

## § 779.115

### § 779.115 Watchmen and guards.

Watchmen or guards employed by retail businesses who protect the warehouses, workshops, or store premises where goods moving in interstate or foreign commerce are kept or where goods are produced for such commerce, are covered under the Act.

### § 779.116 Custodial and maintenance employees.

Custodial and maintenance employees who perform maintenance and custodial work on the machinery, equipment, or premises where goods regularly are produced for commerce or from which goods are regularly shipped in interstate commerce are engaged in covered activities.

### § 779.117 Salesmen and sales clerks.

A salesman or a sales clerk who regularly and recurrently takes orders for, or sells, or selects merchandise for delivery to points outside the State or which are to be shipped or delivered to a customer from a point outside the State, i.e. drop shipments; or who wraps, packs, addresses or otherwise prepares goods for out-of-State shipments is performing covered activities.

### § 779.118 Employees providing central services for multi-unit organizations.

Employees providing central services for a multiunit organization may be engaged both "in commerce" and "in the production of goods for commerce" within the meaning of the Act. For example, employees engaged in work relating to the coordinated purchasing, warehousing and distribution (and in the administrative and clerical work relating to such activities) for various retail units of a chain are covered under the Act. (See *Phillips Co. v. Walling*, 324 U.S. 490; *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, affirming, 128 F. 2d 935 (CA-5); *Mitchell v. C. & P. Stores*, 286 F. 2d 109 (CA-5); *Mitchell v. E. G. Shinner & Co., Inc.*, 221 F. 2d 260 (CA-7); *Donovan v. Shell Oil Co.*, 168 F. 2d 776 (CA-8).) In addition, employees who regularly and recurrently correspond and maintain records of activities of out-of-State stores and such employees as traveling auditors, inventory men, window display men, etc., who regu-

## 29 CFR Ch. V (7-1-06 Edition)

larly travel from State to State in the performance of their duties are covered under the Act. (See *Mitchell v. Kroger Co.*, 248 F. 2d 935 (CA-8).)

### § 779.119 Exempt occupations.

Of course, it should be noted that although employees may be engaged in commerce or in the production of goods for commerce within the meaning of the Act, they may be exempt from the Act's minimum wage or overtime provisions (or both). For a complete list of such exemptions the Act should be consulted. Those exemptions, however, which are of particular interest to employers and employees in the retail field are discussed in subparts D, E, and F of this part.

## Subpart C—Employment to Which the Act May Apply; Enterprise Coverage

### ENTERPRISE; THE BUSINESS UNIT

### § 779.200 Coverage expanded by 1961 and 1966 amendments.

The 1961 amendments for the first time since the enactment of the Fair Labor Standards Act of 1938 provided that all employees in a particular business unit are covered by the Act. Prior to the 1961 amendments each employee's coverage depended on whether that employee's activities were in commerce or constituted the production of goods for commerce. All employees employed in an "enterprise" described in section 3(s)(1) through (5) of the Act as it was amended in 1961 and section 3(s)(1) through (4) of the Act as amended in 1966 are also covered. Thus, it is necessary to consider the meaning of the term "enterprise" as used in the Act.

### § 779.201 The place of the term "enterprise" in the Act.

The term "enterprise" is defined in section 3(r) of the Act and, wherever used in the Act, is governed by this definition. (§ 779.21(a) provides that portion of the definition of "enterprise" which is pertinent with respect to retail and service enterprises.) The term is a key in determining the applicability of the Act to these businesses.

The “enterprise” is the unit for determining whether the conditions of section 3(s)(1) through (5) of the prior Act and section 3(s)(1) through (4) of the amended Act, including, where applicable, the requisite dollar volume are met. The “enterprise” is also the unit for determining which employees not individually covered by the Act are entitled to the minimum wage, overtime, and equal pay benefits, and to the child labor protection, under sections 6, 7, and 12 of the Act. In general, if the “enterprise” comes within any of the categories described in section 3(s)(1) through (5) of the prior Act or section 3(s)(1) through (4) of the amended Act, all employees employed in the “enterprise” are covered by the Act and, regardless of their duties, are entitled to the Act’s benefits unless a specific exemption applies.

**§ 779.202 Basic concepts of definition.**

Under the definition, the “enterprise” consists of “the related activities performed \* \* \* for a common business purpose.” All of the activities comprising the enterprise must be “related.” Activities serving a single business purpose may be related, although different, but other activities which are not related are not included in the enterprise. The definition makes clear that the enterprise includes all such related activities which are performed through “unified operation” or “common control.” This is true even if they are performed by more than one person, or in more than one establishment, or by more than one corporate or other organizational unit. Specifically included, as a part of the enterprise, are departments of an establishment operated through leasing arrangements. On the other hand, the definition excludes from the “enterprise” activities only performed “for” the enterprise rather than as a part of it by an independent contractor even if they are related to the activities of the enterprise. Also, it makes clear that a truly independent retail or service establishment does not become a part of a larger enterprise merely because it enters into certain types of franchise or collective purchasing arrangements or because it has a common landlord with other such retail establishments.

**§ 779.203 Distinction between “enterprise,” “establishment,” and “employer.”**

The coverage, exemption and other provisions of the Act depend, in part, on the scope of the terms *employer*, *establishment*, or *enterprise*. As explained more fully in part 776 of this chapter, these terms are not synonymous. The term *employer* has been defined in the Act since its inception and has a well established meaning. As defined in section 3(d), it includes, with certain stated exceptions, any person acting directly or indirectly in the interest of an employer in relation to an employee. (See § 779.19.) The term *establishment* means a *distinct physical place of business* rather than an *entire business or enterprise*. (See § 779.23.) The term *enterprise* was not used in the Act prior to the 1961 amendments, but the careful definition and the legislative history of the 1961 and 1966 amendments provide guidance as to its meaning and application. As defined in the Act, the term *enterprise* is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide. The enterprise may consist of a single establishment (see § 779.204(a)) which may be operated by one or more employers; or it may be composed of a number of establishments which may be operated by one or more employers (see § 779.204(b)). The enterprise is not necessarily coextensive with the entire business activities of an employer; a single employer may operate more than one enterprise (see § 779.204(c)). The Act treats as separate enterprises different businesses which are unrelated to each other even if they are operated by the same employer.

**§ 779.204 Common types of “enterprise.”**

(a) *The single establishment business.* In the simplest type of organization—the entire business ordinarily is one enterprise. The entire business activity of the single owner-employer may be performed in one establishment, as in the typical independently owned and controlled retail store. In that case the establishment and the enterprise are one and the same. All of the activities