

NEW YORK STATE

DEPARTMENT OF LABOR

INTER-OFFICE MEMORANDUM

Date: February 7, 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) have 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. Please contact me if you have questions.

Charles Horwitz

Charles Horwitz
Senior Attorney

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Att.