



## **Rep. Schrader’s Bill Seeks to Protect Agricultural Employers who Violate Minimum Wage and Child Labor Protections**

**On March 21, 2013, Rep. Schrader (D-OR) introduced HR 1387.** The bill would amend the Fair Labor Standards Act (FLSA) to exclude perishable agricultural products from the so-called “hot goods” provision, a central provision of FLSA. Rep. Schrader’s bill would eliminate a powerful remedy against illegal practices that harm workers suffering wage theft and labor violations. In doing so, Rep. Schrader seeks to protect bad apple employers who violate basic minimum wage and child labor requirements at the expense of farmworkers doing their jobs.

**Under the Fair Labor Standards Act’s hot goods provision, goods produced in violation of FLSA’s minimum wage, overtime and child labor provisions are considered “hot goods” because they are tainted by the labor violations and pollute the channels of interstate commerce.**<sup>1</sup> The FLSA makes it illegal for anyone to transport, ship, deliver, or sell in interstate commerce these “hot goods.”<sup>2</sup> Section 17 of the FLSA authorizes DOL to seek a court order forbidding anyone from placing tainted goods into the stream of interstate commerce (a “hot goods order”). Hot goods orders are a powerful remedy against illegal practices that harm law-abiding employers, consumers and of course the workers who have suffered these violations. Congress determined that the FLSA protections are necessary to protect American workers’ health, efficiency, and general well-being.<sup>3</sup> The hot goods provisions are not simply a remedy, but a central purpose of the statute itself.<sup>4</sup>

**Enforcement of FLSA’s minimum wage and child labor protections is critically important to farmworkers who suffer rampant labor law violations yet are excluded from several major labor laws and FLSA’s overtime provisions because of their occupation.** The DOL finds that about half of the agricultural employers they investigate have violated at least some part of the FLSA or the Migrant and Seasonal Agricultural Worker Protection Act.<sup>5</sup> In order for the DOL to effectively combat the agricultural industry’s systemic labor violations, the agency must effectively enforce the hot goods provisions. As Congress observed in enacting the FLSA, these widespread violations harm not only workers, but also law-abiding employers, who face

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<sup>1</sup> The Fair Labor Standards Act (“FLSA”) is the federal law that establishes the federal minimum wage, requires overtime pay for most employees who work over 40 hours in a week, and bars many forms of child labor. 29 U.S.C. §§ 201–219.

<sup>2</sup> Common carriers are exempt from the hot goods provisions. There is also a good faith exception for purchasers who rely in good faith on written assurances from the producer that no violation has occurred and have no notice of any violations. 29 USC § 215(a)(1); 29 USC § 212(a).

<sup>3</sup> 29 U.S.C. § 202(a).

<sup>4</sup> S.Rept. No. 884, 75th Cong. 1st Sess.

<sup>5</sup> *Perez v. Pan-American Berry Growers, LLC*, No. 6:12-cv-01474-HO (D. Or.), Declaration of Janice E. Hendrix, Assistant Administrator for Planning, Performance, Evaluation, and Communications, Wage & Hour Div., U.S. Department of Labor (ECF No. 21).

unfair competition due to unscrupulous employers gaining an advantage in the marketplace at their workers' expense.

The hot goods provision is especially important for agriculture given that the majority of farmworkers are undocumented and often struggle to survive on incomes hovering around the poverty line. The nature of agricultural work also means that much of the work is seasonal and many farmworkers move from one workplace to another. These socio-economic factors make farmworkers especially vulnerable to workplace abuse and very dependent on their weekly wages. The “hot goods” injunction is a key protection as it represents one of the few tools available to ensure that farmworkers receive the wages they are owed in a *timely* manner while the workers are still in the area.

The agricultural industry in Rep. Schrader's home state of Oregon is a poignant example of why the DOL must be able to use effective enforcement tools such as the “hot goods” injunction to protect workers. In 2009, Pinosos y Campesinos Unidos del Noroeste (PCUN) conducted a survey of labor violations on Oregon berry farms. In this survey, 90% of workers reported that their piece rate earnings were consistently below Oregon's minimum wage and 80% of workers believed that their employer did not record their hours as required by law.<sup>6</sup>

**Agricultural goods are not unique and should not receive special treatment.** The nature of a product should not provide an excuse to violate the law. In fact, in the modern global economy, there is little distinction between the perishability of agriculture and many other consumer goods as virtually all goods have a “perishable” element and as technology has developed many mechanisms to control perishability of agricultural products. Take, for instance, the garment industry. “Fast fashion” retailers like Forever 21, H&M, and Zara require a quick product turnaround in order to be successful. Zara, for example, thrives on its ability to “take a design from drawing board to store shelf in just two weeks,” allowing them to “introduce new items every week.”<sup>7</sup> If a garment manufacturer cannot meet the strict turnaround time that purveyors of “cheap chic” require, its goods will lose value over a matter of days.

Moreover, with today's technology, many agricultural products are shelf-stable as they can be maintained using storage methods such as “controlled atmospheric storage” (“CA”). According to the Washington State Apple Advertising Commission, CA storage can keep apples fresh for long periods—as long as a year or more.<sup>8</sup> Research by a consortium of Pacific Northwest universities and the U.S. Department of Agriculture (“USDA”) indicates that blueberries, while not as hardy as apples, can last for a month-and-a-half in CA storage while maintaining their quality.<sup>9</sup>

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<sup>6</sup> Oregon Wage Theft Fact Sheet, <http://www.ocpp.org/2011/Wage%20theft%20fact%20sheet%203.17.11.pdf>. Full survey available upon request.

<sup>7</sup> Rachel Tiplady, *Zara: Taking the Lead in Fast Fashion*, Bloomberg Businessweek: Global Economics, Apr. 4, 2006, available at <http://www.businessweek.com/stories/2006-04-04/zara-taking-the-lead-in-fast-fashionbusinessweek-business-news-stock-market-and-financial-advice>.

<sup>8</sup> Washington State Apple Advertising Commission, “Controlled Atmospheric Storage (CA),” available at [http://www.bestapples.com/facts/facts\\_controlled.aspx](http://www.bestapples.com/facts/facts_controlled.aspx) (last accessed April 3, 2014).

<sup>9</sup> Northwest Berry & Grape Information Network, *Post-Harvest Handling of Blueberries*, December 14, 2006. Available at <http://berrygrape.org/post-harvest-handling-of-blueberries/> (last accessed April 3, 2014).

**Employers of agricultural products like all other employers have adequate due process rights when DOL uses its “hot goods” authority.** The Department of Labor cannot seize or restrain shipment of goods without a federal court order. For a court to issue a temporary restraining order or preliminary injunction, the DOL must show it is likely to win the underlying case. In addition, the court will weigh the interests of the DOL and the workers it seeks to protect, against the interests of the employer when deciding to issue the injunction.

Absent a court order, the employer is *not* required to stop the shipment or sale of hot goods. However, moving tainted goods through interstate commerce is, in itself, a violation of the FLSA. Similarly, the employer’s downstream purchasers violate the FLSA if they continue to ship or sell tainted goods once they know that they are “hot.”

In many cases, “hot goods” violations are settled out of court. This is beneficial to all parties as employers may save on litigation costs and obtain certainty, DOL saves valuable resources that can be used in other investigations while obtaining a speedy resolution of the case, and workers obtain prompt redress of wage and hour violations. *If an employer is not interested in settling a case or does not believe its goods are “hot,” the employer may of course continue to ship and sell its goods and will have the opportunity to make its case in court should the DOL seek injunctive relief.*

**The hot goods remedy has been used by multiple Administrations to address FLSA violations in agriculture. DOL used the hot goods remedy in the following examples:**

- in 1998, DOL sought redress of the FLSA’s child labor protections in the production of lettuce, onions, tomatoes, cucumber and garlic in Texas;
- in 2001, DOL obtained a court order from a judge against a Washington cherry and apple grower for violations of the minimum wage for 600 workers; and
- in 2002, DOL found wage violations at a California blueberry farm and the grower voluntarily agreed to pay the back wages so that the DOL would not seek to prevent shipment of the blueberries and other crops picked by the workers.

**There is a simple solution to Rep. Schrader’s concern about perishability in agriculture: growers should comply with the FLSA.** Instead of providing cover for law-breakers, Schrader should be sending the message to growers that they must comply with the law and ensure that they are paying their workers the minimum wage and are not illegally employing children. Growers must understand that they cannot evade their responsibilities by subcontracting their labor force to farm labor contractors. Hot goods injunctions prohibit the sale and shipment of tainted goods *independent of who produces them.*

**In our modern day society, there is no longer any excuse to discriminate against certain groups of workers or individuals. Congress must end the historic discrimination against farmworkers; not expand it.**