

of goods for commerce while the drilling operations are going on and are entitled to be paid on that basis notwithstanding some of the wells drilled may eventually prove to be dry holes.⁵⁵

(2) On the other hand, if the lumber manufacturer first mentioned produces lumber to fill the order of a local contractor in the expectation that it will be used to build a schoolhouse within the State, the employees producing the lumber are not engaged in the production of goods “for” commerce and are not covered by the Act. This would remain true notwithstanding the contractor subsequently goes bankrupt and the lumber is sold to a purchaser who moves it to another State; the status of the employees for purposes of coverage cannot in this situation, any more than in the others, be retroactively changed by the subsequent event.

(d) *Goods disposed of locally to persons who place them in commerce.* It is important to remember that if, at the time when employees engage in activities which constitute “production of goods” within the meaning of the Act, their employer intends, hopes, expects, or has reason to believe that such goods will be taken or sent out of the State by a subsequent purchaser or other person into whose possession the goods will come, this is sufficient to establish that such employees are engaged in the production of such goods “for” commerce and covered by the Act. Whether the producer passes title to the goods to another within the State is immaterial.⁵⁶ The goods are produced “for” commerce in such a situation whether they are purchased f.o.b. the factory and are taken out of the State by the purchaser, or whether they are sold within the State to a wholesaler or retailer or manufacturer or processor who in turn sells them, either in the same form or after further processing, in interstate or foreign commerce. The same is true where the goods worked on by the producer’s employees are not owned by the producer and are re-

turned, after the work is done, to the possession of the owner who takes or sends them out of the State.⁵⁷ Similarly, employees are engaged in the production of goods “for” commerce when they are manufacturing, handling, working on, or otherwise engaging in the production of boxes, barrels, bagging, crates, bottles, or other containers, wrapping or packing material which their employer has reason to believe will be used to hold the goods of other producers which will be sent out of the State in such containers or wrappings. It makes no difference that such other producers are located in the same State and that the containers are sold and delivered to them there.⁵⁸

Subpart B—Construction Industry

SOURCE: 21 FR 5439, July 20, 1956, unless otherwise noted.

§776.22 Subpart limited to individual employee coverage.

This subpart, which was adopted before the amendments of 1961 and 1966 to the Fair Labor Standards Act, is limited to discussion of the traditional general coverage of employees employed in activities of the character performed in the construction industry, which depends on whether such employees are, individually, “engaged in commerce or in the production of goods for commerce” within the meaning of the Act. The 1961 and 1966

⁵⁷ *Schulte Co. v. Gangi*, 328 U.S. 108; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88; *Walling v. Kerr*, 47 F. Supp. 852 (E.D. Pa.).

⁵⁸ *Enterprise Box Co. v. Fleming*, 125 F. 2d 897 (C.A. 5), certiorari denied 316 U.S. 704; *Dize v. Maddrix*, 144 F. 2d 584 (C.A. 4), affirmed 324 U.S. 697; *Walling v. Burch*, 5 W. H. Cases 323 (S.D. Ga.); 9 Labor Cases (CCH) par. 62, 613; *Fleming v. Schiff*, 1 W.H. Cases 893 (D. Colo.), 5 Labor Cases (CCH) par. 60, 864.

It should be noted that where empty containers are purchased, loaded, or transported within a single State as a part of their movement, as empty containers, out of the State, an employee engaged in such purchasing, loading, or transporting operations is covered by the Act as engaged “in commerce.” *Atlantic Co. v. Weaver*, 150 F. 2d 843 (C.A. 4); *Klotz v. Ippolito*, 40 F. Supp. 422 (S.D. Tex.); *Orange Crush Bottling Co. v. Tuggle*, 70 Ga. App. 144, 27 S.E. 2d 769.

⁵⁵ *Culver v. Bell & Loffland*, 146 F. 2d 29 (C.A. 9); see also *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88.

⁵⁶ *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634; *Bracey v. Luray*, 138 F. 2d 8 (C.A. 4).

Wage and Hour Division, Labor

§776.22b

amendments broadened coverage by extending it to other employees of the construction industry on an “enterprise” basis, as explained in §776.22a. Employees covered under the principles discussed in this subpart remain covered under the Act as amended; however, an employee who would not be individually covered under the principles discussed in this subpart may now be subject to the Act if he is employed in an enterprise engaged in covered construction as defined in the amendments.

[35 FR 5543, Apr. 3, 1970]

ENTERPRISE COVERAGE

§776.22a Extension of coverage to employment in certain enterprises.

Whether or not individually covered on the traditional basis, an employee is covered on an “enterprise” basis by the Act as amended in 1961 and 1966 if he is “employed in an enterprise engaged in commerce or in the production of goods for commerce” as defined in section 3 (r), (s), of the Act. “Enterprise” is defined generally by section 3(r) to mean “the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units.” If an “enterprise” as thus defined is an “enterprise engaged in commerce or in the production of goods for commerce” as defined and described in section 3(s) of the Act as amended, any employee employed in such enterprise is subject to the provisions of the Act to the same extent as if he were individually engaged “in commerce or in the production of goods for commerce”, unless specifically exempt, section 3(s), insofar as pertinent to the construction industry, reads as follows:

Enterprise engaged in commerce or in the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that

have been moved in or produced for commerce by any person, and which:

* * * * *

(3) Is engaged in the business of construction or reconstruction, or both.

Questions of “enterprise coverage” in the construction industry which are not answered in published statements of the Department of Labor may be addressed to the Administrator of the Wage and Hour Division, Department of Labor, Washington, DC 20210, or assistance may be requested from any of the Regional or District Offices of the Division.

[35 FR 5543, Apr. 3, 1970]

INDIVIDUAL EMPLOYEE COVERAGE IN THE CONSTRUCTION INDUSTRY

§776.22b Guiding principles.

(a) *Scope of bulletin and general coverage statement.* This subpart contains the opinions of the Administrator of the Wage and Hour Division with respect to the applicability of the Fair Labor Standards Act to employees engaged in the building and construction industry. The provisions of the Act expressly make its application dependent on the character of an employee’s activities, that is, on whether he is engaged “in commerce” or in the “production of goods for commerce including any closely related process or occupation directly essential to such production.” Under either of the two prescribed areas of covered work, coverage cannot be determined by a rigid or technical formula. The United States Supreme Court has said of both phases that coverage must be given “a liberal construction” determined “by practical considerations, not by technical conceptions.”¹ The Court has specifically rejected the technical “new construction” concept, as a reliable test for determining coverage under this Act.²

So far as construction work specifically is concerned, the courts have cast the relevant tests for determining the

¹*Mitchell v. Vollmer & Co.*, 349 U.S. 427; *Kirschbaum Co. v. Walling*, 316 U.S. 517; *Alstate Construction Co. v. Durkin*, 345 U.S. 13.

²*Mitchell v. Vollmer & Co.*, ante.