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NEW YORK STATE

DEPARTMENT OF LABOR

INTER-OFFICE MEMORANDUM

Date: February 10, 1989

To: Hugh McDaid Office: Garment District

From: Barbara C. Deinhardt Office: Counsel's Office - B'klyn

Subject: Request for advice concerning imposition of penalties under §345.3 and §345.9 of Article 12 of the Labor Law

This is in response to your query about the meaning of the term "knows" in the above referenced sections of Article 12-A.

You stated that your office recently has cited some manufacturers for §345.3 violations and issued \$100 civil penalties and that apparel industry representatives want you to stop issuing such penalties to employers if they do not "know" the employer with whom they contract is unregistered.

For our purposes the term "knows" is similar to the term "willful". The U.S. Supreme Court in TWA v. Thurston, 469 U.S. 111 (1986) and McLaughlin v. Richland Shoe Co. U.S. (1988) has interpreted "willful" to mean "knowing or showing reckless disregard for whether conduct is prohibited." Willfullness is not established solely because a company was aware that a statute applied or that it was "in the picture". Willfullness requires more than a showing of mere negligence. On the other hand, evil motive and specific intent are not necessary elements of willfullness. A New York court, Walker v. Security Trust Co., 85 Misc. 2d 614 (Monroe Co., 1976), has construed "wilful" to depend on the context in which it is used; a willful violation requires facts from which it might fairly be inferred that parties, as reasonable businessmen, knew that what they were doing was in violation of the law or knew that there was a substantial risk of such a violation.

Therefore, under applicable case law, mere knowledge of the potential applicability of Article 12-A, or knowledge that Article 12-A was "in the picture", would not establish willfullness. Thus, if an employer made a good faith effort to determine whether a manufacturer or contractor with whom it was contracting was registered, that employer would not be subject to a knowing determination. On the other hand, if that employer belonged to a trade association which informed him about the law, then this might help establish a knowing determination.

Attached is a check-list of questions designed to elicit facts establishing knowing violations. Although this list was prepared for

determining "willful" violations under the prevailing wage law, Article 8 of the Labor Law, the questions are generally applicable to the matter at hand. I am also attaching a suggested letter to be sent to every manufacturer or contractor upon re:istration.



Charles Horwitz  
Senior Attorney

CH:11

Att.

Dear Manufacturer or Contractor:

As you will note from the attached provisions of the apparel industry registration law, it is illegal to knowingly contract for any apparel industry service with manufacturers or contractors who are not registered with the Department of Labor. Penalties for violations of the law are severe. To ensure that you comply with the law you should take the following steps:

1. Ask manufacturers or contractors if they are registered and request a registration certificate.
2. Make a copy of the certificate and keep it at your place of business; if the certificate is out of date or, for any reason, does not appear to be accurate or complete, contact our office listed below.
3. If the manufacturers or contractors claim to be registered but are unable to produce a copy of the certificate, ask them to complete and sign the attached verification form and immediately contact our office for verification.

Your adherence to the procedures outlined above should protect you against any significant disruption of your work as a result of the apparel industry registration law. At the same time you will be fulfilling the objectives of the law to eliminate unlawful sweatshop conditions and ensure employers' compliance with laws governing minimum wage and hours of work, child labor, industrial homework, unemployment insurance and workers' compensation as well as health and fire codes.

Your cooperation is essential if these goals are to be accomplished. Thank you.

Very truly yours,

## I. NATURE OF COMPANY

### A. Background of Company

#### COMPANY QUESTIONS

1. For how long has the company been doing business under its present name?

2. Has the company or any of its owners done similar types of business under any other names? If so, give names and dates of operation of the other businesses?

3. Who owns the company?

4. Who are officers of the company?

5. Who manages the day-to-day operations of the company?

6. What is the training and background of the owners, officers, and managers of the company?

7. Who, in the company, is responsible for ensuring compliance with federal, state, and local laws, e.g., health and safety, ERISA, EEO)? Has that person ever attended any sessions, workshops, conferences, etc. on compliance with local laws? Has that person, or any other responsible person in the company, met with counsel concerning compliance with local laws? Who is your attorney? Has the company ever received any publications or training regarding compliance with local laws? If so, describe the publications or training.

8. Have the owners, officers, or managers of the company ever worked in any other company which performed similar type work or which performed public work contracts (or sub-contracts) as a part of its business? If so, give general description of those companies and who was involved

9. For what period of time has the company performed public work contracts (or sub-contracts)?

### B. Size of Business

#### COMPANY OR INVESTIGATOR QUESTION

1.a. What is the dollar amount of the public work contract (or sub-contract) involved in this proceeding?

#### COMPANY QUESTIONS

b. What were the dollar amounts of the last five public work contracts (or sub-contracts) the company performed?

c. What percentage of the company's total dollar volume of business in the past year was attributable to public work contracts (or sub-contracts)?

d. What percentage of the company's total dollar volume of business in the past five years was attributable to public work contracts (or sub-contracts)?

2.a. How many public work contracts (or sub-contracts) has the company performed in the past year, in the last five years, and since it began doing business?

b. What proportion of the company's business over those time periods has public work comprised?

C. Employment Force

COMPANY OR INVESTIGATOR QUESTIONS

1. How many workers did company employ on the public work project involved in this proceeding?

2. Has the company employed apprentices in connection with any public work contracts or sub-contracts? If so, were each of the apprentices registered with the N.Y. Department of Labor?

3. With respect to the project involved in this proceeding, how many of apprentices were employed? How many were women? How many were minority workers? What were their job classifications?

II. KNOWLEDGE OF THE LAW

A. Organizational Ties

COMPANY QUESTIONS

1. Does company belong to any trade associations or industry groups, such as Associated General Contractors or General Building Contractors? If so, which ones and for what period of time?

2. Are you aware of any lawsuits concerning the state prevailing wage law in which a trade association or an industry group in which you are a member is a party? If so, do you know the issues involved in the lawsuits?

B. The Project Involved In The Proceeding

COMPANY OR INVESTIGATOR QUESTIONS

✓ 1.a. If prime contractor, did the company have a copy of the bid specifications prior to submitting its bid?

b. Did the prime contractor have copy of wage schedule prior to submitting its bid? If not, when was the wage schedule received? If not, upon what information did the company base its estimate of labor costs for purposes of bidding on the contract?

c. Did the company sign a contract? If so, what does the contract provide as to wages? Does the contract contain a copy of the wage schedule?

2.a. If sub-contractor, what was the company told by the prime contractor about the nature of the contract?

b. Was the sub-contractor given a copy of the bid specifications by the prime contractor? If so, when?

c. What, if anything, does the sub-contractor's contract say about compliance with the bid specifications and/or the wage schedule and/or Labor Law §220?

d. Did the sub-contractor receive a copy of the wage schedule? If so, when? Was the wage schedule posted at the worksite?

e. Did the sub-contractor sign a contract with the prime contractor? What does the contract provide regarding wages?

3. What effort, if any, did the company make to determine if the project was public work and subject to the state prevailing wage law?

4. What effort, if any, did the company make to determine the requirements of the state prevailing wage law vis-a-vis the project involved in this proceeding?

5. When was company first aware of the Department of Labor investigation? How did company become aware of it? Describe in general the contacts company had with the Department during the investigation.

#### INVESTIGATOR QUESTIONS

6. Did the company cooperate with the investigation? If not, describe in which ways it failed to cooperate?

7. Did the company provide payroll records and other information when requested? Was the investigator required to reiterate requests for information before it was provided? If so, describe the circumstances.

8. Did the company receive a copy of the Department's Notice of Labor Law Violation? If so, when?

## COMPANY QUESTIONS

9. Do you know what are the requirements of the prevailing wage law? Do you know that public work contractors are required by the law to pay the prevailing wages and supplements to their workers? Do you know that public work contractors are required by the law to maintain payroll records?

10. Are you familiar or aware of any other laws governing the company's operation, such as laws requiring that workers be covered for unemployment insurance, worker's compensation insurance, and laws requiring the payment of minimum wage and the maintenance of a safe and healthful workplace, and prohibiting employment discrimination?

### C. History of Violations

#### COMPANY OR INVESTIGATOR QUESTIONS

1. Has the company, its owners, officers, or managers, or any subsidiary or affiliated company ever been involved in any other proceeding or investigation regarding any state or federal prevailing wage law? If so, describe them.

2. Has the company, its owners, officers, or managers, or any subsidiary or affiliated company, ever been found to have violated any state or federal prevailing wage law? If so, describe the violations.