

§776.22a

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

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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.

scope of “in commerce” coverage in substantially similar language as they have used in construing the “production” phase of coverage. Thus the Act applies to construction work which is so intimately related to the functioning of interstate commerce as to be, in practical effect, a part of it, as well as to construction work which has a close and immediate tie with the process of production.³

(b) *Engagement in commerce.* The United States Supreme Court has held that the “in commerce” phase of coverage extends “throughout the farthest reaches of the channels of interstate commerce,” and covers not only construction work physically in or on a channel or instrumentality of interstate commerce but also construction work “so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.”⁴

(c) *Production of goods for commerce.* The “production” phase of coverage includes “any closely related process or occupation directly essential” to production of goods for commerce. An employee need not be engaged in activities indispensable to production in order to be covered. Conversely, even indispensable or essential activities, in the sense of being included in the long line of causation which ultimately results in production of finished goods, may not be covered. The work must be both closely related and directly essential to the covered production.⁵

(d) *State and national authority.* Consideration must also be given to the relationship between state and national authority because Congress intended “to leave local business to the protection of the State.”⁶ Activities which superficially appear to be local in character, when isolated, may in fact have

the required close or intimate relationship with the area of commerce to which the Act applies. The courts have stated that a project should be viewed as a whole in a realistic way and not broken down into its various phases so as to defeat the purposes of the Act.⁷

(e) *Interpretations.* In his task of distinguishing covered from non-covered employees the Administrator will be guided by authoritative court decisions. To the extent that prior administrative rulings, interpretations, practices and enforcement policies relating to employees in the construction industry are inconsistent or in conflict with the principles stated in this subpart, they are hereby rescinded and withdrawn.

[21 FR 5439, July 20, 1956. Redesignated at 35 FR 5543, Apr. 3, 1970]

§776.23 Employment in the construction industry.

(a) *In general.* The same principles for determining coverage under the Fair Labor Standards Act generally apply to employees in the building and construction industry. As in other situations, it is the employee’s activities rather than the employer’s business which is the important consideration, and it is immaterial if the employer is an independent contractor who performs the construction work for or on behalf of a firm which is engaged in interstate commerce or in the production of goods for such commerce.⁸

(b) *On both covered and non-covered work.* If the employee is engaged in both covered and non-covered work during the workweek he is entitled to the benefits of the Act for the entire

³ *Mitchell v. Vollmer & Co.*, ante; Cf. *Armour & Co. v. Wantock*, 323 U.S. 126.

⁴ *Mitchell v. Vollmer & Co.*, ante; *Walling v. Jacksonville Paper Co.*, 317 U.S. 564; *Overstreet v. North Shore Corp.*, 318 U.S. 125.

⁵ *Armour & Co. v. Wantock*, ante; *Kirschbaum v. Walling*, 316 U.S. 417; Cf. *10 E. 40th St. Co. v. Callus*, 325 U.S. 578.

⁶ *Walling v. Jacksonville Paper Co.*, ante; *Kirschbaum v. Walling*, ante; *Phillips Co. v. Walling*, 324 U.S. 490, 497.

⁷ *Walling v. Jacksonville Paper Co.*, ante; *Bennett v. V. P. Loftis Co.*, 167 F. (2d) 286 (C.A.4); *Tobin v. Pennington-Winter Const. Co.*, 198 F. (2d) 334 (C.A.10), certiorari denied 345 U.S. 915; See General Coverage Bulletin, §§776.19 (a), (b), and 776.21(b).

⁸ *Mitchell v. Joyce Agency*, 348 U.S. 945, affirming 110 F. Supp. 918; *Fleming v. Sondeck*, 132 F. (2d) 77 (C.A. 5), certiorari denied 318 U.S. 772; *Kirschbaum v. Walling*, ante; *Walling v. McCrady Construction Co.*, 156 F. (2d) 932, certiorari denied 329 U.S. 785; *Mitchell v. Brown Engineering Co.*, 224 F. (2d) 359 (C.A. 8), certiorari denied 350 U.S. 875; *Chambers Construction Co. and L. H. Chambers v. Mitchell*, decided June 5, 1965 (C.A. 8).