



The Fair Labor Standards Act's Hot Goods Orders: An Important Protection for Farmworkers

What is the Fair Labor Standards Act's hot goods provision?

Under the 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.¹ The FLSA makes it illegal for anyone to transport, ship, deliver, or sell in interstate commerce these "hot goods."²

Section 17 of the FLSA authorizes the Department of Labor (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 low-paid workers who rarely can afford to wait to be paid properly.

The hot goods provisions are not simply a remedy, but a central purpose of the statute itself. The Senate committee report on the FLSA stated that the law provides "a start ... to protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours injurious to health... by closing the channels of interstate commerce to goods produced under conditions which do not meet the rudimentary standards of a civilized democracy."³

Why is the hot goods provision important?

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. Congress determined that the FLSA protections are necessary to protect American workers' health, efficiency, and general well-being.⁴ Congress also recognized that employers who violate the FLSA gain an unfair competitive advantage, because their labor costs will be lower than those of employers who pay the wages required by law.⁵ The "hot goods" provision ensures equity among employers by preventing unfair competition for law-breaking employers.

¹ 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.

² 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).

³ S.Rept. No. 884, 75th Cong. 1st Sess.

⁴ 29 U.S.C. § 202(a).

⁵ *Id.*

DOL's enforcement of the hot goods provision provides a powerful incentive for employers to comply with the law.

Does the “hot goods” provision apply to agriculture?

Yes, it applies to agriculture. Where Congress has discriminated against farmworkers, it has done so explicitly, as the numerous of exclusions of farmworkers from labor laws demonstrates. This is not the case with the “hot goods” provision. Congress did not remove agriculture from its reach, nor did it exempt any category of perishable goods from the consequences of a “hot goods” violation. Congress must end the historic discrimination against farmworkers; not expand it.

Why is the “hot goods” provision important to use in agriculture?

In order for the DOL to effectively combat the agricultural industry's rampant and systemic labor violations, the agency must effectively enforce the hot goods provisions. 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.⁶ As Congress observed in enacting the FLSA, these widespread violations harm not only farmworkers, who depend on these minimal wages for their daily subsistence, but also law-abiding employers, who face unfair competition due to unscrupulous growers 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 Oregon is a poignant example of why the DOL must be able to use strong enforcement methods like the “hot goods” injunction to protect workers. In 2009, Pineros 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 wage⁷, and 80% of workers believed that their employer did not record their hours as required by law.

As an enforcement mechanism, the “hot goods” injunction brings an employer's interstate business to a halt until they “get right with the law.” It is much stronger than merely assessing a

⁶ *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).

⁷ Oregon Wage Theft Fact Sheet, <http://www.ocpp.org/2011/Wage%20theft%20fact%20sheet%203.17.11.pdf>. Full survey available upon request.

civil penalty. In an industry with such extensive violations, an emphatic response from the DOL is necessary to remind employers of their responsibilities under the FLSA and disincentivize future violations.

Are agricultural goods particularly unique?

No. While some agricultural goods may be perishable, that is no reason to treat them differently than other kinds of products subject to the FLSA's hot goods provision. Producers of perishable products, like all producers of goods, have a simple solution to avoid producing "hot goods": compliance with the law by paying the minimum wage owed and following child labor protections. The nature of a product does not provide an excuse to violate the law.

In fact, in the modern global economy, virtually all consumer goods have a "perishable" element. 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."⁸ 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.⁹ 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.¹⁰

What kind of due process rights are available to employers when DOL seeks to invoke the "hot goods" provision?

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."

⁸ 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>.

⁹ Washington State Apple Advertising Commission, "Controlled Atmospheric Storage (CA)," available at http://www.bestapples.com/facts/facts_controlled.aspx (last accessed April 3, 2014).

¹⁰ 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).

In many cases, “hot goods” violations are settled out of court. This is beneficial to all parties as employers may save on litigations 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 makes its case in court should the DOL seek injunctive relief.*

Is the Obama Administration the first administration to use the “hot goods” provision in agriculture?

No, it is not. Various administrations have used “hot goods” injunctions to prohibit the shipment or sale of tainted agricultural commodities and other products. Though a single FLSA violation can make goods “hot”, the Department of Labor has typically used the “hot goods” injunctions in cases that involve more systemic abuse. In 1998, the DOL used the hot goods orders in lettuce, onions, tomatoes, cucumber and garlic produced in Texas in violation of the FLSA’s child labor protections. In the same year, a Louisiana strawberry grower agreed to refrain from shipping strawberries and entered into a consent decree promising to comply with FLSA’s child labor and minimum wage requirements. 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. 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. In 2003, DOL sought to detain an onion shipment in New Mexico until the grower paid fines for child labor violations and came into compliance with the law. This is just a sampling of multiple instances in which hot goods orders have been used by the DOL.

How can growers protect themselves from receiving a hot goods order?

The answer is simple: comply with the FLSA. Growers can ensure that they are paying their workers the minimum wage and are not illegally employing children. Additionally, they can keep accurate payroll records as required under the FLSA as these records are necessary to demonstrate compliance with the law. Moreover, growers need to be aware that they cannot evade a “hot goods” injunction by subcontracting their labor force to FLCs. These injunctions prohibit the sale and shipment of tainted goods *independent of who produces them*. Additionally, the FLSA and the AWPAs have broad joint employer provisions and in many instances courts find growers jointly liable for the acts of their FLCs. Thus, growers relying on farm labor contractors for their labor should ensure the workers responsible for cultivating and harvesting their crops are being treated in accordance with the law.