Someone once said, “No one’s perfect; that’s why pencils have erasers.” He could have said: No one’s perfect; that’s why Congress created the “good faith defense” to liability under the Fair Labor Standards Act. He also would have been correct if he had said that the good faith defense was created because judges and the U.S. Department of Labor — both of whom have the authority to interpret the FLSA — don’t always agree how to apply the law, leaving well-meaning employers caught in the middle.

Let’s start at the beginning: Section 6 of the FLSA requires employers to pay nonexempt employees at least the minimum wage for all hours worked (29 U.S.C. §206). Section 7 of the FLSA entitles nonexempt employees who work more than 40 hours in a work week to overtime pay at one and a half times their regular rate (29 U.S.C. §207). Nonexempt employees who are not paid as required by FLSA Sections 6 and 7 have the right to sue their employers to recover “unpaid minimum wages” and “unpaid overtime compensation” (29 U.S.C. §216(b)). If a court finds that the employer did not pay the minimum wages or overtime properly, the court can assess “an additional equal amount as liquidated damages” (id.). Assessing liquidated damages against an employer is “mandatory” (Haro v. City of Los Angeles, 745 F.3d 1249, 1259 (9th Cir. 2014)).

Simply put, it was bad for the economy. It also was unfair, because “employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay” (id.). Seeing a problem, Congress took action. (No, this is not a fairy tale.)

The result was the Portal to Portal Act, which provides a “good faith” defense to the FLSA. There are two parts to that defense — one, an absolute defense to all liability; the second, a defense to liquidated damages only.

The Absolute Good Faith Defense

Section 10 of the Portal to Portal Act says:

[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the [FLSA] if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [the Administrator of the DOL Wage and Hour Division], or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.” (29 U.S.C. §259(a))

See Back to Basics, p. 2
This defense applies even if “after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect” (id.). This means that, if an employer relies on a DOL regulation, interpretation or Wage-Hour Opinion Letter, the employer will not be liable for back wages even if a judge later rules that DOL’s regulation, interpretation or Wage-Hour Opinion Letter was wrong.

It’s important to note that not all Wage-Hour Opinion Letters can be relied on for the absolute good faith defense. DOL explained in a Wage-Hour Opinion Letter dated April 22, 1987:

It is our opinion that written rulings and opinions prepared for the signature of Wage and Hour staff below the level of the Administrator (or Deputy Administrator [when the post of Administrator is vacant]) may not be relied on for purposes of good faith reliance under the Portal Act.

Therefore, pay attention to who signed an opinion letter before you rely on it, so you don’t end up like the employer in Spires v. Ben Hill County (980 F.2d 683 (11th Cir. 1993)), that argued unsuccessfully that its practices had been sanctioned by a district director of the Wage and Hour Division.

DOL’s position regarding the lack of weight to be given letters signed by lower-level officials is very significant because a large percentage of the opinion letters issued in the George H.W. Bush, Clinton and George W. Bush administrations were not signed by the Administrator, but rather by lower-level officials. (The Obama Administration has never issued a Wage-Hour Opinion Letter.)

Throughout the 1990s, more than 450 Wage-Hour Opinion Letters were signed by an official by the name of Daniel F. Sweeney, whose title at different times was “Deputy Assistant Administrator” and “Director, Office of Enforcement Policy Fair Labor Standards Act Team.” During the “Bush II” administration, more than 80 Wage-Hour Opinion Letters were signed by Mr. Sweeney’s successor, Barbara R. Relerford. According to DOL, none of these letters constitutes a ruling or interpretation of DOL for the purpose of good faith reliance under Section 10 of the Portal-to-Portal Act and 29 C.F.R. Part 790. Helpfully, DOL has placed “non-Administrator” opinion letters from 2001-2009 on a separate webpage (http://www.dol.gov/whd/opinion/flsana.htm) from Administrator opinion letters (http://www.dol.gov/whd/opinion/flsana.htm). For letters dated earlier than 2001, just look at the signature block.

DOL’s position seems unfair, especially because at least some of Mr. Sweeney’s and Ms. Relerford’s letters were written in response to requests from employers for Wage-Hour Opinion Letters. Presumably, the questioners in those cases were looking for guidance they could rely on, and were sorely disappointed. Significantly, at least one U.S. Circuit Court of Appeals seems to have disagreed with DOL, holding that letter rulings signed by the Deputy and Assistant Administrators were properly characterized as the DOL’s position for purposes of the good faith reliance defense (Hultgren v. County of Lancaster, 913 F.2d 498 (8th Cir. 1990); Bouchard v. Regional Governing Bd. of Region V Mental Retardation Services, 939 F.2d 1323 (8th Cir. 1991)). (Note that the Deputy Administrator letters relied on by these courts were not issued during a “vacancy period,” such as the one discussed in DOL’s April 1987 ruling.)

It may be that the Hultgren and Bouchard courts were not aware of DOL’s April 22, 1987, opinion letter setting forth its own position on who is authorized to speak for the agency. In any case, it doesn’t appear that later courts have followed the 8th Circuit’s position from nearly 25 years ago, nor have we found any newer reported decisions discussing the hundreds of letters issued by Mr. Sweeney and Ms. Relerford. Thus, a careful employer would be well advised to tread cautiously before placing all of its reliance on such a letter. At most, such a letter might be an indication of DOL’s present enforcement policy, thus hinting that DOL may be unlikely to target an employer who relies on such a letter.

Another limitation on the availability of the absolute good faith defense is that the employer must have acted “in conformity with” DOL’s regulation, interpretation or letter ruling. According to DOL, an example of an employer not acting “in conformity with” an administrative regulation, order, ruling, approval, practice, or enforcement policy is when an employer receives a letter from the Wage-Hour Administrator stating that if certain specified circumstances and facts regarding the work performed by the employer’s employees exist, the employees are, in the Administrator’s opinion, exempt from the FLSA. In fact, one of the hypothetical circumstances upon which the opinion was based does not exist, but the employer, erroneously assuming that this circumstance is irrelevant, relies upon the Administrator’s ruling and treats the employees as exempt. Because the employer did not act “in conformity” with that opinion, he has no defense under the Portal to Portal Act (29 C.F.R. §790.14(b)).
The Good Faith Defense to Liquidated Damages

If an employer’s FLSA violation was not the result of reliance on a DOL regulation, interpretation or Wage-Hour Opinion Letter, the employer will have to pay back wages. But Section 11 of the Portal to Portal Act says:

In any action … to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the [FLSA], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the [actual back wages awarded]. (29 U.S.C. §260)

This means that even if the absolute good faith defense is not available, the employer might not have to pay liquidated damages if it convinces the judge that the underlying FLSA violation was committed in good faith and that the employer had reasonable grounds for believing that its act or omission was not a violation of the law.

For example, in Perez v. Mountaire Farms, Inc. (650 F.3d 350, 375 (4th Cir. 2011)), the employer, a chicken processing plant, was found liable for back wages for not paying workers for time they spent donning and doffing protective gear. But while finding that the FLSA had been violated, the judge refused to award liquidated damages because he concluded that the violation occurred in good faith. The 4th Circuit explained:

Mountaire also produced evidence of its good faith by showing that the company relied on the advice of David Wylie, an attorney retained by the National Chicken Council. Mountaire presented to the district court fourteen letters and memoranda from Wylie in which he interpreted donning and doffing cases from various jurisdictions, provided updates on plant surveys conducted by the Department of Labor, and advised poultry companies on how the companies could alter or maintain their practices to remain in compliance with the FLSA, as interpreted by different courts. The district court found that Mountaire “clearly” changed its policies based on Wylie’s information and advice. (650 F.3d at 375-76)

By showing that it acted on the advice of knowledgeable counsel, the employer was able to avoid paying liquidated damages, which would have exceeded $700,000 (see 650 F.3d at 374). Notably, the 4th Circuit observed that: “Although Wylie did not specifically advise Mountaire as its legal counsel, but provided the advice on behalf of a private interest group, the information was nonetheless relevant to Mountaire’s policy concerns and was not overtly suspect in its conclusions” (650 F.3d at 376). This suggests that the good faith defense may be available not only if an employer seeks the advice of its own lawyer, but also when the employer relies on advice from a lawyer working for a relevant trade association.

Of course, it’s not enough to consult a lawyer, if the employer then ignores the lawyer’s advice. For example, in Mumby v. Pure Energy Svcs. (USA), Inc. (636 F.3d 1266 (10th Cir. 2011)), the court held that an employer did not act in good faith when it sought legal advice on one potential FLSA violation and ignored the attorney’s advice that it was committing other FLSA violations.

Relying on an attorney’s advice is not the only way to become eligible for the good faith defense to liquidated damages. At least one court has held that an employer could take advantage of the defense because it read this publication. In Clay v. City of Winona, Miss. (753 F. Supp. 624 (N.D. Miss. 1990)), the court wrote

In an attempt to show its good faith, the city cites several facts. First of all the city is in possession of the Fair Labor Standards Handbook as well as the monthly supplements to that handbook. Both Chief Travis T. McClure and Clerk Jean M. Nail signed an affidavit stating that they had verbally contacted the Department of Labor to obtain advice regarding the lawfulness of their system of pay. Furthermore, Chief McClure wrote Mr. Robert Brock of the Jackson, Mississippi division of the United States Department of Labor, Wage and Hour Division. (753 F.Supp. at 626)

And the court concluded:

The employer bears the burden of showing that the violation was in good faith and that he had reasonable grounds for believing that his actions did not violate the FLSA. The court is of the opinion that the employer has met this burden. Chief McClure contacted the Wage and Hour Division of the Department of Labor and submitted written hypotheticals regarding the factual situation as he saw it and requested a written response. Such a response was granted and his reliance thereon was justified. Furthermore, the chief and the clerk of the city read the Fair Labor Standards Handbook and the supplements thereto in an attempt to comply with the FLSA. Therefore, even if the court had found a violation under the facts of this case, it would exercise its discretion under §260 and not award liquidated damages in this case. (753 F.Supp. at 630)
On the other hand, in Schneider v. City of Springfield (102 F.Supp.2d 827 (S.D. Ohio 1999), the court refused to recognize a good faith defense because it was not clear whether the employer had referred to the 1985 version of the Handbook or the 1997 version. The court noted that referring to an out-of-date version might be “reckless,” which would subject the employer to larger, not smaller, FLSA penalties.

**Conclusion**

Employers sometimes may try to cut costs by not getting competent legal advice — your Cousin Vinny may be great at getting you out of a murder charge, but that doesn’t make him competent to give FLSA advice. They also may fail to get FLSA training, and may never read FLSA publications. This may save money in the short run. However, investing in becoming more knowledgeable about the FLSA is more likely to save employers money, and heartache, in the long run.

Shlomo D. Katz, counsel in the Washington, D.C., office of Brown Rudnick LLP, practices wage and hour law and advises clients on employee classification and salary test issues. Mr. Katz represents clients in connection with minimum wage, working time and overtime issues under the federal FLSA, Service Contract Act, Davis-Bacon Act and state wage payment and prevailing wage laws. Mr. Katz has successfully litigated before federal, state and local courts, the U.S. Government Accountability Office and the U.S. Boards of Contract Appeals. Mr. Katz is a co-author of Thompson’s various FLSA publications.