

## § 776.25

is not covered.<sup>13</sup> If an employee regularly transports persons, materials, or equipment between jobs across State lines, or to a covered project, even within the State, as part of his duties for the contractor, he would be covered. As in other situations, the Act would not apply if crossing State lines or transporting persons, materials or equipment by the employee was isolated or sporadic rather than regular and recurring. Also, ordinary home-to-work travel, even across State lines, is not covered.

### § 776.25 Regular and recurring activities as basis of coverage.

Regular and recurring may mean a very small amount and is not to be determined by volume or percentages. Coverage depends on the character rather than the volume of the employee's activities. For example, if an employee in the course of his duties regularly engages in covered work even though the covered work constitutes only a small part of his duties, he would be covered in any week when he performs such covered work.<sup>14</sup>

### § 776.26 Relationship of the construction work to the covered facility.

Unless the construction work is physically or functionally integrated or closely identified with an existing covered facility it is not regarded as covered construction because it is not closely enough related to or integrated with the production of goods for commerce or the engagement in commerce. For this reason the erection, maintenance or repair of dwellings, apartments, hotels, churches and schools are not covered projects.<sup>15</sup> Similarly the construction of a separate, wholly new, factory building, not constructed as an integral part or as an improvement of an existing covered production plant, is not covered (Cf. § 776.27(c)). Coverage of any construction work, whether new or repair work, depends upon how closely integrated it is with, and how essential

<sup>13</sup> *Reck v. Zarmacay*, 264 App. Div. 520, 36 N.Y.S. (2d) 394; *Colbeck v. Dairyland Creamery Co.*, 17 N.W. (2d) 262 (S. Ct. S.D.).

<sup>14</sup> *Walling v. Jacksonville Paper Co.*, ante; *Mabee v. White Plains Publishing Co.*, 327 U.S. 178.

<sup>15</sup> Cf. § 776.18(b).

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it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is "new construction" nor the fact that it is physically separated from an existing covered plant, is determinative. Moreover, the court decisions make it clear that the construction project itself need not be actually employed in commerce or in the production of goods for commerce during the time of its construction in order to be covered.<sup>16</sup> Such factors may be considered in determining whether as a practical matter the work is directly and vitally related to the functioning of the covered facility but would not be decisive.

### § 776.27 Construction which is related to covered production.

(a) *Existing production establishments.*

(1) Covered production facilities within the concept of the Act include mines, oil wells, banks, manufacturing, packing and processing plants, filtration, sewage treatment, electric power and water plants, shipyards, warehouses in which goods are broken down, packed or handled preparatory to being sent in interstate commerce, and similar establishments.

(2) The repair or maintenance of a covered production unit is essential for its continued operation and has a close and immediate tie with the production of goods for commerce.<sup>17</sup> The Act is also applicable to other construction which is an integral part of a covered production unit, such as the replacement, enlargement, reconstruction, extension or other improvement of the premises, the buildings, the machinery, tools and dies and other equipment. Functionally such work is like maintenance and repair and is necessary for the continued, efficient and effective operation of the facility as a unit. Thus the construction of new appurtenances of a covered production establishment such as parking aprons, access roads, railroad spurs, drainage ditches, storm,

<sup>16</sup> *Mitchell v. Vollmer*, ante; *Bennett v. V. P. Loftis Co.*, ante; *Mitchell v. Chambers Const. Co.*, 214 F. (2d) 515 (C.A. 10); *Walling v. McCrady Const. Co.*, ante; *Tobin v. Pennington-Winter Const. Co.*, 198 F. (2d) 334 (C.A. 5), certiorari denied, 345 U.S. 915.

<sup>17</sup> *Kirschbaum Co. v. Walling*, ante; *Walling v. McCrady Const. Co.*, ante.

waste and sanitary sewers or adjacent integrated buildings is subject to the Act. Similarly, the Act applies to the installation of telephone, electric, gas and water lines, machinery and other equipment on the premises of such a facility.

(3) On the other hand, the production and furnishings, within the State, of construction materials, such as sand, gravel, brick and other construction materials produced for general local use, is not covered even if the producer also supplies such materials to construction companies which use them within the State in the repair, maintenance or improvement of facilities for the production of goods for commerce. Employees of the materialman in such a situation would not have such a close and immediate tie to the production of goods for commerce as to be considered "closely related" and "directly essential" to such production.<sup>18</sup>

(b) *Utilities which serve production establishments.* The Act applies to employees of public utilities which furnish gas, electricity, water or fuel to firms engaged within the same State in manufacturing, processing, producing, or mining goods for commerce.<sup>19</sup> Construction work performed upon the plant and facilities of such a utility is covered as in the case of any other covered production establishment.<sup>20</sup> The extension of the lines or other facilities of a covered utility for the first time to the premises of an establishment which produces goods for commerce would be subject to the Act, because such extension is simply an improvement or enlargement of an existing covered utility.<sup>21</sup> Furthermore, the

<sup>18</sup>See General Coverage Bulletin, § 776.19(b)(3); but see § 776.19 (b) (1), (2) and (3); on coverage of furnishing materials "specially designed", or meeting particular specifications, for use in production of particular kinds of goods for commerce; and paragraph (d) of this section, on coverage of producing and furnishing materials for use in construction work on instrumentalities of commerce.

<sup>19</sup>House Manager's Statement, 1949 Amendments.

<sup>20</sup>See decisions cited in footnotes 10 and 11, of this subpart.

<sup>21</sup>*Meeker Cooperative Light & Power Ass'n v. Phillips*, 158 F. (2d) 698 (C.A. 8); Cf. *New Mexico Public Service Co. v. Engel*, 145 F. (2d) 636 (C.A.

maintenance or repair of the wires, pipes, or other conduits of a covered utility which serves business and manufacturing as well as residential areas would also be within the Act. On the other hand, extension or repair of lines or other facilities serving only residential areas would not be covered unless the electricity, gas, fuel, or water comes from out of the State.

(c) *New construction which is not integrated with existing production facilities.*

(1) Construction of a new factory building, even though its use for interstate production upon completion may be contemplated, will not ordinarily be considered covered. However, if the new building is designed as a replacement of or an addition or an improvement to, an existing interstate production facility, its construction will be considered subject to the Act.

(2) If the new building, though not physically attached to an existing plant which produces goods for commerce, is designed to be an integral part of the improved, expanded or enlarged plant, the construction, like maintenance and repair, it would be subject to the Act.<sup>22</sup>

(d) *Production of materials for use in construction work on interstate instrumentalities.* (1) The Act applies to employees who are engaged, at the job site or away from it, in the production of goods to be used within the State for the maintenance, repair, extension, enlargement, improvement, replacement or reconstruction of an instrumentality of interstate commerce. The goods need not go out of the State since the Act applies to the production of goods "for" commerce, including for use in commerce, and is not limited to "production of goods for transportation in commerce," that is, to be sent across State lines.<sup>23</sup>

(2) The Act would also apply to the production of such items as electricity, fuel or water, for use in the operation of railroads or other instrumentalities

10); *Lewis v. Florida Power & Light Co.*, 154 F. (2d) 75 (C.A. 5).

<sup>22</sup>*Walling v. McCrady Const. Co.*, ante.

<sup>23</sup>*Alstate Construction Co. v. Durkin*, 345 U.S. 13; *Tobin v. Johnson*, 198 F. (2d) 130 (C.A. 8); *Mitchell v. Emulsified Asphalt Products Co.*, 222 F. (2) 913 (C.A. 6).

of commerce.<sup>24</sup> Therefore, as in the case of other production units, the maintenance, repair or other improvement of the premises or buildings or the appurtenances, including the machinery, tools and dies and equipment, of the facilities which are used to produce such goods, are subject to the Act.

(3) Coverage also extends to employees who produce sand, gravel, asphalt, cement, crushed rock, railroad ties, pipes, conduits, wires, concrete pilings and other materials which are to be used in the construction of instrumentalities which serve as the means for the interstate movement of goods or persons.

(4) This does not mean, however, that in every case where employees produce such materials which are used within the State in the maintenance, repair, or reconstruction of an instrumentality of commerce, the production of such materials is necessarily considered as production "for" commerce. A material supply company may be engaged in an independent business which is essentially local in nature, selling its materials to the usual miscellany of local customers without any particular intent or purpose of supplying materials for the maintenance, repair, or reconstruction of instrumentalities of commerce, and without any substantial portion of its business being directed to such specific uses. Employees of such an "essentially local business" are not covered by the Act merely because as an incident to its essentially local business, the company, on occasion, happens to produce or supply some materials which are used within the State to meet the needs of instrumentalities of commerce.<sup>25</sup>

**§ 776.28 Covered preparatory activities.**

(a) *Before production begins.* (1) The United States Supreme Court has held that the Act is applicable to employees of a company which was engaged in preliminary oil well drilling, even though the holes were drilled to a spec-

<sup>24</sup> Sections 776.19(b)(2) and 776.21. See also paragraph (b) of this section.

<sup>25</sup> See §§ 776.19 (a) and (b) and 776.21(b)(3). See also cases cited in footnote 22 of this subpart.

ified depth which was short of where the oil was expected to be found.<sup>26</sup> The Act would also apply to drilling operations even though no oil was discovered.<sup>27</sup> Laborers employed in erecting drilling rigs would also be covered.<sup>28</sup> Other preparatory work before drilling begins in an oil field, such as staking oil claims, surveying, clearing the land, assembling materials and equipment, erecting sheds, derricks or dikes would also be within the scope of the Act.<sup>29</sup> Preliminary work such as the foregoing has the requisite close and immediate tie with the production of goods for commerce to be within the coverage of the Act.

(2) Similarly, coverage extends to employees engaged in the installation of machinery to be used in covered production in a new factory building, even though the construction of the building itself may not have been subject to the Act. Such installation is considered to be a preliminary production activity rather than simply part of the construction of the building.

(3) If the construction project is subject to the Act, preliminary activities, such as surveying, clearing, draining and leveling the land, erecting necessary buildings to house materials and equipment, or the demolition of structures in order to begin building the covered facility, are subject to the Act.<sup>30</sup>

(b) *Facilities used in aid of the covered construction.* The installation of facilities, and the repair and maintenance of trucks, tools, machinery and other equipment to be used by a contractor in the furtherance of his covered construction work, are activities subject to the Act.

**§ 776.29 Instrumentalities and channels of interstate commerce.**

(a) *Typical examples.* Instrumentalities and channels which serve as the media for the movement of goods and persons in interstate commerce or for

<sup>26</sup> *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 8.

<sup>27</sup> *Culver v. Bell & Loffland*, 146 F. (2d) 20.

<sup>28</sup> *Devine v. Levy*, 39 F. Supp. 44.

<sup>29</sup> *Straughn v. Schlumberger Well Surveying Corp.*, 72 F. Supp. 511.

<sup>30</sup> Coverage of preparation of plans and designs is discussed in § 776.19(b) (2).