations applies to actions to recover unpaid wages and liquidated damages, and since a time limitation does not apply to common law recoupment neither does it apply to this statutory recoupment.[58]

Another effect of the Portal-to-Portal Act is to provide contractors the defense of good faith reliance on administrative rulings as to failure to pay minimum wages and overtime. This, however, does not apply to child labor violations.[59] Employees have sought to attack this protection given to the employer on the ground that it deprives them of property and vested rights without due process of law; but the constitutionality of the statute has been consistently upheld by the federal courts on the ground that the rights of the employees were created by statute and thus could be altered by statute.[60] The good faith reliance defense is available where the contract was admittedly breached, but the breach occurred because of the contractor's reliance upon a ruling, approval, or interpretation of a federal agency. Sufficient basis for the defense exists if information or counsel of individual employees of such agencies was relied upon. This means that the employee must have authority to speak for the agency.[61] It is clear that the reliance must be based upon an

55. 130 F. Supp. 390 (Ct. Cl. 1955); Unexcelled Chem. Corp. v. United States, 149 F. Supp. 383 (Ct. Cl. 1957).

56. Unexcelled Chem. Corp. v. United States, *supra* note 55.

57. 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 36 (1964).

58. *Supra* note 50, at 393.

59. Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. § 258-59 (1964).

60. Thomas v. Carnegie-Illinois Steel Corp., 174 F.2d 711 (3rd Cir. 1949); see Annot., 21 A.L.R.2d 1333 (1949).

61. Lassiter v. Guy F. Atkinson Co., 176 F.2d 984 (9th Cir. 1949).

applicable ruling as a whole. The contractor cannot excerpt merely those portions of the ruling which are to his benefit.[62] The courts interpret this statute liberally in accord with the congressional intent. In most cases the only question presented is one of fact, *i.e.*, was the reliance in good faith and in conformity with a communication of a federal agency? In deciding this issue the "reasonably prudent man standard" is used.[63]

B. *Blacklisting*

Of all the penalties which may be incurred for breach of a Walsh-Healey contract perhaps the most drastic is "blacklisting." This is the procedure by which a person is barred from contracting with the government for a period of three years from the date of the Secretary of Labor's determination that a breach has occurred.[64] Most contractors would be financially able to withstand the imposition of damages for breach of a contract; but for many contractors whose greatest volume of business is done with the federal government, debarment could spell disaster.

It is fortunate that Congress had the foresight to make blacklisting discretionary with the Secretary of Labor.[65] Automatic debarment following all breaches would indeed result in a penalty which in many instances would be unnecessary to effectuate the policy of the act. Under present policies, breaches caused by negligence may result in debarment, but usually only wilful and continued violations result in the imposition of the penalty. A review of the administrative decisions leads one to the general conclusion that a contractor who honestly attempts to correct the situations which led to the breach of the statute in order to comply in the future will either not be placed on the ineligible list or may successfully petition for removal.[66]

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62. *Ibid.*

63. *Id.* at 993. The annotation, *supra* note 60, is very thorough in regard to actions under the Fair Labor Standards Acts. Fewer cases have arisen under the Walsh-Healey Act, but there is every indication that FLSA "reliance" cases under the Portal-to-Portal Act are good authority in Walsh-Healey controversies.

64. 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 37 (1964).

65. *Ibid.*

66. In the Matter of Shelby Steam Coal Co., Division of Public Contracts, U.S. Dep't of Labor, No. PC-822 (July 11, 1961), it was recommended that the contractor be relieved from the blacklisting penalty in view of the fact that he agreed to no longer deal with suppliers who failed to pay overtime and operated mines which were hazardous to employees; In the Matter of Louis F. Stana, *d/b/a* Stana Mfg. Co., Division of Public Contracts, U. S. Dep't of Labor, No. PC-850 (Dec. 1, 1961), relief from blacklisting was recommended when the 19 unsafe and hazardous conditions complained of were corrected and the company gave assurances of institution of a continuing program to insure compliance with the health and safety standards of the Department of Labor. To the same effect is Matter of Kamer Soap Products Co., Division of Public Contracts, U.S. Dep't of Labor, No. PC-842 (March 22, 1962),

Paisner v. United States,[67] a Court of Claims case, involved the important question of the amount recoverable from a blacklisted contractor if he, in some manner, succeeded in obtaining a government contract. The statute requires the Secretary of Labor to furnish the Comptroller General the names of firms and their owners who are ineligible to contract with the government.[68] No contracts are to be awarded to such designees or to any firms controlled by the contractor on the list.[69] In *Paisner*, the blacklisted partnership changed its name and, through a failure of the agency to check the names of the partners, was later able to bid successfully on three contracts. After the firm completed two of the contracts and was paid therefor, the deception was discovered and the government cancelled the third contract as void *ab initio*, refusing to make any payments thereunder or return the already delivered goods. The unfinished portion of the contract was relet at a greater cost. The partnership brought suit to recover the contract price of the delivered goods and the profits which it lost on the balance of the contract. The Government counterclaimed for the damages in reletting the third contract and for the total amount paid under the first two contracts.

The court held that the government could recover all the profits earned by the contractor plus the damages sustained in the reletting of the third contract. The decision is equitable as the policy of Walsh-Healey will be upheld as long as a debarred contractor can make no profits on his fraudulently obtained contract. However, aside from the fairness of the decision, it appears that the contractor was fortunate to lose only his profits and the reletting damages, for the majority failed to comment on two statutes which seem to be directly controlling and which would appear to call for more stringent treatment. One is the forfeiture statute which provides: "A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance

where a hearing was adjourned for 90 days to allow the employer to correct the violations, and evidence revealed that he had made many expensive improvements in the plant, adopted suggestions of safety engineers, retained an engineering firm to study soap dust problem, and indicated a sincere desire to comply with the Act in the future. *But see* Matter of J. B. Mfg. Co., Division of Public Contracts, U.S. Dep't of Labor, No. PC-863 (April 25, 1962), since unsafe conditions existed at the time of the hearing and the record strongly suggested that the contractor had not exercised the diligence and care required to comply with applicable safety regulations. The Hearing Examiner expressed doubt as to whether the employer could be relied upon in the future to comply with the Act.

67. 150 F. Supp. 835 (Ct. Cl. 1957), *cert. denied*, 355 U.S. 941 (1958). For a discussion of this case see 43 CORNELL L.Q. 503 (1958), and 57 COLUM. L. REV. 1185 (1957).

68. 49 Stat. 2036, as amended, 41 U.S.C. § 37 (1964).

69. *Ibid.*

thereof."[70] The dissenting judge felt this statute should prevent any recovery for the amount due on the third contract, but should not apply to the claims already paid. He reasoned that the statute did not apply to claims already paid for the simple reason that after payment there is no claim to be forfeited.[71] This reasoning is correct but it appears that the False Claims Act[72] would apply even to the contracts under which payment was completed. That statute provides that anyone who knowingly presents a "false, ficticious, or fraudulent claim" to the United States shall be liable in the amount of two thousand dollars for each claim so presented, plus double the amount of actual damage sustained by the government. The act has been held to apply to claims valid on their face arising from contracts which, but for the concealment of pertinent data by the contractor, would not have been awarded to him.[73] The *Paisner* case seems to fall squarely within the act's provisions.

There is no explanation by the majority why these statutes did not apply to the defendants in *Paisner*. It appears that the court simply felt that the denial of profits to the blacklisted contractors would be adequate punishment for their fraud.[74] In the future, if the government presses its rights under these statutes, this judicial exception to the forfeiture statute and the False Claims Act will probably be small solace to contractors. In any case, under existing law the most a blacklisted contractor can recover on a contract is his cost; thus, he will have no incentive to obtain government contracts unless he needs volume to meet fixed overhead costs or to rid himself of unwanted inventory. One other deterrent to such action is the possibility of criminal prosecution. It is a federal crime to present false claims,[75] to attempt to defraud the federal government,[76] or to wilfully misstate material facts in a matter within the jurisdiction of a government agency.[77]

C. *Non-Signatory Liability*

Once a violation of the statute is determined the important question arises as to who is liable for damages. Clearly, the signatories of the contract are liable for their company's violations; but in many cases the government seeks to impose joint and several liability on non-

70. 28 U.S.C. § 2514 (1958).
71. 150 F. Supp. at 839 (dissenting opinion). See F. B. Crano Jr. & Co. v. United States, 100 Ct. Cl. 368 (1943).
72. Rev. Stat. § 3490 (1875), 31 U.S.C. §§ 231-235 (1958).
73. United States v. Johnston, 138 F. Supp. 525 (W.D. Okla. 1956).
74. 150 F. Supp. at 838.
75. Act of June 25, 1948, 62 Stat. 698, 18 U.S.C. § 287 (1964).
76. Act of June 25, 1948, 62 Stat. 698, 18 U.S.C. § 286 (1964).
77. Act of June 25, 1948, 62 Stat. 749, 18 U.S.C. § 1001 (1964).

signatories as well, generally officers of the contracting companies. The act provides: "Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 35 of this title shall render the *party responsible* therefor liable. . . ."[78] Some early cases held the active managing directors of corporations individually liable as "parties responsible" for the breach.[79] However, this interpretation of the "party responsible" has not been followed by other courts. In *United States v. Hudgins-Dize*,[80] the court said, "The statute plays on contracts exclusively. In that setting 'party' is a word of art. It can refer only to a promisor or covenantor in the instrument." However, one should not be misled by this statement into concluding that only the signatory of a Walsh-Healey contract can be made to respond for damages assessed for its breach. Under several judicial theories officers, managers, and directors of corporations have been held jointly and severally liable with the contracting corporation. In certain cases the courts will pierce the corporate veil or regard the corporation as the *alter ego* or agent of an individual in order to hold him individually responsible. In *United States v. Islip Machine Works, Inc.* the court said,

> While the defendant Kent did not individually sign the contract the uncontradicted evidence indicates that he as president in all respects had exclusive control of the corporation by stock ownership and otherwise and that he hired and fired and was the 'boss'. In reality the corporation was his *alter ego* or agent. . . . The Court rests its judgment upon the theory that the corporation and Kent were one and the same, and as contracting parties should be held jointly and severally responsible.[81]

However, the corporate fiction is not perfunctorily disregarded by the courts to hold managers of corporations liable. Persons who loaned money to the corporation and obtained some rights of supervision and inspection have not been held liable when a Walsh-Healey contract was violated.

In *United States v. Hudgins-Dize*, lenders agreed to finance a company's two remaining contracts with the government as the company was unable to raise money through institutional lenders. The court

78. 49 Stat. 2036, as amended, 41 U.S.C. § 36 (1958) (Emphasis added).

79. United States v. Hedstram, 15 CCH Lab. Cas. ¶ 64, 782 (N.D. Ill. 1958) (failure to pay overtime); United States v. A-AN-E Mfg. Co., 15 CCH Lab. Cas. ¶ 64, 621 (N.D. Ill. 1948).

80. 83 F. Supp. 593, 598 (E.D. Va. 1949). See also United States v. Sawyer Finels, Inc., 199 F. Supp. 876, 878 (N.D. 1961); United States v. Islip Mach. Workers, Inc., 179 F. Supp. 585, 588 (E.D.N.Y. 1959). See United States v. Old Dominion Mfg. Co., 16 CCH Lab. Cas. ¶ 65,193 (E.D. Va. 1949), wherein it was stated that "the Statute does not authorize the imposition of liability upon any person not a party to the contract. . . ." *Id.* at 75,746.

81. United States v. Islip Mach. Workers, Inc., *supra* note 80, at 588-90.

held the lenders not responsible for violations of the act although they

> reserved to themselves not only the right to inspect the records and work, but also to protect the security of their loan by requiring the company to follow such orders and instructions, and take such steps and measures, as might be necessary to restore the workmanship and progress of the production under the contracts to a satisfactory state, whenever it was found that the company was not being capably managed or the work efficiently performed.[82]

In this decision, the court may have been influenced by the fact that the only major action taken by the lenders with respect to the operations of the corporation was their insistence upon the replacement of a superintendent. If the lenders had exercised more of their rights under the contract, a different result would not have been unreasonable.

If the corporate form is not used "fraudulently and illegally," the personnel of the corporation will be free from personal liability.[83] Thus, in a case involving the employment of minors by a bookkeeper only the corporation was held responsible.[84]

Another theory sometimes used is that the director or officer induced the corporation to breach the contract.[85] The general principle is that a third party who induces a breach of contract is liable to the injured party.[86] Thus, judgment might be entered against the corporation for breach of contract, and against the individual for inducing the breach. No cases have been found in which the court has actually held the personnel of a corporation liable on the theory of inducement. The possible use of this theory has been suggested by way of dicta, but since the cases usually involve officers who own as well as manage the corporation, the courts have simply applied the more familiar theory of ignoring the corporate entity.

Similarly, the problem may arise where one corporation is sought to

82. 83 F. Supp. at 599.

83. United States v. Old Dominion Mfg. Co., *supra* note 80. The court stated, "the statute does not authorize the imposition of liability upon any person not a party to the contract, and the evidence does not justify a finding that the corporate fiction of the contracting party was used fraudulently or illegally, so as to warrant a judgment against the personnel of the corporation." Perhaps the court saw no reason in this case to hold the officers liable as there were sureties on the contract which insured that the government would collect on its judgment.

84. United States v. B. & W. Sportswear, Inc., 17 CCH Lab. Cas. ¶ 65,295 (E.D.N.Y. 1949). The cited case indicates that the officers of the corporation left the hiring of workers to lower echelon employees. The court stated, "[A]bsent a showing of personal participation . . . [the officers] would surely not be vicariously responsible in their individual capacity for the acts of the servants of the corporation, only the corporation would have to answer for these." *Id.* at 76,110.

85. United States v. Old Dominion Mfg. Co., *supra* note 80, at 590-91.

86. RESTATEMENT, TORTS § 766 (1939).

be held responsible although it did not bid on or obtain the contract from the government. The simplest situation is when a dealer obtains the contract and then causes a manufacturer to deliver directly to the government the called for goods. Article 104 of the Walsh-Healey regulations deals expressly with this situation and declares the dealer to be the agent of the manufacturer.[87] The manufacturer as the principal is deemed to have agreed to the stipulations contained in the contract and is, therefore, subject to liability under the act. This regulation has been given the force of law by the courts.[88]

A related question concerns the liability of the contracting firm when one of its suppliers does not conform to Walsh-Healey standards. In *United States v. New England Coal & Coke Co.*,[89] the court held that the act does not make a regular dealer responsible for the labor standards of its suppliers. This case in no manner lessens the authority of the direct shipment exception of the regulations and case mentioned above. In *New England,* the dealer bought coal and then delivered it to the government itself. The cases may be easily distinguished on the fact of direct shipment. The issue likely to arise in the future is how much control the contracting dealer must exercise over the goods before they go to the buying agency. Would labeling, packaging, or sorting by the dealer relieve him from liability under the direct shipment rule? Since the Secretary of Labor has ruled that the principal contractor will not be held liable as an agent of his supplier if the goods are merely added to his stock, such a result is entirely possible.[90] However, a related and unanswered question arises when the goods are merely held at the dealer's place of business while in transit to the government. Finally, it may be said that the courts have had no difficulty in imposing liability for the breach on the part of the contractor's surety.[91]

The Secretary of Labor has ruled that if a manufacturer contracts with the government to furnish commodities and then subcontracts out the work, the subcontractor does not have to produce the material subject to the Walsh-Healey Act if such subcontracting is the "regular practice in the industry."[92] The problem, of course, is determining

87. 41 C.F.R. § 50-201.104 (1964).

88. United States v. Standard Pharmacel Co., 17 CCH Lab. Cas. ¶ 65,460 (N.D. Ill. 1949).

89. 318 F.2d 138 (1st Cir. 1963).

90. "Seetion 50-201.104 does not apply if the manufacturer ships the goods to the warehouse or other establishment of the regular dealer and the dealer puts the goods in his regular stock, even though the Government contract is filled from that stock." WALSH-HEALEY PUB. CONTRACTS ACT, RULINGS AND INTERPRETATIONS No. 3, U.S. DEP'T OF LABOR §§ 34(c) (May 31, 1963) [hereinafter cited as RULINGS AND INTERPRETATIONS No. 3].

91. United States v. Old Dominion Mfg. Co., *supra* note 80.

92. RULINGS AND INTERPRETATIONS No. 3 § 30.

what constitutes the regular practice in the industry. This ruling by the Secretary of Labor is mentioned because of its obvious importance but little can be said of it because the issue has not been litigated.

One way in which a manufacturer may furnish goods to the government and yet not be subject to Walsh-Healey is by the use of a stockpile. The act does not apply retroactively to work performed before the award of the contract.[93] The contractor may fill the contract from finished goods in his stockpile and the act will only apply to employees who remove articles from the stock or those who perform any subsequent work such as further processing of the goods, or inspecting, labeling, packing or crating the finished articles.[94] Usually, the manufacturer has a stockpile on hand at the time of the award of the contract, and during the performance of the contract produces goods of the same kind which are added to the stockpile and commingled with them so as to be unidentifiable from the existing stock previously on hand. If all of the following factors are present during the performance of the contract, the Secretary of Labor has ruled that those employees engaged in such additional production are not covered by the act: (1) The contractor must customarily maintain a stockpile of materials which are unidentifiable as to the time work was performed on any particular unit in the pile; (2) such a stockpile, at the time of the award of the contract and at all times before the contract is completed, must be sufficient to fulfill the remaining demands under the government contract; and (3) the contract must be in fact filled from that stock pile.[95] If the goods added to the pile are identifiable as having been produced after the date of the contract and furnished to the government, then employees engaged in their production would be covered by the act. This regulation is a boon to many manufacturers but it appears that this is only because the Government has not stringently attempted to enforce the requirement that the goods added to the pile must not be identifiable as having been produced after the date of the contract. The government could reasonably maintain that the coal, sand, or gravel taken from the top of a pile or that the machinery or automobiles with the highest serial numbers were the last produced.

This concludes the discussion of the Walsh-Healey Act which governs federal supply contracts. The statutes considered below deal exclusively with federal contracts involving the construction or repair of public works.

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93. RULINGS AND INTERPRETATIONS No. 3 § 24(a).
94. RULINGS AND INTERPRETATIONS No. 3 § 24(d).
95. RULINGS AND INTERPRETATIONS No. 3 § 24(b).

IV. THE DAVIS-BACON ACT

Government contracts for the construction, alteration, and repair of public buildings or public works, when in excess of 2,000 dollars, are subject to the Davis-Bacon Act only if laborers or mechanics are employed on the project. The statute provides that every such contract must contain a stipulation that all laborers and mechanics employed directly on the site of the work will be paid not less than the prevailing wages in that locality as determined by the Secretary of Labor. The statute further requires that employees be paid at least once a week.[96] Since the act applies only to laborers and mechanics employed directly on the work site, the problem associated with the interpretation of coverage is minimal. The Comptroller General has held that this statute applies only to contracts to which the United States is a party. It does not apply to federally assisted construction work.[97] The statute specifically provides that a clause must be included in the contract incorporating the requirements of the act.[98] If the stipulations are not included in the contract, whether properly or improperly, the act is not binding on the contractor.[99] Section 276(a)-2 grants the Secretary of Labor the power, in his discretion, to debar a contractor who has violated the act from contracting with the government for three years. The Secretary has established the Wage Appeals Board to review determinations made by the contracting agencies in the administration and enforcement of Davis-Bacon.[100] Detailed regulations have been promulgated to govern the procedure to be followed before this Board.[101] Following a Board decision imposing monetary liability for failure to pay the prevailing wages, the courts may be presented the issue in one of two ways. If payments of funds have been withheld from the contractor pursuant to section 276(a) of the act, the contractor may sue the government for their recovery. If payments were not withheld, the government may sue the contractor basing its case on the administrative finding.

In some instances the availability of judicial review of administrative determinations under this act has not been clear. It has now

96. Davis-Bacon Act, 46 Stat. 1494 (1931), as amended, 40 U.S.C. § 276(a)-(a)1 (1964).

97. OP. COMP. GEN., B-150223 (Dec. 3, 1962) (unpublished). See 7 MCBRIDE & WACHTEL, GOVERNMENT CONTRACTS § 45.50/2/ (1964).

98. 46 Stat. 1494 (1931), as amended, 40 U.S.C. § 276(a) (1964).

99. 40 Decs. Comp. Gen. 565, 570 (1961).

100. 29 Fed. Reg. 118 (1963).

101. 2 C.F.R. §§ 7.1-15 (Supp. 1965) "The Davis-Bacon Act requires the Secretary of Labor to prescribe appropriate standards, regulations, and procedures for the enforcement of the statute and leaves to the contracting agencies the actual administration and enforcement." 7 MCBRIDE & WACHTEL, *op. cit. supra* note 97, § 45.50(8).

been settled by the Supreme Court, however, that the correctness of the Secretary of Labor's determination of prevailing wage rates is not subject to judicial review. The Court reasoned that the United States Government may set its own terms upon which it will contract.[102]

A question on which the Court has not ruled is whether a blacklisted contractor has standing to seek judicial review of his debarment. In 1961, the United States Court of Appeals for the District of Columbia decided that blacklisted contractors did have such standing.[103] The issue arose under the Eight Hour Laws[104] dealing with overtime compensation under federal contracts, but the decision should be good authority for the same issue arising under Davis-Bacon. The problem exists because of the doctrine that only one suffering a legal wrong may seek access to the courts in the absence of a statute granting such judicial determination. *Perkins v. Lukens Steel Corp.*[105] authoritatively decided that persons have no right to receive government contracts; thus, no legal wrong is suffered by them when the government requires certain conditions to be met by all who contract with it. The Court of Appeals for the District of Columbia, in holding that a blacklisted contractor had standing to seek judicial review of the administrative action of debarment, necessarily conceded that persons have no right to receive government contracts on their own terms; but it asserted that a right does exist "not to be invalidly denied equal opportunity under applicable law to seek contracts on government projects. If deprived of this right they suffer a 'legal wrong' which gives them access to the courts . . . ."[106] Due to the severe consequences that might befall a contractor who is denied the right to contract with the government for three years, this decision was indeed wise. Other than the burden of requiring the government to litigate these blacklisting issues there is no overriding reason for denying a debarred contractor judicial review. In *Perkins* the Court pointed out that the lower court's injunction against the enforcement of the prevailing wage determinations had rendered inoperative for longer than a year the minimum wage provision of the Walsh-Healey Act. The Court, in denying judicial review of the wage determinations, gave as one of

102. United States v. Binghamton Constr. Co., 347 U.S. 171, 177 (1954).

103. Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961).

104. 37 Stat. 137 (1912), as amended, 40 U.S.C. §§ 324-26 (1964).

105. 310 U.S. 113 (1940).

106. 290 F.2d at 371. Section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964), codifies the common law to the effect that "any person suffering legal wrong because of any agency action . . . shall be entitled to judicial review thereof." This is subject to the exceptions of when statutes preclude judicial review an agency action is by law committed to agency discretion; See Note, 56 Nw. U.L. Rev. 811 (1962).

its reasons the necessity of preventing the purchasing machinery of the government from being hampered by the delays which are incident to judicial action.[107] This consideration is inapplicable in the case of a debarred contractor, as the pendency of the case involving his blacklisting will in no way prevent the government from continuing its contracting with others.[108]

Since the penalty blacklisting is discretionary and not lightly imposed, it is less likely to be a recurring problem than the issue of monetary liability which befalls all contractors who breach the stipulations of a contract subject to Davis-Bacon. All such contracts include the provision that the Comptroller General may withhold as much of the accrued payments due under the contract as is necessary in order to pay laborers and mechanics employed on the project the difference between the required rates and those actually paid.[109] The statute authorizes withholding only from payments due under the contract governing the project that the laborer or mechanic is working on. For that reason, the problem of governmental withholding from other Davis-Bacon contracts has not arisen. If the accrued payments withheld are insufficient to reimburse fully all of the wrongfully underpaid laborers and mechanics, section 276(a)-2(b) confers upon them the right of action or intervention against the contractor or his sureties. This section further provides that it shall be no defense to such a suit that such laborers and mechanics accepted or agreed to accept less than the required rates or voluntarily made refunds.[110] It has been held that a release executed by a laborer subject to the protection of Davis-Bacon who has been paid a wage less than the prevailing wage is null and void.[111]

A powerful weapon given the government by section 276(a)1 of the act is the power to terminate a contractor's right to proceed with the contract, to prosecute the work to completion, and then charge any excess cost to the contractor or his sureties. It should be noted that there is always a surety in the picture on a Davis-Bacon covered project due to the requirements of the Miller (Heard) Act.[112] It appears that the government has not exercised to any great extent its power to terminate Davis-Bacon contracts. The difficulties and loss of time inherent in termination and the later completion of these contracts may be secondary reasons why the government does not

107. 310 U.S. 113 at 130.
108. Note, *supra* note 106, at 822.
109. 46 Stat. 1494 (1931), as amended, 40 U.S.C. § 276(a) (1964).
110. 46 Stat. 1494 (1931), as amended, 40 U.S.C. § 276(a)-2(b) (1964).
111. Maryland Cas. Co. v. United States, 305 U.S. 651 (1939); United States *ex rel.* Johnson v. Morley Constr. Co., 98 F.2d 781 (2d Cir. 1938).
112. Act of August 24, 1935, 49 Stat. 793, as amended, 40 U.S.C. §§ 270z-e (1964).

vigorously assert this power. The primary reason would seem to be that the presence of sureties on the contracts eliminates any danger that the funds to pay the employees cannot be recovered. One case where the contract was terminated involved the actions of a subcontractor who had failed to pay his workers the statutory wage and had not maintained payroll records. The principal contractor argued to no avail that he was not responsible for the breaches of the contract by the subcontractor. The Wage Appeals Board held that "[t]o relieve appellant, the prime contractor, of its responsibility pertaining to labor provisions of the contract even though the violations were those of its subcontractor would defeat the purpose of labor legislation. . . ."[113]

A stipulation in all Davis-Bacon contracts unequivocally requires preservation of payroll records and submission each week of certified copies thereof to the contracting officer.[114] Without any records available the government could not readily determine the amounts due employees. Perhaps this failure to maintain records with its attendant hampering of the government's enforcement of the act was the main consideration leading to the termination of the contract.

In conclusion, it may be said that draftsmen of the Davis-Bacon Act did a commendable job. Its clarity has forestalled any need for frequent litigation in regard to breaches of the covered contracts. The most troublesome problem arising under the act has been the specification of the prevailing wage determinations in the contracts. Often contractors have found that labor was not available at the specified rate and have attempted to hold the government liable for the higher wage rates which it was necessary to pay to complete the contract. Generally, the contractors have been denied recovery on the ground that the specified wage rates did not guarantee that the contractor would not have to pay more.[115] Exceptions to this general conclusion have been recognized, however. Recovery has been allowed where the contracting agency ordered the employer to pay the higher rates,[116] and where the government affirmatively misrepresented the wage situation in the area.[117] A detailed analysis of this problem is beyond the scope of this discussion, but an excellent treatment may be found in the work on government contracts by Messrs. McBride and Wachtel.[118]

113. Appeal of Kenmel, Inc., ASBCA 3467, 59-1 BCA 2235 (1959).
114. 29 C.F.R. § 5.5(3)(ii) (1964).
115. 347 U.S. 171 (1954).
116. Irvin & Leighton v. United States, 115 Ct. Cl. 18 (1949); Winn-Senter Constr. Co. v. United States, 110 Ct. Cl. 34 (1948).
117. Albert & Harrison, Inc. v. United States, 107 Ct. Cl. 292 (1946).
118. 7 McBride & Wachtel, *op. cit. supra* note 97, §§ 45-60-4.60/121.

The next statute to be considered is one which was enacted to complement the federal contract construction acts which contain no provisions for overtime work. This act supplies both overtime standards and the penalties for their breach for other acts which have no provisions regarding overtime, Davis-Bacon being the most obvious example.

V. WORK HOURS STANDARDS ACT OF 1962

In 1892, Congress passed the first legislation regulating overtime work on government contracts.[119] This act was criminal in nature and required proof of an intent to violate its provisions before a conviction could stand. The desire to offer wider protection to employees on federal contracts led Congress to enact a non-criminal statute which provided for liquidated damages of five dollars for every day that each laborer and mechanic worked over eight hours.[120] As originally enacted, the prohibition against overtime work was absolute; but during World War I Congress suspended the act to allow overtime work, subject to the requirement that such work be compensated for at not less than one and one-half times the basic rate.[121] In 1940, the absolute prohibition was removed in its entirety to allow laborers and mechanics to work overtime so long as they were paid at least time and one-half.[122] To collect the various federal laws regarding overtime into one act and to make some needed revisions, Congress passed the Work Hours Standards Act of 1962.[123] All previous overtime legislation was expressly repealed by this act. Only those contracts existing on or before October 12, 1962, the effective date of the Work Hours Act of 1962, or those that were entered into pursuant to invitations for bids outstanding on August 13, 1962, the date the Work Hours Act was enacted, remain subject to the older acts and are excepted from the coverage of the new act.

The act applies to all laborers, mechanics, watchmen and guards employed by the government or by any contractor or subcontractor upon a public works project of the United States.[124] The act requires that all covered employees be compensated at a rate not less than one and one-half times their basic rates for all hours worked in excess of eight hours in any day, or in excess of forty hours in the workweek. The act is drafted to cover contracts for work financed in whole or in

119. Act of Aug. 1, 1893, 27 Stat. 340, 40 U.S.C. § 321-2 (1964).
120. Act of June 19, 1912, 37 Stat. 137, 40 U.S.C. §§ 324-25 (1964).
121. Act of March 4, 1917, 39 Stat. 1192, 40 U.S.C. § 326 (1964).
122. Act of Sept. 9, 1940, 54 Stat. 884, 40 U.S.C. § 325a (1964).
123. Act of Aug. 13, 1962, 76 Stat. 357, 40 U.S.C. § 327-32 (1964).
124. 76 Stat. 357, 40 U.S.C. § 3329 (1964). The act also applies to persons who perform services similar to those of a laborer or mechanic in connection with dredging or rock excavation in any river or harbor of the United States.

part by loans or grants from the United States when the contracted work is included within the coverage of any United States statute providing wage standards for such projects. However, if financial assistance is composed solely of loan guarantees or of insurance, the act does not apply.[125] Neither does it apply to any contracts covered by the Walsh-Healey Act, as that act contains its own provisions relating to overtime.

Section 102(b) deals with the penalties for violation of the act. It provides that any contractor or subcontractor subject to the act shall be liable to the United States for liquidated damages of ten dollars a day for every day that each employee worked overtime without receiving the required overtime wages. This section goes further and grants the contracting agency the right to withhold from accrued payments such sums as may administratively be determined to be necessary to satisfy any liabilities of the contractor or subcontractor for unpaid wages or liquidated damages.

If an employer fails to pay the required overtime wages, he is liable to his employees for such unpaid sums. If the agency withholds payments from the contractor, the Comptroller General is authorized to pay directly the sums due to the employees. If the funds withheld are inadequate to pay the entire amount due, the employer pays an equitable proportion to each worker.[126] The employees may sue the contractor and his sureties for any unpaid amounts that the government does not allot them from withheld payments.[127] In such a suit, it is no defense that the workers accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

Any contractor or subcontractor aggrieved by the withholding of a sum as liquidated damages is granted the right to appeal, within sixty days, to the head of the contracting agency. Such agency head has authority to review the administrative determination of liquidated damages and to either affirm it; or if it is found that the sum withheld is incorrect or that the contractor violated the provisions of the act inadvertantly, notwithstanding his exercise of due care, recommendations may be made to the Secretary of Labor that an appropriate adjustment in liquidated damages be made, or that the contractor be relieved of liability from any liquidated damages. The Secretary reviews the recommendation, conducts any investigation that he deems proper and then renders his decision. If the contractor wishes to appeal this decision he may, within sixty days, file a claim in the

125. 76 Stat. 357, 40 U.S.C. § 329 (1964).
126. 76 Stat. 357, 40 U.S.C. § 330(a) (1964).
127. 76 Stat. 357, 40 U.S.C. § 330(b) (1964).

court of claims. In that court the administrative findings of fact are conclusive if supported by substantial evidence.[128]

One of the most noteworthy portions of this act is its provision for criminal violations. Intentional violations are misdemeanors for which contractors or subcontractors may be punished by fines up to one thousand dollars and six months imprisonment.[129]

The act itself does not grant the Secretary of Labor authority to debar a contractor found to be in violation of the act, but regulations do prescribe such action.[130] The regulations gain the force of law from Reorganization Plan No. 14 of 1950[131] which authorized their issuance by the Secretary. It has been held that a contractor blacklisted under the authority of regulations issued in accordance with the Reorganization Plan has standing to seek judicial review of the administrative action.[132]

VI. THE COPELAND ACT

To prevent the circumvention of statutes requiring certain wages to be paid to employees performing work on federal construction contracts, Congress enacted the Copeland Anti-Kickback Act.[133] It provides criminal penalties for whoever by force, intimidation, threat of procuring dismissal or by any other means induces any person employed in the construction, prosecution, completion, or repair of any public building or public work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his employment contract. Persons found guilty may be fined not more than five thousand dollars or imprisoned not more than five years, or both.

The act in its entirety is composed of only one brief section. However, the Secretary of Labor has been granted authority to make reasonable regulations to aid in its enforcement.[134] The regulations define the scope of the act to include any contract for the construction or repair of any federally financed public building or public work which is subject to federal wage standards.[135] If federal assistance is limited to loan guarantees or insurance the act does not apply.[136]

128. 76 Stat. 357, 40 U.S.C. § 330(e) (1964).
129. 76 Stat. 357, 40 U.S.C. § 332 (1964).
130. 29 C.F.R. § 95-5.6(b) 1 (1964).
131. Reorg. Plan No. 14 of 1950, 15 Fed. Reg. 3176 (1950), adopted under authority of the Organization Act of 1949, 63 Stat. 203, U.S.C. § 1332-2-15 (1964).
132. Copper Plumbing & Heating Co. v. Campbell, *supra* note 103.
133. 18 U.S.C. § 874 (1964).
134. Act of June 13, 1934, 58 Stat. 948, 40 U.S.C. § 276(c) (1964).
135. 29 C.F.R. § 3.1 (1964).
136. 29 C.F.R. § 3.2(d) (1964).

The primary thrust of the statute is to aid in the enforcement of the minimum wage provisions of the Davis-Bacon Act and the overtime provisions of the Work Hours Act of 1962. Several payroll deductions are permissible under the act. These include the withholding of federal income taxes, social security taxes, deductions required by court process, employee contributions to pension and insurance funds, union dues, initiation fees, and miscellaneous other deductions.[137] Further, the weekly submission of a statement by the employer of the wages paid the preceding week to each laborer and mechanic is mandatory.[138]

The offense which the statute is designed to remedy is the compelling of a workman to give up part of his contract wages in order to obtain or remain on a job.[139] In *United States v. Charlick*,[140] it was held that an employer who required workmen to return part of the wages stipulated in the contract was not liable as the workers' contracts of employment provided that such "kickbacks" were permissible. In that case the employees had agreed to a scheme whereby the employer was to pay them the stipulated wage in the federal contract under the scrutiny of the inspector, and they were to return part of this wage. The court reasoned that the Copeland Act was not intended to punish the refusal or failure of an employer to pay his men the wages stipulated for in his contract with the government. The court held that the workers were not parties to this contract, and that they had not given up anything to which they were entitled under their contracts of employment. The bothersome point of this decision is that it offers a simple method for employers to evade the Copeland Act. Under the reasoning of this opinion there can be no criminal liability imposed on a contractor if he makes secret agreements with his workers whereby they voluntarily return to him part of their wages. Perhaps the possibility of civil liability, termination of the contract, and blacklisting afford the government sufficient tools to protect the workers' interest, but since Congress has expressed its desire, and presumably the need, for a criminal sanction, it seems ludicrous to allow this criminal statute to be flouted by such a simple subterfuge.

Litigation in regard to this statute has involved primarily the issue of whose actions are subject to the act. The Supreme Court has applied a broad interpretation of the statute to uphold the conviction of persons other than employers who induce employees to give

137. 29 C.F.R. § 3.5(a)-(i) (1964).
138. Act of June 13, 1934, 48 Stat. 948, 40 U.S.C. § 27(c) (1964).
139. United States v. Charlick, 26 F. Supp. 203 (E.D. Pa. 1939).
140. *Ibid.*

up part of their wages. In *United States v. Laudani*,[141] the clause "whoever induces" was held to include a company foreman with authority to hire and discharge who, for his own benefit, compelled surrender of a portion of the employees' wages. If a person has the authority to hire or discharge, and procures kickbacks by threatening to dismiss the workers, little difficulty is encountered in finding him guilty under the act.[142] If a person with such authority agrees to employ only those approved by others, and kickbacks are required to gain the requisite approval, the persons accepting the kickbacks may be found guilty. Since the case of *United States v. Fuller*[143] decided in 1943, this premise has consistently been upheld in indictments against union officials.

The Supreme Court has expressly refrained from attempting "to delineate the outside scope of the act's application,"[144] but has made clear that the act does not apply "to every extortioner, blackmailer or other person who extracts money from one who has previously received it for labor on a federally financed project."[145] The case which came closest to defining the outer limits of the act involved the prosecution of a foreman on a Tennessee Valley Authority project who admittedly did not have the authority to hire or fire employees on his crew;[146] he could only recommend dismissal for cause. In such a case, the contracting agency would then inquire of the employee whether he had been treated fairly.[147] The United States Court of Appeals for the Sixth Circuit held that the statute applied to anyone who possesses "the power to affect the employment relationship."[148] The money extracted "must be paid in return for the exercise of that power in a way favorable to the employee."[149] The case involved the sufficiency of the indictment and thus, the court did not pass on the action of the accused in requiring two dollars per working day from each member of his crew. Implicit in the court's decision is the requirement that the extortioner must in fact be able to affect the employment relationship. In the case under discussion, it seems

141. 320 U.S. 543 (1944).

142. See United States v. McGraw, 47 F. Supp. 927 (N.D.N.Y. 1942).

143. 51 F. Supp. 951 (N.D.N.Y. 1943) (Employer's agent agreed to hire only persons approved by union officials. Such officials indicated for violation for requiring kickback for their approval). To the same effect under similar facts see, United States v. Alsup, 219 F.2d 72 (5th Cir.), *cert. denied*, 348 U.S. 982 (1955); United States v. Hullinharst, 141 F. Supp. 158 (E.D. La. 1956); United States v. Lombard, 54 F. Supp. 537 (W.D.N.Y. 1944).

144. United States v. Laudani, *supra* note 141, at 548.

145. *Ibid.*

146. United States v. Price, 224 F.2d 604 (6th Cir.), *cert. denied*, 350 U.S. 876 (1955).

147. *Id.* at 606.

148. *Id.* at 608.

149. *Ibid.*

that the defendant did not possess this power. If he recommended that a non-paying worker be discharged for some trumped up cause, the investigation by the agency almost assuredly would have revealed the illegal scheme. Yet, the case is important for its principle that one who possesses less than the power to hire and fire may be found guilty under the act. Thus, if a person obtains kickbacks by threatening to exercise his power to discipline, demote, promote, transfer or otherwise "affect the employment relationship," it appears that he will be in violation of the Copeland Act.

The circumspection of certain activities of union officials has been attempted by Copeland Act prosecutions. As earlier discussed, the Government has been successful in its prosecution of union officials who required kickbacks from employees to gain the indispensable union approval of their employment.[150] However, the case of *United States v. Carbone*[151] laid down what has become an established precedent in closed shop situations where the union officials require employees to remit initiation fees as a condition of their employment. The case was decided before section 8(a)(3) of the National Labor Relations Act[152] eliminated the closed shop, but the same problem can still exist in a valid union shop arrangement. The defendants in *Carbone* required all workers to pay an initiation fee of twenty dollars in five dollar installments. If a worker terminated his employment on the project before paying the full fee, the defendants pocketed the previously paid installments. In holding that the union officials were not guility of violating the Copeland Act the Court said:

> There is nothing in the legislative history to support the thesis that the statute was intended to affect legitimate union activities. Nor was it intended to be used to punish unlawful acts, including those committed by union officials in violation of union rules, that are not in the nature of kickbacks. . . . It is enough to note that this Act was designed solely to prevent workers from wrongfully being deprived of their full wages and that evils relating to the internal management of unions were matters with which Congress did not concern itself in enacting the Kickback Act.[153]

The Court held that the assessments were lawful when made and that the defendants had the right to make them on behalf of the unions. The later conversion of the money by the union officials was deemed to be outside the scope of the act. The statute is not a general extortion statue and the prosecution of persons who fraudulently obtain money from workers must be sought under other

150. United States v. Fuller, *supra* note 143.
151. 327 U.S. 633 (1946).
152. National Labor Relations Act § 8(a)(3), 49 Stat. 452, as amended, 29 U.S.C. § 158(a)(3) (1964).
153. United States v. Carbone, *supra* note 151, at 639.

laws. If the money given up by the employees is pursuant to a lawful assessment at the time of remittance, then the later conversion is not covered by the act. Thus, a person who absconds with federal taxes or other funds lawfully withheld from workers has not violated the Copeland Act. In many situations, general embezzlement statutes would appear to be adequate for the prosecution of offenders. The problem with such statutes, however, is that the Government, in order to effectively prosecute, must gain the cooperation of the organization which suffered the embezzlement. The problems involved in such a situation are apparent, but the Court is probably right in its assertion that the Copeland Act was not designed to cover such actions. Only when the workers are required, in the general sense of the term, to kickback part of their wages to protect their jobs will the Copeland Act be violated.

VII. CONCLUSION

As the foregoing consideration of Walsh-Healey, Davis-Bacon, and the Work-Hours Act of 1962 reveals, Congress has sought through divergent means to use the federal government's purchasing power to require those contracting with it to assent to numerous provisions regarding wages and working conditions. Although it might be possible for one comprehensive statute to regulate wages and working conditions on all government contracts, Congress has seen fit to enact different statutes to regulate the two major classifications of government contracts. The Walsh-Healey Act is concerned with supply contracts while construction and repair contracts are governed by Davis-Bacon and the Work-Hours Act of 1962.

The differences in the administration of the acts are substantial, especially in regard to hearings on violations and subsequent administrative and judicial review. Also, the penalties imposed for violations of these acts are strikingly different in some instances. For example, under a Walsh-Healey contract, a contractor who fails to compensate employees at the stipulated rates, including overtime, is subjected to the possibility of contract cancellation and liability for any excess cost that the government incurs in its completion. No such governmental action is provided against breaching contractors under the Davis-Bacon or the Work-Hours Act. Neither do these latter acts provide for the imposition of the ten dollars a day penalty for the employment of minors as does the Walsh-Healey Act. However, the Walsh-Healey contractor is not subjected to the penalty of ten dollars a day for each employee who does not receive the required overtime rate of pay as the Work-Hours Act, which applies to Davis-Bacon contracts, provides. Why Congress has applied different penalties to different

types of contracts is not always readily apparent.[154] Perhaps the reason construction contracts are not subject to cancellation is that such action would, in many cases, entail the removal of special construction equipment and the necessity of another contractor attempting to complete a structure which was perhaps started under methods unfamilar to him. Why failure to pay overtime on construction contracts should result in the imposition of a penalty of ten dollars a day per underpaid employee and not on supply contracts is not at all clear.

Turning to the administration of the acts, it is apparent that Walsh-Healey contractors have the advantage of more thorough administrative hearings and review. The adversary hearing before a trial examiner with appeal available to the Administrator of the Wage and Hour Division and then the further availability of appeal of the blacklisting penalty to the Secretary of Labor results in a more thorough review of the facts and law than does the Davis-Bacon and Work-Hours procedures. Under the latter statutes the Solicitor General conducts investigations and renders his decision as to the breach. The only possible administrative appeal if the overtime provision is not in issue is to the Wage Appeals Board. However, this board is directed to review only those cases concerning substantial sums of money, large numbers of employees, or novel situations. Under this standard it is obvious that few cases will be reviewed by the Board. When the Solicitor General imposes liquidated damages for breach of overtime provisions, the contractor is afforded more complete administrative review as he may appeal to the head of the contracting agency and then to the Secretary of Labor. No good reason can be advanced why the provisions for administrative review are so different under these statutes, but it does seem that fewer Davis-Bacon and Work-Hours cases would require court review if they were subject to the more exhaustive administrative review afforded Walsh-Healey contracts. The contractor who participates in an adversary proceeding before an impartial examiner and then is allowed to appeal to the administrator of all public contracts is more likely to accept an adverse decision than is one who is found in default by the Solicitor General and has little chance of appeal.

One other advantage which Walsh-Healey contracts offer is the possibility of judicial review of otherwise non-reviewable administrative determinations as provided by statute. The Fulbright Amendment to Walsh-Healey was a recognition that the government should not be

154. The legislative history of these statutes offers no clue to the difference in treatment regarding penalties. For a discussion of the legislative history see, *Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor*, 87th Cong., 2d Sess. (1962).

able to impose its own determination of prevailing wages, blacklisting, and many terms of definition in the act on potential contractors. The common law rule that a person must suffer a legal wrong before he may seek court redress has been replaced in Walsh-Healey by allowing any "interested person" to seek judicial determination of administrative action. However, the old rule still applies under other government contracts. It is not apparent why Congress has not seen fit to amend these other acts to afford contractors more ready access to the courts.

The administrative proceedings of Walsh-Healey coupled with easy access to the courts lead to decisions which are accepted as definitive by both contractors and the Government. Congress should reconsider many of the provisions of the other acts dealing with labor standards and conform them to the preferable provisions of Walsh-Healey.[155]

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155. It is recognized that there are differences in supply contracts and construction contracts which will always necessitate some different statutory treatment. It is in regard to penalties and administrative and judicial hearings and review that the statutes should be more alike.