WAGE-HOUR COVERAGE OF THE FAIR LABOR STANDARDS ACT

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I. Introductory

A. General Considerations

Prior to the Fair Labor Standards Act of 1938¹ state attempts to remedy sub-standard labor situations had proved largely ineffective. In the sporadic state action ownership of goods often figured as the pivotal determinant. The FLSA protects workers regardless of ownership of goods. Process and movement constitute the crucial test. The Act appears as an extension of the doctrine and power of Congressional regulation of interstate commerce set forth in the Wagner Act cases.²

The geographic avenue provides an initial approach to coverage of the FLSA. The realm of applicability consists of continental United States, and all territories and possessions.³ Special exceptions are made to rates of pay for workers in Porto Rico and the Virgin Islands.⁴ American workers employed by an American firm under contracts for the Federal Government at the U. S. Naval Base in Bermuda are included, though Bermudans hired by their compatriots at the same base are not included.⁵

Workers within the wage and hour coverage are basically indi-

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2. Cooper, "Extra time for Overtime" Now Law, 37 Mich. L. Rev. 28 (1938). As a practicing attorney in Detroit, Mr. Cooper early predicted many legal and practical problems in operating the Act.
3. § 3 (b), (c), and (j). "All territories and possessions" includes specifically: Alaska, Hawaii, Porto Rico, Canal Zone, Guam, Guano Islands, Samoa, Virgin Islands. All significant terms used in §§ 1-19 of the Act are defined in § 3 thereof.
4. U. S. Dep't of Labor, Wage and Hour and Public Contracts Division, Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the FLSA, Pt. 776, Subpart A-General 7, n. 16 (1950), hereafter referred to as Interp. Bull., No. 776. This Bulletin (2, 3) reiterates that all administrative interpretations issued prior to July 11, 1947, had been rescinded and withdrawn. Furthermore, all interpretations issued on or after July 11, 1947, inconsistent with FLSA amendments of 1949 were declared ineffective after January 24, 1950.
5. Vermilya-Brown Co. v. Connell, 335 U. S. 377 (1948) involving Bermuda bases leased by the U. S. from Great Britain. This case established the principle that within the meaning of FLSA, these bases and such areas though subject to the sovereignty of another nation became in effect by the operation of the agreement "possessions of the United States." See also United States v. Spelar, 338 U. S. 217 (1949).
cated by the 1938 Act and by Amendments added in 1940, 1946, 1947, and 1949. General coverage includes every employee either "engaged in commerce" or "in the production of goods for commerce." Administrative regulations, and administrative and judicial interpretations of "commerce," "goods," "production," and even of "for" have begun to clarify who is entitled to benefits prescribed by the wages and hours provisions of the statute. A few useful "guides" issued by the Wage and Hours Administrator consolidate general considerations on worker coverage into rules and regulations which the Supreme Court views as providing "a practical guide to employers and employees" as to how the Administrator will apply the law until and unless he is reversed or declared incorrect by his own subsequent rulings or by court decisions.

A decade ago the Supreme Court acknowledged that difficulty in applying the statutory provisions to fact situations arises partly from our dual system of government. An early analyst supports four main conclusions as to statutory coverage: (1) General lines of coverage are clear; (2) coverage reaches production activities before interstate traffic begins; (3) the statute reaches production employees whose product is not directly or immediately put into interstate commerce; (4) not only the employees whose work engages them directly in the physical processes of commerce or production therefor, but also those whose activities are in employment related thereto in some necessary manner.

The term employee as defined in § 3(e) of the Act, does not include a learner or a trainee.

B. Guiding Principles in Determining What Employees and What Employments are Covered by the Act

Several factors guide the Administrator in determining what workers and what employments are covered by the Wage and Hour

6. § 6 (treats minimum wages); § 7 (deals with maximum hours).
14. Davisson, Coverage of the FLSA, 41 Mich. L. Rev. 1060-1088 (1943). His conclusions are taken into account in section 5 of this paper.
provisions of FSLA. Congressional policy as declared in § 2 of the Act, appears as the first of these interpretive guides. Numerous court cases recognize Congressional policy as the basic general "interpretative guide" for the Administrator. The essence of this policy is the exercise of Congressional power over commerce to remedy "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and the general well-being of workers" engaged in commerce or in the production of goods for commerce. Malcolm M. Davisson has succinctly summed up the declared policy: "... to extend Federal control throughout the farthest reaches of the channels of interstate commerce."

A second interpretive element next after declared Congressional policy is that coverage is based on the individual worker and not on blanket applicability to all workers in a particular plant or to all workers in an industry as a whole. An employer must meet the statutory requirements for each employee covered. Nor can he escape his obligations under the Act on the claim that he himself is not engaged in commerce or the production of goods for commerce. If any employee is covered, his employer is considered as being so engaged.

The next factor related to the preceding one: Employee status rather than that of the employer is the basis for determining cover-

16. Kirschbaum v. Walling, 316 U. S. 517 (1942); Walling v. Jacksonville Paper Co., 317 U. S. 564 (1943); 10 E. 40th St. Bldg. v. Callus, 325 U. S. 578 (1945); A. H. Phillips, Inc. v. Walling, 324 U. S. 490 (1945); Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52 (8th Cir. 1940); Bowie v. Gonzales, 117 F. 2d 11 (1st Cir. 1941); Armstrong v. Walling, 161 F. 2d 515 (1st Cir. 1947). These cases reveal that Congress did not choose to make FLSA coextensive in all respects with the limits of its power over Commerce, nor to apply it to all activities affecting Commerce. See also Interp. Bull., No. 776, 3. In the Jacksonville Paper Co. case, supra, and in Higgins v. Carr Bros. Co., 317 U. S. 572 (1943) the interpretation of the phrase "in commerce" was developed.


18. Davisson, Coverage of FLSA—Effect given to Administrative Decisions Under, 43 Mich. L. Rev. 867-900 (1945). This sequential article, second in a series, considers the most important FLSA cases decided since the writing of his earlier article on FLSA, see note 14 supra. See note 16 supra for a modification of Davisson's sweeping interpretation. See also Overstreet v. North Shore Corp., 318 U. S. 125 (1943).

19. U. S. Dep't Labor, Wage and Hour and Public Contracts Division, Federal Wage-Hour Law Digest 2 (issued without date).

The main point here is the nature of the worker’s tasks. In determining the nature of any worker’s occupational tasks, the employer’s business may serve only as a secondary factor, but not as a primary one. While the Administrator followed this principle from the beginning, the courts apparently shifted to employee basis only in the Overstreet and subsequent cases. In the Jacksonville and Higgins cases, the courts relied on the nature of the employer’s business. The legislators themselves became explicit on the matter of proper basis in 1949.

The general rule of broad interpretation of Congressional policy for coverage under the Act yields to strict interpretation of individual employee status involved in the phrase “engaged in commerce.” This specific restriction holds even in face of the changed legislative intention, as indicated in the FLSA Amendments of 1949, to expand the category of workers under “Commerce” while narrowing the category only of those covered under the correlative term production (“produced”) in the original statute.

The situation often arises that the same employee is actually engaged in both covered and non-covered tasks. FLSA makes no stipulation as to percentage, volume, or amount of involvement, whether of employee or employer, in either commerce or the production of goods for commerce. Contrariwise, the “any-and-every” principle prevails.

Although workers performing tasks connected with merely isolated, sporadic, or occasional shipments in commerce of insubstantial amounts of goods, are not covered, the law is now settled that

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26. In this respect of broad applicability, FLSA resembles the Wagner Collective Bargaining Act. For the most part the language of FLSA is more restrictive than the National Labor Relations Act.

27. §§ 6 and 7 of FLSA specify “each” and “any” employee engaged in covered activities. Similarly § 15(a) (1) prohibits the introduction into the channels of interstate or foreign commerce of “any” goods in the production of which “any” employee was occupied in violation of §§ 6 and 7. See also Interp. Bull., No. 776, 5.
every employee whose engagement in tasks in commerce or the
production of goods for commerce, even though small in amount
yet is regular and recurring, does come within FLSA coverage.28

A further interpretive factor is the standard workweek.29 Chief
importance here is that "any" part of any particular workweek de-
vo ted to covered tasks governs the decision for that workweek. The
proportion of a worker’s time in covered or uncovered occupational
tasks is immaterial. If in regular and recurrent tasks he spends any
time in a workweek in covered work, he IS considered as having
been so employed for the entire workweek.30

The Administrator has prescribed at least two specific tests to
clarify covered tasks and covered workers. The first of these tests is:
was there any handling of, or work of any kind on, “goods” or “ma-
terials” shipped in commerce or used in production of goods for
commerce? The second test: did the employee engage in any work
“closely related” to and "directly essential” to production of goods
for commerce?31 Application of these tests necessitates access to
the records statutorily required of the employer to enable him to
segregate and demonstrate whether (a) each worker was engaged
in the workweek in any activities of interstate or foreign commerce,
and (b) whether any part of the week's employment was performed
in the production of goods for commerce.

Lastly, the “regular-rate-of-pay” factor must be considered as
an essential element in the specific Wage and Hour provisions
essential in coverage. The “hourly” wage as such is not a determi-
nant in fixing on the regular rate of pay. Neither is the method of

28. United States v. Darby, 312 U. S. 100 (1941); Mabee v. White
Plains Pub. Co., 327 U. S. 178 (1946); Schmidt v. People's Tel. Union of
Maryville, Mo., 138 F. 2d 13 (8th Cir. 1943); New Mex. Pub. Serv. v. Engel,
145 F. 2d 636 (10th Cir. 1944); Sun Pub. Co. v. Walling, 140 F. 2d 445 (6th
Cir.), cert. denied, 322 U. S. 728 (1944); Davis v. Goodman Lmbr. Co.,
133 F. 2d 52 (4th Cir. 1943). See also Interp. Bull., No. 776, 5.

29. For a definition of the workweek see “Overtime Compensation,”
Div., Jan. 1950). The same reference presents a thorough practical treatment
of the surprisingly complicated application of overtime compensation.

denied, 332 U. S. 774 (1947); Roberg v. Henry Phipps Estate, 156 F. 2d 958
(2d Cir. 1946); Walling v. Black Diamond Coal Mining Co., 59 F. Supp. 348
(W.D. Ky. 1943); Fleming v. Knox, 42 F. Supp. 948 (S.D. Ga. 1941);
Walling v. Fox-Pelletier Detective Agency, 4 W&H Cases 452, 8 CCH Lab.
Cases 62219 (1944).

31. The vital significance of all these terms will be shown in the main
body of this article. See Guess v. Montague, 140 F. 2d 500 (4th Cir. 1943). See
also Interp. Bull., No. 776, 6. The experience of the W&H Div. on the whole
indicates that much so-called "segregation" by employers does not meet the
tests stated above. Many so segregated as non-covered, are found on closer
analysis to be covered.
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calculating compensation. Compensation may be actually made on basis of piecework, weekly, monthly or annual salary, commission, or other. The main problem here is in translating method of calculation other than the hourly rate of pay into the statutory minimum hourly rate. This must be done even though payment by the hour is not itself a determinant of coverage. So long as the work concerned is performed within the statutorily declared geographical limits, the place of work does not serve as a guiding factor in determining coverage.

C. Workers Covered—Detailed Considerations

A thorough understanding and determination of what workers are covered depends on the application of statutory provisions as to "commerce" and "production of goods for commerce." Examination in detail must be given to eight particular aspects of these provisions under these two chief classifications, four under Commerce and four under Production.

Commerce

(1) Workers employed in the Actual Movement of Commerce.
(2) Workers employed in Occupations Related to Instrumentalities of Commerce.
(3) Workers Crossing State Lines.
(4) Commerce Crossing International Boundaries.

Production

(5) Activities constituting Actual Production.
(6) Employment in a "Closely Related" Process or Occupation "Directly Essential To" Production.
(7) Employees of Independent Employers Meeting Needs of Producers for Commerce.
(8) "Goods" and "For Commerce" defined and applied in the field of Production.

33. The Administrator's Regulations on this statutory requirement are published in U. S. Dep't of Labor W&H Division, Records Pt. 516. For methods of translating other forms of compensation into the equivalent hourly rate for purposes of complying with §§ 6 and 7 of the Act, consult the Division's Interp. Bull., Board, Lodging, and Other Facilities, Pt. 777.
34. Walling v. American Needlecrafts, 139 F. 2d 60 (6th Cir. 1943); Walling v. Twyffort, Inc., 158 F. 2d 944 (2d Cir. 1947); McComb v. Home-workers' Handicraft Coop., 176 F. 2d 633 (4th Cir. 1949).
35. Coverage of employees under Commerce is treated in Pt. II hereof, of employees in production for commerce under Pt. III. In actual applications of the statutes the two elements of (1) Goods and (2) the bearing of the preposition FOR in production are given practically equal significance with the two main classifications of Commerce and Production.
36. For a list of such instrumentalities, see infra text to note 53.
II. WORKERS COVERED

A. Workers Engaged in Commerce

1. Definition of Commerce

The term Commerce is defined in § 3(b) (as amended by § 3(a) of FLSA Amendments of 1949), to indicate the occupational activities covered by §§ 6 and 7 of the Act, and states:

"'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."\(^38\)

"State" refers not only to any of the 48 States but also to the District of Columbia and to any territory or possession of the United States.

"Commerce" is defined broadly and includes but does not limit application to "commercial" transactions involved in Trade, to Transportation, or to Traffic in "goods." Movement of persons as well as of things is included. Transmission or communication across state lines may cover more or other than "goods."\(^39\) "Goods" is itself also broadly defined by the Act.\(^40\)

2. Scope of "In Commerce"

Despite its obviously broad definition, "Commerce" does not statutorily include all employees engaged in activities which merely "affect" interstate or foreign commerce, but the courts have made it clear that coverage extends to every employee engaged "in the channels of" such commerce or in activities so closely related to such commerce as to be considered part of it.\(^41\)

One practical question asked by the courts and by the Administrator in applying the clause or interpreting it in particular situations, is whether, without the particular service involved, interstate (or foreign) commerce would be impeded, impaired, or abated.\(^42\) Another is, does the service contribute materially to the consum-

\(^38\) "Any place outside thereof" is not restricted to mean to another State or Country, but ship-to-shore transactions or shipments from shore to ship for consumption at sea, are likewise included. See Interp. Bull., No. 776, 9.


\(^40\) Infra to text following note 146.

\(^41\) Specific and detailed inclusions are indicated in each of these five cases: Walling v. Jacksonville Paper Co., 317 U. S. 564 (1943); Overstreet v. North Shore Corp., 318 U. S. 125 (1943); McLeod v. Threlkeld, 319 U. S. 491 (1943); Boutell v. Walling, 327 U. S. 463 (1946); J. F. Fitzgerald Construction Co. v. Pedersen, 324 U. S. 720 (1945).

\(^42\) Republic Pictures Corp. v. Kappler, 151 F. 2d 543 (8th Cir. 1945), aff'd, 327 U. S. 757 (1946); New Mex. Pub. Serv. Co. v. Engel, 145 F. 2d 636 (10th Cir. 1944).
nation of transactions in such commerce? Thirdly, does it enable existing instrumentalities of commerce to accomplish the movement of such commerce and free it from obstacles?

3. Actual Movement of Commerce

a. Workers in Instrumentalities of Commerce

Typical (but not exclusive) of industries whose workers are covered because the industries in which they are employed constitute the instrumentalities and channels of interstate and foreign commerce are the following:

- Telephone
- Telegraph
- Radio and Television
- Transportation and Shipping

Workers in banking and insurance and newspaper publishing are likewise generally covered.

b. Employees Whose Work Is “Essential” to Commerce

Many types of business involve tasks which are an essential part of the stream of interstate or foreign commerce. Employees performing such tasks consequently are held to be engaged in commerce within the statutory coverage. Warehouses receiving or

43. Walling v. Sondock, 132 F. 2d 77 (5th Cir. 1942), cert. denied, 318 U.S. 772 (1943); Horton v. Wilson & Co., 223 N. C. 71, 25 S. E. 2d 437 (1943). The Court stated that an employee is engaged “in commerce” if his services (not too remotely but substantially and directly) aid such commerce.

44. Overstreet v. North Shore Corp., 318 U.S. 125 (1943); J. F. Fitzgerald Construction Co. v. Pedersen, 324 U.S. 720 (1945); Bennett v. V. P. Lofts, 167 F. 2d 286 (4th Cir. 1948); Walling v. McCrady Construction Co., 156 F. 2d 932 (3d Cir. 1946); Ritch v. Pudget Sound Bridge & Dredging Co., 156 F. 2d 334 (9th Cir. 1946); Walling v. Patton-Tully Transp. Co., 134 F. 2d 945 (6th Cir. 1943).

45. Schmidt v. People’s Tel. Union of Maryville, Mo., 138 F. 2d 13 (8th Cir. 1943); North Shore Corp. v. Barnett, 143 F. 2d 172 (5th Cir. 1944); Strand v. Garden Valley Tel. Co., 51 F. Supp. 898 (D. Minn. 1943).


47. Wabash Radio Corp. v. Walling, 162 F. 2d 391 (6th Cir. 1947); Wilson v. Schuman, 140 F. 2d 644 (8th Cir. 1944).


distributing goods across state lines afford an active example; their employees are covered.\footnote{Phillips v. Walling, 324 U. S. 490 (1945); Clyde v. Broderick, 144 F. 2d 348 (10th Cir. 1944).}

\textbf{c. Use of Communications Across State Lines}

Likewise covered are private employees such as department managers, heads of sections, secretaries and correspondence clerks, shipping and order clerks, whose work involves the continued use of interstate mails, telephone, telegraph, or similar communication services across state lines.\footnote{McComb v. Weller, 9 W & H Cases 53 (1949); Phillips v. Meeker Coop. Light & Power Ass’n, 63 F. Supp. 733 (D. Minn. 1945); Anderson Bros. Corp. v. Flynn, 309 Ky. 633, 218 S. W. 2d 653 (1949); Yunker v. Abbye Employment Agency, 32 N. Y. S. 2d 715 (N.Y. Munic. Ct. 1941).} Notwithstanding this broad coverage the principle of “Essentiality” does not mean that any use by an employee of the mails and other channels of communication for his employer is sufficient to establish coverage. But if an employee, as a “regular and recurrent” part of his duties, uses such instrumentalities in his normal employment in obtaining or communicating information or in sending or receiving written reports or messages, or sending or receiving orders for goods or services, or plans or other documents across state lines, he come within the scope of the Act as an employee directly engaged in the work of interstate “communication.”\footnote{Interp. Bull., No. 776, 11.}

\section*{4. Workers in Other Occupations Connected with Instrumentalities of Commerce}

\textbf{a. Maintenance and Repair Workers}

Workers performing tasks involved in the maintenance, repair, alterations, or improvement of existing instrumentalities of commerce compose a large category “engaged in Commerce.” Examples of such instrumentalities of commerce include railroads, highways and city streets, pipe lines, telephone and electric transmission lines, rivers, and other waterways over which interstate (or foreign) commerce moves; likewise

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\item terminals for same, such as railroad and bus and truck stations; steamship harbors, docks, wharves, and piers, and airports; telephone exchanges, radio and TV stations; bridges & ferries carrying interstate traffic even though they are wholly within a single state;
\item dams, dikes, revetments, and levees which facilitate such movements by air, land, or sea;
\item warehouses and other distribution depots for receipt and ship-
ment of such goods; the vehicles themselves in the several means of transportation—ships, cars, aircraft.\footnote{53}

Thus maintenance-of-way employees,\footnote{54} workers (including office staffs, guards, watchmen) engaged on contracts in maintenance, repair, reconstruction, or other improvement project on such instrumentalities of commerce, are covered; likewise employees similarly engaged in the maintenance or alteration and repair of ships\footnote{55} or trucks\footnote{56} used as instrumentalities of interstate or foreign commerce.

b. \textit{Watchmen and Guards}

Watchmen or guards of ships or vehicles regularly used in commerce,\footnote{57} or on similar duty at warehouses, railroad yards, or equipment areas\footnote{58} where goods moving in such commerce are temporarily held; porters, janitors, or persons in other maintenance capacities at transportation terminals\footnote{59}—coverage applies to all these.

Despite particular business activities in which employed, not all employees in the above two categories of maintenance and repair workers, and guards and watchmen are covered. Only those workers in these two categories who are directly connected with instrumentalities of commerce as indicated are included. Many workers are engaged in activities less directly connected with the functioning of instrumentalities of commerce or too remote from interstate or

\begin{footnotes}
\footnote{53} Interp. Bull., No. 776, 12.
\footnote{55} Walling v. Keansburg Steamboat Co., 162 F. 2d 405 (3d Cir. 1947); Slover v. Wathen, 140 F. 2d 258 (4th Cir. 1944).
\footnote{57} Slover v. Wathen, 140 F. 2d 258 (4th Cir. 1944); Cannon v. Miller, 22 Wash. 2d 227, 155 P. 2d 500 (1945); Agosto v. Rofafort, 5 W & H Cases 176, 9 CCH Lab. Cases \# 62610 (1945).
\footnote{58} Mid-Continent Pet. Corp. v. Keen, 157 F. 2d 310 (8th Cir. 1946); Englebretson v. E. J. Albrecht Co., 150 F. 2d 602 (7th Cir. 1945); Walling v. Mut. Wholesale Food & Sup. Co., 141 F. 2d 331 (8th Cir. 1944); Walling v. Sondock, 132 F. 2d 77 (5th Cir. 1942); Reliance Storage & Insip. Co. v. Hubbard, 50 F. Supp. 1012 (W.D. Va. 1943); McComb v. Russell Co., 9 W & H Cases 258, 17 CCH Lab. Cases \# 65519 (1949); Walling v. Fox-Pelletier Detective Agency, 4 W & H Cases 452, 8 CCH Lab. Cases \# 62219 (1944).
\footnote{59} Williams v. Jacksonville Term. Co., 315 U. S. 386 (1942); Hargis v. Wabash Ry. Co., 163 F. 2d 608 (7th Cir. 1947); Mornford v. Andrews, 151 F. 2d 511 (5th Cir. 1945); Walling v. Atlantic Greyhound Corp., 61 F. Supp. 992 (E.D. S.C. 1945); Rouch v. Continental Oil Co., 55 F. Supp. 315 (D. Kan. 1944). The \textit{Williams} case also established the fact that tips are included as wages within the meaning of the Act.}
foreign commerce to establish coverage. For instance, a cook preparing meals for workmen repairing tracks over which interstate trains operate, is not covered. Nor is a porter caring for washrooms and lockers in a garage which is not itself an instrumentality of commerce, although used for servicing trucks both in intrastate and interstate commerce.

c. Other Covered Categories in Activities Incidental to Instrumentalities of Commerce

Coverage extends to employees in other kinds of work which contribute directly to the movement of commerce by providing goods, services, or facilities to be used or consumed by instrumentalities of commerce in the performance of their functions in transportation, transmission, communication, or other form of movement.

Examples of covered employments are those in which workers provide such things as electric energy, steam, fuel, or water needed for the movement of commerce to such carriers as railroads, airports, radio stations, and telephone exchanges. Work of this nature is considered "so related to the actual movement of commerce as to be considered as an essential and indispensable [italics supplied] part thereof, and without which it would be impeded or impaired."

d. Employees Traveling Across State Lines

Such employees as salesmen, traveling buyers, service people, construction crews, collectors, circusmen, road showmen, orchestras, and similar entertainment groups, raise the question whether the Act applies to employees whose work requires them to cross state lines, as distinct from merely traveling to and from work and lodging.

No precise formula for all such situations is feasible. Questions

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62. Skidmore v. John J. Casale, Inc., 160 F. 2d 527 (2d Cir.), cert. denied, 331 U. S. 812 (1947) (of total use of trucks serviced, from 10 to 25 per cent was in interstate commerce).
65. Lewis v. Florida Power & Light Co., 154 F. 2d 751 (5th Cir. 1946); Walling v. Connecticut Co., 154 F. 2d 552 (2d Cir. 1946). Such employees, moreover, would also be covered as engaged in the "production of goods for commerce," hence doubly covered.
of degree are inevitably a factor. As a general rule, however, employees who regularly cross state lines in the performance of their duties, are covered as being engaged in commerce. Contrariwise, an employee who in only isolated or sporadic instances so crosses state lines in connection with his work which is otherwise intrastate is not covered. The facts in each individual case must govern.

**e. Commerce Crossing International Boundaries**

An amendment to § 3(b) of the Act effective January 25, 1950, places employees of importers on a similar plane with employees of exporters. Earlier the employees of importers were in a less favorable position; these employees whose work related solely to the flow of commerce into a State from places outside it which were not "States" as defined in the Act, were not covered, although employees engaged in work connected with the flow of commerce out of the State to such places were covered.

**B. Workers Engaged in Production of Goods for Commerce Covered by FLSA**

1. **Definition of "Engaged" and "Production"**

Of the three interrelated essential elements of coverage in the phrase *production of goods for commerce*, each of which ((1) production; (2) goods; (3) for commerce), is comprehensively defined by Congress, "production" has proved much more difficult in interpretation and application than either goods or for commerce. The pertinent section in the Act explains:

"'Production' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." [Italics supplied.]

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71. § 3(b), containing the definition of commerce, originally referred to commerce from any State to "any place outside thereof." The amendment substituted the word "between" for "from," and substituted "and" for "to" so that the clause now reads: "between any State and any place outside thereof."
As indicated in the italicized portions of the section just quoted, two other major elements are introduced to add to the complexity of interpreting coverage—"closely related" and "directly essential." Neither of these two new elements nor any of the three basic ones—"production," "goods," or "for commerce"—will be considered if the employee would already be covered because engaged in commerce as treated in the first section of this paper. Examples of such double coverage include employees of common carriers who handle or work on goods eventually entering into interstate transit; personnel of a telegraph company who prepare messages for interstate transmission; television cameramen who photograph sports or news events for multistate TV production.73

Section 15(a)(1) bars from interstate commerce any goods in the production of which any worker was employed in violation of the minimum-wage or overtime-pay provisions, and § 15(b) provides that in determining whether a worker was so occupied, employment in any place where goods shipped or sold in commerce were produced within 90 days prior to removal of goods, shall be prima facie evidence of such employment.74

2. General Scope of "Production" Coverage

Thus it is clear that typical (but not exclusive) production coverage includes the large class of workers employed in mines, oilfields, quarries, factories, processing plants, or distribution centers where goods are in any way produced or readied for commerce. Production employees covered are not limited to those occupied in actual physical work on processing or handling the product itself, nor even to such workers in the factories, mines, warehouses, where goods intended for commerce are produced or stored in transit. It suffices for coverage if the employee's tasks bear the required relationship to such production, regardless of (1) whether his work takes him into actual contact with such goods, or (2) into the plants where they are produced or handled, or (3) his employer may be other than the producer of goods for commerce.75

Production coverage embraces many workers who serve production enterprises in capacities which do not involve working

directly on production goods but which are "closely related" and "directly essential" to successful occupations in producing goods for commerce. 76

As a general rule then, if a worker is gainfully employed in a place where goods are produced, processed, or otherwise handled which are sold or shipped in interstate or foreign commerce, he is considered as covered, subject of course to analysis in each particular case of the close relationship and direct essentiality of his activity to production for commerce. 77

3. Production Employments Covered

a. Activities Constituting Production

Workers employed in producing, manufacturing, mining, handling, or in any other manner "working on" GOODS, including parts and ingredients thereof, for interstate or foreign commerce, are considered for the purposes of the Act as actually engaged in the production of such goods, and are covered. 78

Not only is the work involved in making the products of mining, manufacturing, or processing operations included under coverage, but also activities embraced in "handling, transporting, or in any other manner working on" the goods. This comprehensive coverage applies regardless of whether the goods are to be processed further or are so-called "finished goods." Each and every step of incidental operation, whether manufacture or not, in readying the goods into a condition for entering the stream of commerce is legally comprehended in the term "production" 79 within the meaning of the Act.

b. The Physical Labor Factor in Production Coverage

The physical labor factor in production coverage is applied to a wide variety of employments. Some of these, as illustrative but not exhaustive, are here enumerated:

Sorting, screening, grading, storing, packing, labeling, addressing, or otherwise handling or working on goods in shipping rooms, warehouses, distribution yards, grain elevators, etc., in

preparation for shipment of the goods out of the State;"80

Handling of ingredients, such as scrap iron, of steel used in
building ships which will move in commerce;"81

Handling and caring for livestock at stockyards where live-
estock is destined for interstate shipment on the hoof,82 and "meat
products" after slaughtering and processing;83

Handling or transporting containers to be used in shipping
products interstate;84

Transporting oil (within a single State) to a refinery;85 or
lumber to a mill (also within the same State),86 if products of
refinery or mill are to be sent out of the State;

Transporting parts or ingredients of other types of goods
(or the finished goods themselves) between processors, manu-
facturers, and storage places located in a single State, for eventu-
tial outstate shipment whether in same or altered form; [Italics
supplied.]87

Repairing or otherwise working on ships,88 vehicles;89 ma-
chinery,90 clothing,91 or other goods which may be expected to
move interstate.

Some of these physical-labor production coverage activities are
manifestly and simultaneously commerce coverage as well, since
the activities are so closely related to "commerce" as distinct from

80. McComb v. Wyandotte Furniture Co., 169 F. 2d 766 (8th Cir.
1948); Clyde v. Broderick, 144 F. 2d 348 (10th Cir. 1944); Walling v.
Mut. Wholesale Food & Sup. Co., 141 F. 2d 331 (8th Cir. 1944); Walling v.
Yeakley, 140 F. 2d 830 (10th Cir. 1944); W. Kentucky Coal Co. v. Walling,
153 F. 2d 582 (6th Cir. 1946); Walling v. Home Loose Leaf Tobacco Whse.
907 (W.D. Ky. 1943); Walling v. McCracken County Peach Growers' Ass'n,


82. Walling v. Friend, 156 F. 2d 429 (8th Cir. 1946).

83. Fleming v. Swift & Co., 41 F. Supp. 825 (N.D. Ill. 1941); McComb

1943).

85. Mid-Continent Pipe Line Co. v. Hargrave, 129 F. 2d 655 (10th Cir.

86. Hanson v. Lagerstrom, 133 F. 2d 120 (8th Cir. 1943).

aff'd, 153 F. 2d 587 (6th Cir. 1946).

88. Slover v. Wathen, 140 F. 2d 258 (4th Cir. 1944).

89. Hertz Drivyself Stations v. United States, 150 F. 2d 923 (8th Cir.
1945); Walling v. Armbruster, 51 F. Supp. 166 (W.D. Ark. 1943); McComb
v. Weller, 9 W&H Cases 53 (1949); Walling v. Sturm & Sons, Inc., 6 W&H
Cases 131, 10 CCH Lab. Cases ¶ 62980 (1946).

90. Engelbretson v. E. J. Albrecht Co., 150 F. 2d 602 (7th Cir. 1945);
Guess v. Montague, 140 F. 2d 500 (4th Cir. 1943).

91. Phillips v. Star Overall Dry Cleaning Laundry Co., 159 F. 2d 416
(2d Cir. 1945), cert. denied, 327 U. S. 780 (1946); Walling v. Belikaf, 59 F.
Supp. 167 (S.D. N.Y. 1944), aff'd, 147 F. 2d 1008 (2d Cir. 1945); Campbell
v. Zavelo, 243 Ala. 361, 10 So. 2d 29 (1942).
"production," as to be commerce" for all practical purposes, and particularly for the purposes of the Act. Since such employments are already covered under Commerce, their validity as Production needs no consideration. Thus the principle is established that labor "in commerce" as broadly construed is the primary consideration, and production for commerce is secondary or contributory to the basic commerce aspect of employment.

Personnel of a telegraph company who prepare messages for interstate transmission, television cameramen who photograph sports or news events for multi-State TV reproduction, truck crewmen and railroad crewmen hauling goods interstate are excluded from production coverage since already covered under "commerce."

c. Nonmanual Occupations

Production coverage includes not only the manual, physical labor involved in the primary production and subsequent processing, handling, and working on the tangible substances of a production enterprise, but also the administration, control, policy-making and planning, systematizing, superintendence and supervision of all the physical processes. This includes of course the purchasing, personnel, safety, financial, accounting and clerical occupations required in conducting production.93

Employees who perform any of the variety of tasks indicated in the preceding paragraph are an integral and essential part of the production entity of a modern industrial organization. Obviously no enterprise produces goods for commerce solely with manual workers.94 In view of this practical reality, the Supreme Court holds that all workers who perform such tasks "are actually engaged in the production of goods for commerce just as much as those who process and work on the tangible products." [Italics supplied.]92

4. Processes or Occupations "Closely Related" and "Directly Essential" to Production for Commerce

While these terms—"Closely Related" and "Directly Essential"—were considered by the Congressional framers to be more precise than the word "necessary" for which they were substituted in 1949,

92. E.g., Hertz Drivurself Stations v. United States, 150 F. 2d 923 (8th Cir. 1945); Englebretson v. E. J. Albrecht Co., 150 F. 2d 692 (7th Cir. 1945); Slover v. Wathen, 140 F. 2d 258 (4th Cir. 1944); Walling v. Sturm & Sons, Inc., 6 W&H Cases 131, 10 CCH Lab. Cases ¶62980 (1946).
93. Borden v. Borella, 325 U. S. 679 (1945); Hertz Drivurself Stations v. United States, 150 F. 2d 923 (8th Cir. 1945); Callus v. 10 E. 40th St. Bldg., 146 F. 2d 438 (2d Cir. 1944), rev'd on other grounds, 325 U. S. 578 (1945).
they yet do not yield to exact definition. The two terms taken together were designed to describe situations wherein a worker's occupation bears such a relationship to the production of goods for interstate or foreign commerce as to be both (1) close enough as distinguished from remote or tenuous, and (2) of direct aid to the employer in a practical sense of providing something essential to the effective, efficient, and satisfactory operation of the productive process.6

Not all “Closely related” employment tasks are “directly essential” to production; nor do all directly essential activities meet the test of close relationship. Must each of these two crucial phrases in the amended act extending production coverage beyond the physical process of manufacture be satisfied, or need only one be met? And if only one, may it be either one? Or must one of the phrases govern regardless of the other; and if so, which one? These questions arose early in the administration of the Act, and have been answered by the Administrator: each must be met.9

a. Effect of the Terms “Closely Related” and “Directly Essential”

The two phrases, “closely related” and “directly essential” serve to extend production coverage immeasurably. Coverage may be determined either on the basis of actual physical production or because the work is closely related and directly essential, but according to recent decision, if determined on either ground, it is not necessary to determine whether coverage would be established on the other ground.98

These two pivotal phrases were incorporated into the Act with the FLS Amendments of 1949, replacing the less precise and more inclusive word “necessary.” Originally, the Act covered employees engaged “in any process or occupation necessary to the production” of goods for commerce. This particular feature of the 1949 Amendments has given rise to more difficulty of precise interpretation and more litigation than any other in the Act. The Wage and Hour and Public Contracts Division devote to it more than one-third of their interpretive bulletin expounding the whole field of coverage, citing many cases.99 The legislative history of the Act shows that the language of the last clause of § 3(j) is intended to narrow the scope

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8 Warren-Bradshaw Drilling Co. v. Hall, 124 F. 2d 42 (5th Cir. 1941), aff’d, 317 U. S. 88 (1942).
of coverage with respect to production workers not engaged in commerce.\textsuperscript{100}

Because of this narrowing revision, some employees who might have met the test of \textit{necessity} under the original wording of the Act, are now not covered unless their work is both closely \textit{and} directly essential to such production.\textsuperscript{101}

Because this feature of the Act (§ 3(j)) uses the conjunction “\textit{or},” question might arise as to this “\textit{both-and}” interpretation. The reconciling explanation is a simple one. The clause provides coverage for employment “in any closely related process or occupation directly essential to the production thereof in any State.” Misunderstanding results from construing the conjunction “\textit{or}” cumulative and not alternative in its content and application. The phrase is \textit{not} dealing with two different \textit{things}—(1) closely related \textit{process}, and (2) occupation directly essential to the production thereof, joined (or opposed) by use of “\textit{or}.” This was not the intention of the legislators. The many pages in the W&H coverage bulletin of interpretations, the House Managers’ Statement, and application of the language of the Amendment in many court cases witness the true meaning. The true meaning is that “closely related” is an adjective phrase modifying \textit{not} the single noun “process,” but the compound noun-phrase “process \textit{or} occupation.” Any alternative significance of “\textit{or}” applies as between “process” and “occupation.” Similarly, the adjectival phrase “directly essential” applies not to the single noun “occupation” which immediately precedes it, but to the same compound noun-phrase “process \textit{or} occupation.” Part of the confusion arises of course from the fact that one adjectival phrase precedes the first word in the compound noun-phrase and the second adjectival phrase follows the final member of the noun-phrase.

The foregoing interpretation is implicit in the law as considered by all three branches of the government—Legislative, Executive, and the Judiciary. The legislative history of FLS Amendments of 1949,\textsuperscript{102} the interpretative provisions of the W&H Administra-

\textsuperscript{100} Id. at 22.


tion, and a wide range of illustrative court cases support this statement.

While the coverage or non-coverage of countless employees may now be determined with reasonable certainty, obviously no precise line of inclusion or exclusion can be drawn. Borderline problems will inevitably arise which can be determined with finality only by authoritative court decisions. For example, though the legislators in 1949 deliberately narrowed the extension of the production coverage and yet later widened it again somewhat from the first amendatory phrasing by replacing the word "indispensable" with the phrase "directly essential," they expressed their intention to leave undisturbed particular areas of coverage already established by court decisions.

b. Distinguishing and Applying "Closely Related" and "Directly Essential" Standards

Close relationship of an occupation to the whole process of production may be tested by a wide variety of relevant factors. Direct essentiality in its turn depends solely on considerations of need or function in the entire production process. As used in the amendment, direct essentiality refers only to the bearing of the individual employee's particular tasks on production, regardless of nature or purpose of employer's business. Criteria for determining closeness of perform activities that are closely related and directly essential to the production of goods for commerce."

103. Interp. Bull., No. 776, 23-26, § 19(b), 31, is entitled: "Extent of coverage under "closely related" and "directly essential" clause." (Note: linkage with conjunction "and," and the word "clause" is in the singular.) On page 32 is a discussion of situations where the work of an employee is directly essential but does not meet the "closely related" test, hence not covered.

104. Farmers' Reservoir Co. v. McComb, 337 U. S. 755 (1949); Roland Elec. Co. v. Walling, 326 U. S. 657 (1946); Borden v. Borella, 325 U. S. 679 (1945); 10 E. 40th St. Bldg. v. Callus, 325 U. S. 578 (1945); Armour & Co. v. Wantock, 323 U. S. 126 (1944); Walton v. Southern Package Corp., 320 U. S. 540 (1944); Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. 88 (1942); Kirschbaum v. Walling, 316 U. S. 517 (1942); Brogan v. National Surety Co., 246 U. S. 257 (1918); Walling v. W. D. Haden Co., 153 F. 2d 196 (5th Cir. 1946); Reynolds v. Salt River Valley Water Users Ass'n, 143 F. 2d 863 (9th Cir. 1944); Hanson v. Lagerstrom, 133 F. 2d 120 (8th Cir. 1943); Bracey v. Luray, 138 F. 2d 8 (4th Cir. 1943); Walling v. People's Packing Co., 132 F. 2d 236 (10th Cir. 1942), cert. denied, 318 U. S. 774 (1943); Consolidated Timber Co. v. Womack, 132 F. 2d 101 (9th Cir. 1942); Mid-Continent Pipe Line Co. v. Hargrave, 129 F. 2d 655 (10th Cir. 1942); Phillips v. Meeker Coop. Light & Power Ass'n, 63 F. Supp. 733 (D. Minn. 1945).

105. H. Mgrs. St. (1949). The phrase "directly essential" was adopted by the Conf. Comm. in lieu of the word "indispensable" contained in the Amendment first passed by the House. If "indispensability" had become the test, many workers now covered would have been excluded.

relationship, on the other hand, cannot be limited to those which show this closeness in terms of need or function. Close relationship is thus a more inclusive phrase than its narrower counterpart, direct essentiality. This nice distinction, however, does not preclude situations where the tie between close relationship and direct essentiality involves both qualities inextricably.107

Pertinent factors in "close relationship" are: time and/or place of performance; purposes of the activities for which the employee serves the particular employer; relative directness or indirectness of the effect of the particular task on production; and whether employment is within or outside the productive enterprise.108 This element of relevance of place-factor in performance must be distinguished from the rule that place of work is not used by the Administrator as one of the "guides" to coverage. Here place of performance is pertinent to establish "close relationship" of employment not themselves direct engagements in commerce or production therefor.109

(1) Factors Which Distinguish Close from Remote Relationship

The following can be listed as vital factors determining close relationship of an occupational activity to production as distinct from remote relationship.110

Contribution which the activity makes to production;
Who performs the activity?
When, where, and how is it performed with respect to the production to which it relates?
What is the purpose—to aid production or otherwise?
Immediacy (or ultimacy) of its effect on production;
Number and nature of any intervening operations between it and the production concerned;
Characteristics and purposes (if pertinent) of employer's business.111

In some situations, where particular work is genuinely directly essential to production, it is performed by the workers of an operator other than the producer, and the degree of such essentiality may be

107. Ibid. As an example of inextricably combined close relationship and direct essentiality, the Roland Elec. case, see note 72 supra, involved a worker employed in repairing electric motors used in factories producing goods for commerce.
109. FLSA § 4(f) (1938).
a significant factor in determining "close relationship." Such cases illustrate the interrelationship of the two principles.

None of the factors given above is of itself alone a necessarily controlling determinant. In given situations factors other than those listed may emerge as more vital. Facts of an individual situation are determinant. The sum of all relevant factors determines closeness of relationship of any given activity to production.112

(2) Practical Judgment Needed to Fix Degree in "Direct Essentiality" Cases

Many "direct essentiality" situations in production coverage problems involve practical judgments as to degree of essentiality and of directness concerning the function and need of any activity to a successful, effective, and efficient production enterprise.113 Occupations in a producing plant may be directly essential (for example, machinery repair, clerical, and custodial employment), but vary in the degree of their particular essentiality and in the directness of their particular aid to the productive process.114 Coverage may depend upon this degree of essentiality.

An industrial enterprise which provides something essential to meet the immediate needs of production (for example, the manufacture of machinery, tools, or dies for use in the production of goods for commerce) is no less directly essential merely because distribution, transportation, or installation of such contributory products intervenes before these instruments can be used in production.115

(3) Examples of Covered Employments in Closely Related and Directly Essential Production for Commerce

Many "office" or "white collar" employees, are covered because their occupations, if not actually a part of the production, are closely related and directly essential to it. Included under such coverage are: bookkeepers, stenographers, clerks, accountants, payroll clerks, timekeeping employees, time-study workers, draftsmen, inspectors, testers, research workers, industrial safety men; employees in personnel, advertising, promotion, labor relations, and public relations activities of a producing enterprise; work instructors.116

113. Ibid.  
Similarly, workers engaged in maintaining, servicing, repairing, or improving the buildings of a producing enterprise; or performing similar tasks on machinery, equipment, vehicles, or other facilities used in the production of goods for commerce are covered.\textsuperscript{117} Custodial and protective employees such as caretakers, watchmen, guards, patrolmen, firemen, stockroom workers, and warehousemen, are covered unless specifically exempted by some other provision of the Act.\textsuperscript{118}

Transportation workers who transport supplies, equipment, materials to the producer's premises; those who remove slag or other waste materials therefrom; or others who perform any transportation activities needed in production, likewise are entitled to the \textit{coverage benefits} of FLSA. Machinists, carpenters, electricians, plumbers, steamfitters, plasterers, glaziers, painters, metalworkers, hodcarriers, bricklayers, roofers, stationary engineers, and the apprentices and helpers of all these, are embraced in the foregoing category, as are elevator operators and starters, janitors, charwomen, porters, handymen, and messengers.\textsuperscript{119}

c. \textit{Distinctions between Covered and Noncovered Workers in Similar Production Occupations}

Not all employees of a genuine producer of goods for commerce are considered to be themselves engaged in such production. If they are employed solely in connection with any local operations of the producer independently of his productive enterprise; or in some dispensable or collateral activity not directly essential to the productive function, they are not entitled to the wages and hours benefits of the Act.

A producer, for instance, may engage in incidental local activities as a landlord, merchant, or restaurateur either to provide, primarily, a convenient means of meeting the personal needs of his employees such as housing, sale of commodities, feeding, or to take advantage of the opportunity to realize additional and separate profit. Workers

\textsuperscript{117} No distinction of statutory or economic significance can be drawn between such work in a building where the production of goods is carried on physically and in one where such production is controlled, administered, and managed. Borden v. Borella, 325 U. S. 679 (1945). In the \textit{Schulte} case, see note 111 \textit{supra}, the Court held that maintenance workers employed in a loft building tenanted by business that performed process work on goods belonging to out-of-state owners, were covered as engaged in employments necessary to the production of goods. (Today the closely-related-directly-essential principle would be applied.)


\textsuperscript{119} \textit{Ibid.}
exclusively employed in such essentially local activities of providing residential, eating, or other living facilities for genuine production workers of a producer are not considered as engaged in work closely related or directly essential to their employer’s principal activity of producing goods for commerce.\textsuperscript{120}

But this exclusion from coverage does not deprive all cooks and helpers of the benefits of wages and hours provisions of the Act. Again the principle of each case being determined by its own circumstances must be applied to distinguish between covered and noncovered workers performing the same tasks. In an isolated lumber or mining camp, where the operation of a cook-house is a vital part of the productive process, kitchen employees may in fact be “closely related” and “directly essential” to the production of goods for commerce.\textsuperscript{121}

As we have seen, such services as watchman, guarding, maintenance and repair of buildings, facilities, and equipment used in the production of goods for commerce are “directly essential” as well as “closely related” to such production.\textsuperscript{122} But the same kind of tasks performed in or in connection with private dwellings, owned by the producer and tenanted under lease by employees of the producer, as in a mill or mining village, would not be “directly essential” to production, and therefore not covered.\textsuperscript{123}

Likewise, those employees of a producer who are engaged only in maintaining company facilities for entertaining the employer’s customers; or in providing food, refreshments, or recreational facilities (including restaurants, cafeterias, and snack bars), for the producer’s employees in a factory, or in operating a children’s nursery for the convenience of employees who leave young children there during working hours, or in similar desirable but not indispensable social welfare activities, would not be doing work “directly essential” to the production of goods for commerce and hence would not be covered.\textsuperscript{124}


\textsuperscript{121} Brogan v. National Surety Co., 246 U. S. 257 (1918); Hanson v. Lagerstrom, 133 F. 2d 120 (8th Cir. 1943); Consolidated Timber Co. v. Womack, 132 F. 2d 101 (9th Cir. 1942).


\textsuperscript{123} See cases cited note 121 supra; Wilson v. Reconstruction Finance Corp., 158 F. 2d 564 (5th Cir. 1946), cert. denied, 311 U. S. 810 (1947).

5. Employees of Independent Operators Meeting Needs of Producers for Commerce

Activities of independent operators must meet the "closely related" test. In situations where a worker's tasks are "closely related" and "directly essential" to the production of goods for commerce, the mere fact that he is employed by an independent operator rather than the actual producer would not deprive him of the benefits of the Act to which he would be entitled if employed by a producer of the goods.\textsuperscript{125}

If such work, performed for an employer not himself a producer, is manifestly "directed essential" but not "closely related" as well, coverage does not extend to employees of such independent employers.\textsuperscript{126} The dividing line in many such cases is very thin indeed. The independent employer may carry on an essentially local business without intent or purpose on his part to aid in the production of goods for commerce, regardless of the fact that actually his operation is directly essential to the production of goods for commerce. In such situations the activity of the independent employer is not deemed "closely related."\textsuperscript{127}

However, the mere fact of the local nature of the employer's business may not negate the "closely related" principle. A large measure of "direct essentiality" in the independent employer's processing might be such as to carry with it a sufficient degree of close relationship on the part of the employee's occupation as to warrant coverage under the Act.\textsuperscript{128}

When independent employers operate businesses definitely intended for providing producers of goods for commerce with materials or services directly essential to such production, their business activities are very probably closely enough related to such production as to bring their workers under coverage.\textsuperscript{129} Moreover, all the employees of such independent operators engaged in the activity of meeting such needs of a bonafide producer for commerce are brought within the benefits of the wages and hours provisions of FLSA.\textsuperscript{130}

\textsuperscript{126} 10 E. 40th St. Bldg. v. Callus, 325 U. S. 578 (1945).
\textsuperscript{127} Ibid.
\textsuperscript{130} Roland Elec. Co. v. Walling, 326 U. S. 657 (1946) (foremen, mechanics and helpers, trouble shooters, and office employees of companies sell-
Coverage extends to all employees of independent operators, engaged in maintenance, custodial, and clerical work which is performed by their employer for manufacturer, mining company, or other producer for commerce. As summarily appears in H. Mgrs. St. 1949: "All such employees perform activities that are closely related and directly essential to the production of goods for commerce."

a. Some Typical Situations of Coverage for Employees of Independent Operators; ‘Segregation’ Required

Where the independent operator supplies producers of goods for commerce with things as directly essential to production as electric motors or other machinery or machinery parts for use in producing the goods of a manufacturer, or for mining operations, or for production of oil, or for other production operations or products, the relation between such activities and production is so close and immediate as to bring the employees of such independents within the benefits of coverage. Similarly, suppliers of power, fuel, or water required for the production operations are covered.

The fact that the essential needs of producers mentioned or indicated in the above paragraph are supplied through businesses having local aspects cannot alter their close relationship and direct essentiality to the producers who are customers of the independent employer. "Such sales and services must be immediately available to ... (the) customers or their production will stop."

Employees of independent employers providing such essential goods and services to producers and meeting the "closely related" test, will not be removed from coverage because an unsegregated
portion of their work is performed for customers other than producers of goods for commerce. Examples of occupations in which the work of employees is unsegregated as between producers and non-producers of goods for commerce are: public utilities furnishing gas, electricity, or water, both to firms within the State engaged in manufacturing, mining, or other forms of producing goods for commerce, and to customers who are non-producers. Workers in these public utilities are entitled to benefits of the Act.\(^{134}\)

The employees of independent employers who provide to manufacturers, mining, companies, or other producers for commerce such items used in their production as tools, dies, patterns, designs, blueprints, are engaged in work that meets both tests—"closely related" as well as "directly essential."\(^{135}\) So too are the employees of an independent employer who produces and supplies cast-shed, core, and molding sands to a steel mill to meet specifications in the production of steel. Another field of covered work is that of employees of industrial laundry and linen supply companies serving the needs of customers who manufacture or mine goods for commerce.\(^{136}\)

b. Some Distinctions Between Covered and Non-Covered Workers in Similar Occupations of Independents

Some employments are not sufficiently direct in their essentiality to the production of goods to come within the coverage of the Act. For example, activities of a local architectural firm including the preparation of plans for the alteration of buildings which are used to produce goods for interstate commerce; its employees are not covered.\(^{137}\) Employees of an independently owned and operated restaurant, located in a factory, are not engaged in an activity sufficiently essential or sufficiently direct in their essentiality to production of goods for commerce to come within coverage under the Act.\(^{138}\)

Such distinctions indicate the existence of borderline cases. Another illustrative contrast distinguishes between employees constructing a dike to prevent the flooding of an oil field producing oil for commerce, and contra, employees of a material man quarrying, processing, and transporting stone to the construction site for use in that dike. The construction employees are doing work both di-

135. Walling v. Amidon, 153 F. 2d 159 (10th Cir. 1946).
rectly essential and closely related to production; work of the material man's employees is too remote from production to be considered closely related thereto.\textsuperscript{139}

A further operational situation which makes clear the distinction between covered and noncovered employees (besides those classes of employees and employees tasks specifically exempted in the Act), involves mine props for the production of coal. Employees engaged in producing these mine props are occupied in work closely and sufficiently immediate to the production of coal sold in interstate commerce, whereas employees of a sawmill-equipment-handling firm, selling such equipment to the producer of the mine props are engaged in work too far removed from the covered production.\textsuperscript{140}

A less obvious and more complex situation arises in farming. Workers of a supplier of water for irrigation purposes to farmers who grow products shipped to other States are covered as being engaged in work closely related and directly essential to the production of goods for commerce. Employees of power companies supplying power to such farmers are similarly covered.\textsuperscript{141} Employees of producers or suppliers of feed for poultry and livestock, or seed for crops, used by farmers (within the State) in the production of goods shipped out of the State, are covered for the same reasons.\textsuperscript{142}

In contrast to these covered employments—incidental yet essential and indispensable—workers in a local fertilizer plant producing fertilizer for use by farmers within the same State to improve the productivity of the land used in growing products shipped outside the State, are no longer (especially since the 1949 amendments) considered adequately close in their relationship to production for commerce.\textsuperscript{143} However, prior to the 1949 amendments to FLSA such employees \textit{were} considered necessary to production of goods for commerce. Fertilizer is ordinarily thought of today as assimilable to the soil rather than to the crop, and hence virtually less directly essential to production of farm crops, even when the product goes into interstate commerce, than are water, livestock feed, or seed. This is one of the very few classes of employees to suffer elimination in the generally broadening inclusiveness of coverage exten-

\textsuperscript{139} E. C. Schroeder Co. v. Clifton, 153 F. 2d 385 (10th Cir. 1946); H. Mgrs. St. 15 (1949).
\textsuperscript{140} Walling v. Hamner, 64 F. Supp. 690 (W.D. Va. 1946).
\textsuperscript{141} Farmers' Reservoir Co. v. McComb, 337 U. S. 755 (1949); Reynolds v. Salt River Valley Water Users Ass'n, 143 F. 2d 863 (9th Cir. 1944); Phillips v. Meeker Coop. Light & Power Ass'n, 63 F. Supp. 733 (D. Minn. 1945).
\textsuperscript{142} Interp. Bull., No. 776, 34-35.
\textsuperscript{143} H. Mgrs. St. 15 (1949).
tion and this elimination represents an outstanding effect of the 1949 Amendment to FLSA.

Repair and maintenance men working on machinery or buildings used by a manufacturer in his production of goods for commerce, and employees of a watchman, guard, patrol, or burglar alarm service protecting the producer's premises, are among the classes of employees whose work clearly entitles them to coverage. But men engaged in cleaning windows or cutting grass at the production plant are not included if employed by a local window-cleaning company or a local independent nursery concern, and are so occupied at the producing plant because the manufacturer is one of the service company's customers.

By the same reasoning, employees of a local exterminator service working wholly within a State exterminating pests in private homes, local establishments, and in buildings within the State even if any are used to produce goods for interstate commerce are not included within the benefits of the wage and hour provisions of FLSA.

6. The Goods Factor

a. "Goods" Defined and Illustrated

"Goods" is defined in § 3(i) of the Act to mean:

"... goods (including Ships and Marine Equipment), wares, products, commodities, merchandise, or articles, or subjects of commerce of any character, or any part or ingredient thereof [italics supplied], but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

"Goods" as defined thus for the purposes of the Act are not limited to commercial goods or articles of trade, nor, indeed, to tangible property, but also include: "articles or subjects of commerce of any character." Such things as "ideas... orders, and intelligence are subjects of commerce." Telegraphic messages have accordingly been held to be "goods" within the meaning of the Act.

By similar reasoning and interpretation, the courts have included...
printed items as newspapers, magazines, brochures, pamphlets, bulletins, and announcements. Likewise:

- written reports; fiscal and other statements and accounts; correspondence; lawyers’ briefs; and other kindred documents;
- advertising; motion pictures; newspaper copy; radio script; artwork; Mss. for publication;
- sample books used by salesmen for purposes of illustrating their products;
- letterheads, envelopes, shipping tags, labels, checkbooks, blank books, book covers; advertising circulars; candy wrappers.

Therefore, employees engaged in producing these various articles swell the millions of covered workers.

“Goods” also include insurance policies, bonds, stocks, bills of exchange, bills of lading, checks, drafts, negotiable notes, and other “commercial paper.”

Similarly “goods” comprises such articles, subjects, or instruments of trade, commerce, transportation, or transmission among the States, as these:

- gold,
- ships, vehicles, and aircraft as “goods” before they became instruments of commerce;
- livestock;
- poultry and eggs.


156. Fox v. Summit King Mines, 143 F. 2d 926 (9th Cir. 1944); Walling v. Haile Gold Mines, 136 F. 2d 102 (4th Cir. 1943).


158. Hertz Drivuself Stations v. United States, 150 F. 2d 923 (8th Cir. 1945).


160. Walling v. Friend, 156 F. 2d 429 (8th Cir. 1946).

waste paper collected for shipment in commerce;\textsuperscript{162}
garments being rented (or laundered);\textsuperscript{163}
containers and packing materials of many sorts (e.g.: cigar boxes, wrapping paper, excelsior, etc.) for shipping other goods in commerce;\textsuperscript{165}
electric energy or power, gas, etc.;\textsuperscript{166}
by-products of manufacturing, shipped in commerce.\textsuperscript{167}

b. "Parts and Ingredients" of Goods are Themselves Goods

The "goods" provision of the Act (§ 3(i)) defines "goods" to mean "goods ... or any part or ingredient thereof" [italics supplied]. Many goods are processed or changed in form by one or more intervening employers before entering the stream of interstate or foreign commerce in their final form. This fact does not affect the character of the original produce as "goods produced for commerce." This principle is illustrated by a garment manufacturer who sends goods to an independent contractor within the State for sewing; after they are returned to him, the garment man further processes them and then ships them in interstate commerce. The mere division of production functions between the two employers does not alter the fact that the employees of the independent contractor, as well as those of the originating garment manufacturer, are actually producing, because "working on," the goods, or "parts or ingredients" thereof, which enter the channels of commerce. The independent contractor's employees sewing on those goods which later entered the flow of commerce, are covered.\textsuperscript{169}

A manufacturer of buttons who sells his product within the State to a manufacturer of shirts, who ships his shirts with the buttons sewn thereon in interstate commerce, must also comply with the Act as it covers his employees; they are held to be engaged in the production of goods for commerce.\textsuperscript{169}

Similarly, the employees of a lumber manufacturer who sells his lumber locally to a furniture manufacturer who in turn sells his

\textsuperscript{162} Flemington v. Schiff, 1 W & H Cases 893, 5 CCH Lab. Cases \textsuperscript{163}Phillips v. Star Overall Dry Cleaning Laundry Co., 149 F. 2d 416 (2d Cir. 1945), \textit{cert. denied}, 327 U. S. 780 (1946).
\textsuperscript{164} Atlantic Co. v. Walling, 131 F. 2d 518 (5th Cir. 1942); Hamlet Ice Co. v. Fleming, 127 F. 2d 165 (4th Cir. 1942).
\textsuperscript{165} Enterprise Box Co. v. Fleming, 125 F. 2d 897 (5th Cir.), \textit{cert. denied}, 316 U. S. 704 (1942).
\textsuperscript{166} Walling v. Connecticut Co., 154 F. 2d 552 (2d Cir. 1946).
\textsuperscript{167} Walling v. Peoples' Packing Co., 132 F. 2d 235 (10th Cir. 1942), \textit{cert. denied}, 318 U. S. 774 (1943).
\textsuperscript{168} Schulte Co. v. Gangi, 328 U. S. 108 (1946).
furniture in interstate commerce, come within the scope of the Act. Thus, any employee who is engaged in the production of any part or ingredient of goods produced for trade, commerce, transportation, transmission, or communication among the several States . . . is engaged in the production of goods for commerce.

c. Effect of the Exclusionary Clause in the Statutory Definition of "Goods"

The purpose of the exclusionary clause in the statutory definition of "goods" which excepts goods "after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof," is to protect ultimate consumers (other than producers, manufacturers, or processors of the particular goods) from the "hot goods" provision of the Act. By so defining "goods" as to exclude goods after their delivery into the actual physical possession of the ultimate consumer (other than a producer, manufacturer, or processor thereof), Congress made it clear that it did not intend to hold the ultimate consumer in violation of § 15(a) (1) of the Act penalizing transportation of "hot goods" across a State line. For example, a purchaser of a pair of shoes for himself from a retail store, who then carries them across a State line, is not himself guilty of a violation of the Act even though the shoes were produced in violation thereof.

Contrariwise, workers are covered who are engaged in building a boat for delivery to the purchaser (ultimate consumer) at the boat yard, the employer knowing or believing during the building that the purchaser will sail it outside the State.

170. Ibid.
172. FLSA § 15(a) (1).
174. This section makes it unlawful for any person "to transport . . . or . . . ship . . . in commerce . . . any goods" produced in violation of the W & H provisions of the Act. See also Jackson v. Northwest Airlines, 75 F. Supp. 32 (D. Minn. 1947).
175. Hamlet Ice Co. v. Fleming, 127 F. 2d 165 (4th Cir. 1942).
177. Joshua Hendy Corp. v. Mills, 169 F. 2d 898 (9th Cir. 1948); St.
d. Special Significance of the Preposition in the Phrase “for Commerce”

Goods are produced “for” commerce where the employer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them, in the same or in an altered form or as a part or ingredient of other goods, will move in interstate or foreign commerce.\(^{178}\)

If such movement of the goods in commerce can be reasonably known or expected beforehand by the employer when his workers perform tasks defined in the Act as production of such goods, it matters nothing whether he himself, or a subsequent owner or possessor, puts the goods into the stream of commerce.\(^{179}\) The actual movement of the goods in interstate commerce is strong (though not conclusive) evidence that the employer intended, hoped, expected, or had reason to believe that they would so move.\(^{180}\)

Questions have risen as to whether a given work done on goods may constitute production ‘for’ commerce even though the goods do NOT eventually leave the State. Situations involving whether production of goods is for commerce (and hence covered by the Act) or not, fall into two main classes: (1) Goods produced intentionally for direct furtherance of interstate movement; (2) goods disposed of locally to persons who subsequently place them in commerce.\(^{181}\)

(1) Goods Produced Intentionally for Direct Furtherance of Interstate Movement

Whenever goods are produced for movement among the several States, such goods are produced for commerce, whether or not there is any expectation or reason to expect that the particular goods, or any part of the total product, will leave the State.\(^{182}\) For example, ice is produced for commerce when it is produced for use by interstate rail or motor carriers in the refrigeration or cooling of the equipment in which the interstate traffic actually

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\(^{180}\) Interp. Bull., No. 776, 42.

\(^{181}\) Id., at 42-45.

\(^{182}\) Fleming v. Atlantic Co., 40 F. Supp. 654 (N.D. Ga. 1941), aff’d, 131 F. 2d 518 (5th Cir. 1942).
moves, even though the particular ice may melt before the vehicle or equipment in which it is placed leaves the State. The ice produced for such use enters also into the process of transportation in which the burdens of traffic are borne. 183

Electrical energy produced and sold within a single State for such uses as lighting and operating signals on railroads and at airports and bus terminals to guide interstate traffic; lighting and operating radio stations which broadcast programs interstate; and lighting and transmission of messages by telephone and telegraph companies 184—all these are covered because used in production for commerce.

Similar principles apply to the production of the following:
Water or fuel for use in the operation of railroads with which interstate commerce is carried on;
Radio or television scripts which provide the basis for programs broadcast interstate;
Telephone and telegraph poles for use in the necessary maintenance, repair, or improvement of interstate communication systems;
Crushed rock, ready-mixed concrete, crossties, culvert pipe, bridge timbers, and kindred items for use in the required repair, maintenance, or improvement of railway roadbeds and bridges which serve as the instrumentalities over which interstate traffic moves;
Goods for use in the ‘direct furtherance’ of the movement of commerce on highways, pipelines, and waterways which likewise serve as instrumentalities of interstate and foreign commerce. 185
Materials for use in the necessary repair, maintenance, or improvement of any such instrumentality so as to prevent impairing or impeding the flow of commerce, 186 such as stone or ready-mixed concrete, crushed rock, sand, gravel for bridges or dams; and these ‘materials’ 187 for road mending and surfacing:

183. See note 164 supra; Southern United Ice Co. v. Hendrix, 153 F. 2d 689 (6th Cir. 1946); Chapman v. Home Ice Co., 136 F. 2d 353 (6th Cir.), cert. denied, 320 U. S. 761 (1943); Hansen v. Salinas Valley Ice Co., 62 Cal. App. 2d 357, 144 P. 2d 896 (1st Dist. 1944). But workers producing ice at a local plant which delivers the ice for a water cooler in the local railroad station are not covered because this ice is not “for” commerce. Interp. Bull., No. 776, 44.

184. Lewis v. Florida Power & Light Co., 154 F. 2d 751 (5th Cir. 1946); Walling v. Connecticut Co., 154 F. 2d 552 (2d Cir. 1946).


Concrete or galvanized pipe for road drainage; bridge planks and timbers; paving blocks. All such items when so used are held by the courts as produced for commerce even though they do not leave the State where produced.\textsuperscript{184}

If any of the materials indicated are supplied by a materialman engaged in an essentially local business serving various local customers without any substantial part of the business being devoted to the needs of highway repair or reconstruction, those materials would not be held by the Administrator to be for commerce; consequently workers engaged in providing them would not be covered.\textsuperscript{180}

(2) \textit{Facts at Time of 'Production'}

Determine Coverage

Borderline cases do arise. In each situation the facts must be examined. One such case involved a lumber manufacturer who produced lumber to fill an out-of-State order. Before the product could be shipped, or could be delivered for shipment, it was destroyed by fire. The employees were held covered because producing for commerce. The facts at time of production, not at some subsequent time, govern the answer as to coverage.\textsuperscript{190}

The Wages and Hour Administration held that if the above lumber had been intended for a local contractor to build a schoolhouse within the State, the workers engaged in the production would not be producing for commerce, and therefore would not be covered. If something should cause that lumber to be sold to another purchaser who ships it out-of-State, the status of the production workers cannot thereby be retroactively changed to bring them within the benefits of the Act.\textsuperscript{191}

Similarly, workers drilling for oil which the employer intends to ship out of the State either as crude or refined product are producing for commerce while drilling operation proceeds, and they are therefore covered. This decision obtains even if some of the wells prove dry.\textsuperscript{192}

(3) \textit{Goods Sold Locally to Persons Who Place Them in Commerce}

Goods sold locally to persons who put them in commerce, if the original producer believes or expects, intends or hopes that his

\textsuperscript{180} Ibid.
\textsuperscript{181} Interp. Bull., No. 776, 43-44.
\textsuperscript{182} Culver v. Bell & Loffland, 146 F. 2d 29 (9th Cir. 1944).
\textsuperscript{183} Interp. Bull., No. 776, 45.
customer or a subsequent purchaser will ship out-State, are produced 'for' commerce and the employees producing them are covered. Whether or not the original producer passes title to the goods to a purchaser within the State, whether for local consumption or out-of-State shipment, is immaterial. Coverage applies in these cases, whether or not goods so produced are sold f.o.b. factory, or sold within State for later out-State shipment by the subsequent purchaser; it is likewise extended to goods which do not belong to the producer but are merely produced or processed or otherwise worked on by the 'producer' and then returned or delivered to the owner who ships out of State.

Coverage is also extended, as occupied in production for commerce, to workers engaged in manufacturing, handling, working on, or otherwise employed in producing boxes, barrels, bags, crates, bottles, wrapping or packing materials which their employer has reason to believe will be used to contain the goods of other producers which will be sent out-State in such wrappings and containers. In such transactions and situations, both the producer of the goods to be shipped and the producer of the containers and packing and wrapping materials, may be located in the same State. This sameness of locale would have no bearing, for it is the goods and their destination which determine coverage of workers producing them.

Such containers and packing and wrapping materials when themselves shipped empty out-of-State, are 'in commerce' and the employees engaged in their purchasing, loading, or transporting, are therefore, and by that fact, covered; they do not depend on the production classification for commerce.

III. Summary and Conclusions

The core of FLSA is its Wage-Hour provisions §§ 6 and 7, § 6 dealing with minimum wages and § 7 with maximum hours. Operational and administrative difficulties and coverage litigation stem

193. Bracey v. Luray, 138 F. 2d 8 (4th Cir. 1943); Hamlet Ice Co. v. Fleming, 127 F. 2d 165 (4th Cir. 1942).
195. Dize v. Maddrix, 144 F. 2d 584 (4th Cir. 1944), aff'd, 324 U. S. 697 (1945); Enterprise Box Co. v. Fleming, 125 F. 2d 897 (5th Cir.), cert. denied, 316 U. S. 704 (1942); Walling v. Burch, 5 W&H Cases 323, 9 CCH Lab. Cases ¶ 62613 (1945); Fleming v. Schiff, 1 W&H Cases 893, 5 CCH Lab. Cases ¶ 60864 (1941).
profusely from these two provisions. When maximum hours are exceeded extra compensation must be paid. Forty hours is the standard workweek and 75 cents an hour the minimum wage. Extra remuneration for overtime must be paid at a rate not less than one and one-half times the regular rate of pay. Other sections of § 7 provide for inescapable modifications to meet specified situations.197

The purpose of the Act is to prohibit shipment in interstate commerce of goods produced under substandard labor conditions, a proper exercise by Congress of its power under the Commerce clause.

The Act is remedial in nature and should be liberally construed. The nature of the worker’s tasks govern coverage; he must be engaged in commerce or in the production of goods for commerce or in some occupation or process closely related and directly essential thereto.

Decisions arising under §§ 6 and 7 of the Act hinge upon the meaning of numerous vital terms. All the significant terms used in §§ 1 through 19 of the Act are defined in §3. The most basic terms are employee, commerce, production, wage, and goods. The significance of vital modifying expressions used in the Act is also discussed and brought to bear on the basic elements. Wage and Hour Coverage revolves around the precise nature of occupational activities of workers in commerce and in production therefor. The scope of this coverage will continue to expand and contract according to the response of governing forces to the dynamic reality of our industrial life.