Chapter 4

EMPLOYER COVERAGE

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I. Overview

A worker is covered by the Fair Labor Standards Act (FLSA) if: (1) an employment relationship exists between the worker and the putative employer; (2) the employer or its worker satisfies the requirements for either individual or enterprise coverage as set forth in the statute; and (3) the worker performs work for the employer in the United States or a U.S. possession or territory. The first requirement is discussed in Chapter 3, The Employment Relationship, and the third requirement in Chapters 6, Other Statutory Exemptions, and 9, Minimum Wage Requirements. The second requirement is discussed in this chapter.

Until 1961, the FLSA only applied to employees based on individual coverage. Under “individual coverage,” as discussed in Section II [Individual Coverage] of this chapter, employees are covered by the FLSA in each workweek in which they are individually engaged in interstate commerce, produce goods for commerce, or work in activities that are closely related and directly essential to the production of goods for commerce.

In 1961, Congress amended the FLSA to include “enterprise coverage,” which permits coverage based upon the characteristics of the employing enterprise rather than by reference to the employees’ own work. Under the definition adopted in 1961, and expanded in 1966 and 1974, an enterprise is covered if: (1) it has two or more employees who meet the test for individual coverage, or has two or more employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and (2) its annual gross volume of sales made or business done is not less than $500,000. The intricacies of enterprise coverage are discussed in Section III [Enterprise Coverage] of this chapter. Following the 1961 amendments, coverage exists under either “individual coverage” or “enterprise coverage.”

The following U.S. Department of Labor (DOL) regulations address matters covered in this chapter:

* 29 C.F.R. Part 776, Coverage; and
* 29 C.F.R. Part 779, Retailers of Goods or Services.[[1]](#footnote-2)

II. Individual Coverage

A. General Principles

The minimum wage and overtime provisions of the FLSA apply to “each … employee[] who in any workweek is engaged in commerce or in the production of goods for commerce … .”[[2]](#footnote-3) “Commerce” is defined as “trade, commerce, transportation, transmission, or communication among the several States, or between any State and any place outside thereof.”[[3]](#footnote-4) “Individual coverage” turns on the nature of the particular employee’s work activities, rather than on the business of the employer,[[4]](#footnote-5) and is distinct from enterprise coverage, which applies to employees “employed in an enterprise engaged in commerce or in the production of goods for commerce.”[[5]](#footnote-6)

The relationship of the employer’s business to commerce may be relevant to the nature of the employee’s work activities.[[6]](#footnote-7) An employee who fails to meet the requirements for individual employee coverage may nonetheless be covered under the FLSA’s enterprise standard.[[7]](#footnote-8) Conversely, an individual employed by an employer that fails to meet the enterprise standard could still be covered under the individual coverage tests.[[8]](#footnote-9)

B. “Engaged in Commerce”

To determine whether an employee is engaged in commerce, the test “is not whether the employee’s activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.”[[9]](#footnote-10) The FLSA does not set forth any specific percentage, volume, or amount of activity that might determine whether an employee is “engaged in commerce.”[[10]](#footnote-11) An employee whose engagement in interstate or foreign commerce is regular and recurring is covered by the FLSA, even if the amount of interstate or foreign commerce itself is small.[[11]](#footnote-12)

Because specific factual circumstances often determine whether an employee is engaged in commerce,[[12]](#footnote-13) it is difficult to enumerate particular occupations[[13]](#footnote-14) or activities that fall within the scope of the FLSA. However, a review of relevant case law shows that employees are generally “engaged in commerce” when they perform work that (1) relates to the actual movement of commerce, (2) regularly uses the channels of commerce, or (3) relates to the instrumentalities of commerce.[[14]](#footnote-15)

1. Work Related to the Actual Movement of Commerce

Employees whose work is involved with or relates to the movement of persons or things “among the several States or between any State and any place outside thereof” are engaged in commerce.[[15]](#footnote-16) The provisions of the FLSA apply most obviously to employees in the transportation and shipping industries.[[16]](#footnote-17) Even if their activities appear to be local (i.e., intrastate) in character, transportation workers such as truck drivers,[[17]](#footnote-18) route helpers,[[18]](#footnote-19) and local deliverymen[[19]](#footnote-20) may be engaged in commerce when their intrastate work is part of an integrated operation that furthers the interstate transportation of goods or services. Similarly, employees such as chauffeurs are covered if their work is part of an integrated operation to transport interstate or foreign travelers, even if their travel is purely intrastate.[[20]](#footnote-21) Other employees who are involved with receipt and distribution of interstate or foreign commerce also may be covered. Courts have found the FLSA applicable to watchmen or guards of goods that are held for interstate or foreign commerce,[[21]](#footnote-22) to funeral home workers who receive bodies for burial from other states and who embalm bodies so they can be moved across state lines,[[22]](#footnote-23) and to automobile dealership employees who sell or purchase vehicles manufactured out of state.[[23]](#footnote-24)

The concept that employees are “engaged in commerce” so long as they are part of “a practical continuity of movement of goods” in interstate commerce was first articulated in *Walling v. Jacksonville Paper Co.*[[24]](#footnote-25) There, the Supreme Court found that warehouse employees of a wholesaler who received goods in interstate commerce but did not ship or deliver these goods across state lines were nevertheless engaged in commerce and thus were covered by the FLSA. The Court held that the “entry of the good into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer ‘in commerce.’”[[25]](#footnote-26) It was sufficient that there was a “practical continuity of movement of the goods until they reached the customers for whom they are intended.”[[26]](#footnote-27)

In *Jacksonville Paper*, some of the merchandise was shipped directly from the mill to customers, some was purchased by special order by customers, and some was stored at the warehouse.[[27]](#footnote-28) Some items were ordered in anticipation of the need of a particular customer pursuant to a contract or understanding, and some were received on back order and shipped to the customer as soon as they were received in the warehouse. The Court found that goods specially ordered and ordered pursuant to a preexisting contract or understanding with the customer were in commerce until they were received by the customer.[[28]](#footnote-29) However, the Court found that the goods that were ordered based on the employer’s precise estimate of the general needs of in-state customers were not in interstate commerce.[[29]](#footnote-30)

Consistent with this framework, some courts and the DOL have found that the individual coverage provisions of the FLSA apply to employees who engage solely in intrastate transportation, provided the persons or things transported have been or will be involved in interstate or foreign commerce.[[30]](#footnote-31) However, workers transporting locally produced goods intrastate or providing purely intrastate transportation services may not be engaged in commerce.[[31]](#footnote-32) For example, the Fifth Circuit has held that an employee of a motel who drove guests being treated at Texas Medical Center to the medical center and nearby stores was not engaged in interstate commerce because his activities took place after the guests arrived from out of state and before they began their departure journey.[[32]](#footnote-33) The Eighth Circuit similarly has held that drivers who deliver and pick up soda bottled in state from intrastate customers have not engaged in work related to the actual movement of commerce, even if some of the materials used to produce the soda were shipped in interstate commerce.[[33]](#footnote-34)

Intrastate activities are also discussed with respect to the interstate commerce requirement of enterprise coverage in Section III.C.1 [Enterprise Coverage; Requirements of Section 203(s); Section 203(s)(1)(A)(i): Engagement in Commerce] of this chapter and the intrastate commerce requirement of the Motor Carrier exemption to the overtime requirement of the FLSA[[34]](#footnote-35) in Chapter 6, Other Statutory Exemptions, Section IV.A [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Employees Covered Under the Motor Carrier Act].

Because the statutory definition of “commerce” refers to “transmission, or communication among the several States,” the FLSA also applies to persons who are employed to transmit interstate communications.[[35]](#footnote-36) Thus, employees who perform communications work for telephone, telegraph,[[36]](#footnote-37) and messenger[[37]](#footnote-38) companies are often held to be engaged in commerce. Employees who perform similar work in the television[[38]](#footnote-39) and radio[[39]](#footnote-40) industries are also covered by the FLSA.

2. Regular Use of the Channels of Commerce

Employees who regularly use the channels of interstate or foreign commerce in the course of their work may also be covered by the FLSA.[[40]](#footnote-41) This category includes employees who regularly use the interstate mails or telephone while performing other work,[[41]](#footnote-42) such as employees who work in the banking,[[42]](#footnote-43) loan,[[43]](#footnote-44) insurance,[[44]](#footnote-45) and publishing[[45]](#footnote-46) industries. However, sporadic or occasional use of interstate mails or telephone may not be sufficient to establish that an employee is engaged in commerce.[[46]](#footnote-47) Employees who regularly use the Internet[[47]](#footnote-48) or process credit card charges also may be covered by the FLSA,[[48]](#footnote-49) but several courts have held that processing of credit card transactions alone is insufficient to establish individual coverage.[[49]](#footnote-50) An individual employee also is not engaged in commerce simply because he may use tools or other goods that at one time traveled through the channels of interstate commerce,[[50]](#footnote-51) or because their employer happens to use an instrumentality of interstate commerce.[[51]](#footnote-52) Such employees may only be entitled to the protections of the FLSA if they handle or transport materials as part of the production of goods for interstate commerce,[[52]](#footnote-53) or their employer is a covered enterprise.[[53]](#footnote-54)

3. Work Related to the Instrumentalities of Commerce

Employees who perform work that is closely related to the instrumentalities of commerce are also engaged in commerce and covered by the FLSA.[[54]](#footnote-55) An “instrumentality of commerce” is any fixed or movable object or facility on which the flow of interstate or foreign commerce depends.[[55]](#footnote-56) This category of employees includes those who supply services or goods that are essential to the continued flow of interstate or foreign commerce.[[56]](#footnote-57) It also includes employees who repair, maintain, or improve existing instrumentalities of commerce.[[57]](#footnote-58) Courts have held that the FLSA covers employees who work on vehicles, trains, ships, ferries, and aircraft that are regularly used to transport persons or goods in commerce.[[58]](#footnote-59) Coverage also extends to employees who work on highways, streets, railroads, bridges, and waterways over which commerce moves;[[59]](#footnote-60) on telephone and cable lines, towers, stations, and other structures that transmit electricity and communication signals;[[60]](#footnote-61) and on warehouses, docks, depots, and terminals that receive or ship persons or goods across state lines.[[61]](#footnote-62) It also extends to truck drivers transporting materials used to construct interstate roads and highways.[[62]](#footnote-63)

Courts have held the FLSA covers employees who guard vehicles, ships, or other instrumentalities of commerce,[[63]](#footnote-64) or warehouses storing goods that are received from or are awaiting interstate shipment.[[64]](#footnote-65) Similarly, courts have extended FLSA coverage to janitors and custodial workers if they maintain airports, railroad and bus terminals, or buildings that house businesses engaged in commerce.[[65]](#footnote-66) The DOL has taken the position that all employees “who are employed in connection with construction work which is closely or intimately related to the functioning of existing instrumentalities and channels of commerce or facilities” are engaged in commerce for purposes of individual coverage.[[66]](#footnote-67) This includes employees engaged in work at a construction site as well as clerical, custodial, and other support workers for the project.

Courts have concluded that the FLSA covers employees who supply goods or facilities to be consumed by the instrumentalities of commerce, including employees who provide electricity, water, and fuel to facilities that are engaged in commerce.[[67]](#footnote-68) The FLSA also covers employees who supply materials to be used in the repair, maintenance, or improvement of the instrumentalities of commerce.[[68]](#footnote-69) Similarly, employees have been found to be covered if they facilitate the movement of persons or goods by removing waste products[[69]](#footnote-70) or obstructions, including accidents,[[70]](#footnote-71) from the instrumentalities of commerce.

However, some work related to the functioning of these instrumentalities is too remotely connected to interstate or foreign commerce to allow for individual coverage under the FLSA.[[71]](#footnote-72) For example, an employee who prepared meals for workers repairing interstate railroad tracks was held not to be covered by the FLSA,[[72]](#footnote-73) as was a washroom and locker attendant who worked in a garage where other employees repaired and maintained vehicles used in interstate commerce.[[73]](#footnote-74) Employees who perform general maintenance unrelated to the interstate transport functions of a military base also have been found to perform work that is not sufficiently related to interstate ­commerce.[[74]](#footnote-75) Likewise, employees who salvage auto parts, tow cars, or wash or repair vehicles have been held not to be engaged in commerce simply because they worked with automobiles.[[75]](#footnote-76)

C. “Engaged in the Production of Goods”

Another basis for individual coverage exists when an employee is engaged in the “production of goods for commerce.”[[76]](#footnote-77) Section 203(j) of the FLSA provides that an employee engages in the production of goods for commerce if the employee is “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.”[[77]](#footnote-78)

1. “Production”

The term “production” includes all types of production-related activities, ranging from producing or manufacturing goods to handling or “in any other manner working” on goods during the production process.[[78]](#footnote-79) The Supreme Court has interpreted FLSA coverage broadly in this area to include “every step in putting the subject to commerce,” including “all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce,” as well as “every kind of operation preparatory” to this process.[[79]](#footnote-80) In accordance with this broad interpretation, the regulations deem many production-related activities within the scope of “production” regardless of whether the employee comes into actual contact with the product itself or engages in physical work on the product.[[80]](#footnote-81)

Courts have held that the term “production” encompasses not only the physical tasks that are required to produce a product—such as manufacturing, mining, and warehousing goods for interstate shipment—but also all types of nonmanual or intellectual work related to the production of goods, such as accounting, clerical, administrative, management, and other duties that support and direct the production process.[[81]](#footnote-82) An employee will be considered to be within coverage of the FLSA if the employee works in a place of employment where goods sold or shipped in interstate commerce or foreign commerce are being produced, unless the employer establishes that the employee’s functions are completely segregated from the production process.[[82]](#footnote-83)

For practical purposes, employees engaged in “production” can be divided into two general categories: those engaged in “direct production” of goods and those engaged in “indirect” activities “closely related” and “directly essential” to the production of goods.[[83]](#footnote-84) Direct or “actual” production includes not only the work involved in making the products of mining, manufacturing, or processing operations, but also “handling, transporting or in any other manner working on” the goods.[[84]](#footnote-85)

In the regulations, the DOL provides illustrative examples of direct production activities.[[85]](#footnote-86) These examples include employees working in shipping rooms, warehouses, distribution yards, or grain elevators who sort, screen, grade, store, pack, label, address, or otherwise handle or work on goods in preparation for shipment of goods out of the state.[[86]](#footnote-87) Other examples of direct production activities found in the regulations with citations to relevant cases include the following:

* handling ingredients, (scrap iron) of steel used in building ships that will move in commerce;[[87]](#footnote-88)
* caring for livestock destined for interstate shipment either as is or as meat products;[[88]](#footnote-89)
* handling or transporting containers to be used in shipping products interstate;[[89]](#footnote-90)
* transporting oil to an in-state refinery[[90]](#footnote-91) or lumber to an in-state mill[[91]](#footnote-92) where the end products will be sent out of state;
* transporting parts or ingredients of other types of goods or the finished goods themselves between processors, manufacturers, and storage places where the transported goods will leave the state in the same or an altered form;[[92]](#footnote-93) and
* repairing or otherwise working on ships,[[93]](#footnote-94) vehicles,[[94]](#footnote-95) machinery,[[95]](#footnote-96) clothing,[[96]](#footnote-97) or other goods that may be expected to move in interstate commerce.[[97]](#footnote-98)

The regulations caution that these examples are “illustrative,” not “exhaustive,” and that some relate to situations in which handling may constitute not only production for commerce but also engaging in commerce because the activities are so closely related to commerce as to be part of it.[[98]](#footnote-99) However, as the regulations note, handling or working on goods constitutes engagement in “commerce” only and not engagement in the production of goods for commerce when it is done by employees of a common carrier and is itself the means whereby interstate movement of the good by the carrier is accomplished; these employees are covered only under the phrase “engaged in commerce.”[[99]](#footnote-100)

Nonmanual work such as management, administration, and control of the physical processes, together with the accompanying accounting and clerical activities, may also be considered “direct production” where the goods are produced for commerce by an “enterprise.”[[100]](#footnote-101) The Supreme Court has held that, from a production standpoint and for the purposes of the FLSA, employees who perform such activities are “actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products.”[[101]](#footnote-102)

The regulations provide examples of nonmanual direct production activities. Employees who perform such activities include those who do the following:

* conceive and direct the policies of the producing enterprise;
* dictate, control, and coordinate steps involved in the physical production of goods;
* maintain detailed and meticulous supervision of productive activities; and
* direct the purchase of raw materials and supplies, methods of production, amounts to be produced, quantity and character of the labor, safety measures, budgeting and financing, labor policies, and maintenance of plants and equipment.[[102]](#footnote-103)

2. “Goods”

Section 203(i) of the FLSA defines “goods” as “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,” but the definition “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.”[[103]](#footnote-104)

The regulations provide that covered “goods” include both manufactured articles of trade and nontangible items such as “ideas, orders, and intelligence.”[[104]](#footnote-105) The term “goods” also includes livestock,[[105]](#footnote-106) poultry and eggs,[[106]](#footnote-107) gold,[[107]](#footnote-108) vessels,[[108]](#footnote-109) vehicles,[[109]](#footnote-110) aircraft,[[110]](#footnote-111) garments being laundered or rented,[[111]](#footnote-112) ice,[[112]](#footnote-113) electricity, power, gas, packaging,[[113]](#footnote-114) motion pictures, artwork, advertising, newspaper and radio copy, manuscripts for publication,[[114]](#footnote-115) telegraphic messages,[[115]](#footnote-116) and written materials such as newspapers, magazines, bulletins, employment announcements,[[116]](#footnote-117) correspondence, reports, fiscal statements, and lawyers’ briefs,[[117]](#footnote-118) to name only a few.[[118]](#footnote-119)

The term “goods” covers any part or ingredient of the good or material used in the production process.[[119]](#footnote-120) Consequently, the fact that goods are processed or changed in form by several in-state employers before going into interstate or foreign commerce does not alter their character under the FLSA.[[120]](#footnote-121)

According to the regulations, goods produced in direct furtherance of the movement of interstate or foreign commerce are also covered by the FLSA, regardless of whether they are expected to leave the state.[[121]](#footnote-122) Examples of such goods include

* electrical energy used for lighting and operating interstate highways, signals on railroads, airports to guide interstate traffic, and radio stations that transmit programs interstate, and for lighting and message transmission of telephone or telegraph companies;[[122]](#footnote-123)
* ice produced to cool the perishable cargo of interstate rail or motor carriers;[[123]](#footnote-124)
* television scripts that provide the basis of programs that are transmitted interstate;[[124]](#footnote-125) and
* concrete or other surfacing materials that are used in constructing or repairing bridges, roads, pipelines, or other instrumentalities of interstate commerce.[[125]](#footnote-126)

Despite the expansive reading given to the meaning of “goods,” the regulations specifically exclude dams, river improvements, highways and viaducts, and railroad lines from the classification of “goods.”[[126]](#footnote-127) Courts also have refused to classify the following as “goods”: audit reports;[[127]](#footnote-128) professional opinions of an accountant;[[128]](#footnote-129) reusable empty soft-drink bottles;[[129]](#footnote-130) military installations and facilities;[[130]](#footnote-131) war materials;[[131]](#footnote-132) an atomic bomb;[[132]](#footnote-133) investigative reports compiled for specific clients and not for general sale to the public;[[133]](#footnote-134) money;[[134]](#footnote-135) oil cuttings obtained for drilling purposes;[[135]](#footnote-136) payroll records and time sheets;[[136]](#footnote-137) construction plans incidental to the performance of a contract;[[137]](#footnote-138) water;[[138]](#footnote-139) and records, reports, and contracts that have no inherent value.[[139]](#footnote-140)

3. Whether Goods Are Produced “for Commerce”

Where goods are produced “for commerce” within the meaning of the FLSA, every employee engaged in the actual process of production is covered.[[140]](#footnote-141) The term “commerce” refers only to those goods produced for “trade, commerce, transportation, transmission or communication among the several states or between a state and any place outside thereof.”[[141]](#footnote-142) This includes both the interstate transportation of goods for “use or consumption,” as well as the interstate transportation of goods “for sale or exchange.”[[142]](#footnote-143)

According to the regulations, determining whether goods are in fact produced “for” commerce depends on the intentions and expectations of the producer at the time the goods are being produced, rather than on whether the goods actually travel interstate.[[143]](#footnote-144) In general, goods are produced “for” commerce only where the producer “intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or some altered form or as part of an ingredient of other goods) in such interstate commerce.”[[144]](#footnote-145) Thus, if an employer foresees or has reason to anticipate at the time of production that the goods will, at some point, be placed into interstate or foreign commerce, then the employees who work on the goods are covered by the FLSA.[[145]](#footnote-146) “It makes no difference whether [the employer] or a subsequent owner or possessor of the goods put the goods in interstate or foreign commerce.”[[146]](#footnote-147) Conversely, if an employer produces goods for local use and has no reason to suspect that they will be taken out of state, the goods have not been produced “for” commerce, regardless of whether they are subsequently sold to someone who moves them to another state.[[147]](#footnote-148)

The regulations further provide that “[t]he fact that goods do move in interstate or foreign commerce is strong evidence that the employer intended, hoped, expected, or had reason to believe that they would so move.”[[148]](#footnote-149) The nature and intended use of the goods may also be considered in determining whether such goods were produced “for commerce.” For example, ice is produced “for” commerce when it is produced for use by rail or motor carriers to refrigerate goods moving in interstate commerce, “even though the particular ice may melt before the equipment in which it is placed leaves the state.”[[149]](#footnote-150) The ice produced for such use “enters into the very means of transportation by which the burdens of traffic are borne.”[[150]](#footnote-151) Also, if the employer produces goods intended for alteration or use as a component or ingredient of another good that is likely to be placed in interstate or foreign commerce, the employer’s employees are covered under the FLSA.[[151]](#footnote-152) For example, the Eighth Circuit has held that coverage was established where, even though the employer made and sold pallets only within Nebraska, at least one customer regularly used the pallets to ship processed hams out of state.[[152]](#footnote-153) According to the regulations, it is immaterial whether the employer passes title to the goods within the state where they are produced.[[153]](#footnote-154)

4. “Closely Related” and “Directly Essential”

In 1949, Section 203(j) of the FLSA was amended to read:

“Produced” means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter 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*.[[154]](#footnote-155)

The regulation at 29 C.F.R. §776.17 defines employment in a “closely related process” and in an “occupation directly essential to” the production of goods.[[155]](#footnote-156) It also details the legislative history of the 1949 amendments to Section 203(j). Additionally, this regulation lists several factors that may affect the decision as to whether an activity is considered “closely related” to production, including:

* the contribution that the activity makes to the production;
* who performs the activity;
* where, when, and how the activity is performed in relation to the production to which it pertains;
* whether its performance is with a view to aiding production or for some different purpose;
* how immediate or delayed its effect on production is;
* the number and nature of any intervening operations or processes between the activity and the production in question; and
* the characteristics and purposes of the employer’s business.[[156]](#footnote-157)

The regulations note that none of these factors is necessarily controlling, and other factors may assume importance.[[157]](#footnote-158)

“Directly essential,” under the regulations, means the work of the employee “directly aids production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of an employer’s operations in producing [the] goods.”[[158]](#footnote-159) In determining whether an activity is “directly essential” to production, a practical judgment is required as to whether, in terms of the function and need of such an activity in successful production operations, it is “directly essential” to such operations.[[159]](#footnote-160)

Prior to the 1949 amendments, the Supreme Court described work that was “necessary” to the production of goods for commerce in similar terms—work that “had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it.”[[160]](#footnote-161) It used this standard to define the boundaries of Section 203(j) in several early cases that involved coverage of custodial and maintenance workers employed by owners of commercial buildings. In *Kirschbaum Co. v. Walling*,[[161]](#footnote-162) the employer owned a building that housed tenants who were engaged in the manufacture of clothing for interstate distribution. The Court held that the owner’s employees who performed custodial, elevator, and watchman services were engaged in work so essential to production that the employees were brought within the FLSA’s coverage.[[162]](#footnote-163)

By contrast, in *10 East 40th Street Building v. Callus*,[[163]](#footnote-164) the Court determined that similar maintenance employees were engaged in merely “local” activity and did not qualify for coverage, where neither the owner nor any of his tenants performed activities on the premises devoted to the production of goods for commerce.[[164]](#footnote-165) The Court held that the running of an office building as an entirely independent enterprise was too remote from the physical process of the production of goods to warrant the conclusion that the maintenance employees were engaged in an occupation or process that was necessary for the production of goods for commerce.[[165]](#footnote-166)

The regulation at 29 C.F.R. §776.18lists employees and activities deemed to be “closely related” and “directly essential” to the production of goods for interstate commerce:

bookkeepers, stenographers, clerks, accountants and auditors, employees doing payroll, timekeeping and time study work, draftsmen, inspectors, testers and research workers, industrial safety men, employees in the personnel, labor relations, advertising, promotion, and public relations activities of the producing enterprise, work instructors, and other office and white collar workers; employees maintaining, servicing, repairing or improving the buildings, machinery, equipment, vehicles, or other facilities used in the production of goods for commerce, and such custodial and protective employees as watchmen, guards, firemen, patrolmen, caretakers, stockroom workers, and warehousemen; and transportation workers bringing supplies, materials, or equipment to the producer’s premises, removing slag or other waste materials therefrom, or transporting materials or other goods, or performing such other transportation activities, as the needs of production may require.[[166]](#footnote-167)

As the regulation notes “these examples are intended as illustrative, rather than exhaustive of the group of employees of a producer who are ‘engaged in the production’ of goods for commerce, within the meaning of the Act.”[[167]](#footnote-168)

Although it is difficult to set down general propositions to determine when employees are engaged in work “closely related” and “directly essential” to production,[[168]](#footnote-169) subsequent circuit court decisions provide some guidance. For example, in *Brennan v. Metropolitan Trash*,[[169]](#footnote-170) the Tenth Circuit found that employees who regularly collected trash from the premises of various customers, including six manufacturing firms that produced goods for commerce, were closely related and directly essential to the manufacturing processes of these customers.[[170]](#footnote-171) Similarly, in *Hodgson v. Ewing*,[[171]](#footnote-172) the Fifth Circuit held that the FLSA covered mechanics and clerical employees of an employer that leveled farm land from which a substantial percentage of the crops harvested were shipped in interstate commerce.[[172]](#footnote-173) By contrast, the Eleventh Circuit has held that mold and water restoration work at residential and commercial buildings is not directly essential to the production of goods for interstate commerce, even if a small amount of the work was performed for clients that move goods in interstate commerce.[[173]](#footnote-174)

5. Employees of Independent Employers Meeting the Needs of Producers for Commerce

The fact that a person is employed by an independent employer doing work on behalf of a producer of goods for commerce will not take the worker outside coverage of the FLSA if that person’s work otherwise qualifies as the “production” of “goods” for “commerce.”[[174]](#footnote-175)

Where the work of an employee would be “closely related” and “directly essential” to the production of goods for commerce if the employee were employed by a producer of the goods, the mere fact that the employee is employed by an independent employer will not justify a different answer.[[175]](#footnote-176) In determining whether an employee’s work is “closely” or only remotely related to the production of goods for commerce by an employer other than the employee’s own, the nature and purpose of the business in which the employee is employed and in the course of which the employee performs the work may sometimes become important.[[176]](#footnote-177)

For example, one court has found that electric power company employees who performed maintenance and repair work on power lines furnishing power to producers for interstate commerce were covered by the FLSA because their duties were closely related and directly essential to the production of goods for commerce.[[177]](#footnote-178) The court stated the employees would be covered regardless of whether they were employed directly by the power company or by an independent employer.[[178]](#footnote-179) Similarly, guards of a contractor who protected the transport of crude oil through a wholly intrastate pipeline to a refinery for processing and later interstate sales have been found to be involved in preparing goods for commerce and thus covered under the FLSA.[[179]](#footnote-180) By contrast, coal miners who worked for a coal company that sold most of its coal within the state have been held to be not covered under the FLSA where only isolated and insubstantial sales of coal were made to a coal broker, who in turn made sales to other companies engaged in the production of goods for interstate commerce.[[180]](#footnote-181)

At some point the frequency and relationship of a contractor’s work to the production of goods for interstate commerce may be so attenuated that it no longer qualifies as production, or closely related and directly essential to the production, of goods shipped in interstate commerce.[[181]](#footnote-182)

III. Enterprise Coverage

A. General Principles

As discussed in Section I [Overview] of this chapter, before 1961, coverage under the FLSA was determined solely on an individual employee basis.[[182]](#footnote-183) Under the “individual coverage” standard, an employee is covered by the FLSA if the employee is engaged in interstate commerce[[183]](#footnote-184) or in the production of goods[[184]](#footnote-185) for interstate commerce.[[185]](#footnote-186) The application of this individual standard resulted in fragmented and inconsistent outcomes under the FLSA. For example, employees who worked within the same department in a large company often received different wages and overtime pay depending on the proximity of their particular work activities to interstate commerce.[[186]](#footnote-187) Moreover, because the time period used to determine coverage was the “workweek” and employees were covered only for the weeks in which they spent time performing interstate activities, employees could well be covered in some weeks and not in others.[[187]](#footnote-188)

In 1961, Congress amended the FLSA to include an “enterprise” standard of coverage[[188]](#footnote-189) by adding subsections (r) and (s) to Section 203’s definitions. Since this enactment, Section 203(r) has had two amendments, whereas Section 203(s) has been the subject of several changes. The current version of Section 203(r) is set out below with the 1966 amendments in bold and the 1974 amendments in bold italics.

(r)*(1)* ‘Enterprise’ means 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 including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement,

*(A)* that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or

*(B)* that it will join with other such establishments in the same industry for the purpose of collective purchasing, or

*(C)* that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.[[189]](#footnote-190)

***(2)* For purposes of paragraph (1), the activities performed by any person or persons**

**(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool,[[190]](#footnote-191) elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or**

**(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a state or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit*,[[191]](#footnote-192) or***

***(C) in connection with the activities of a public agency[[192]](#footnote-193)* shall be deemed to be activities performed for a business purpose.**

Section 203(s) provides:

(s)(1) ‘Enterprise engaged in commerce or in the production of goods for commerce’ means an enterprise that —

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000[[193]](#footnote-194) (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or (C) is an activity of a public agency.[[194]](#footnote-195)

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.[[195]](#footnote-196)

A central purpose of enterprise coverage was to strengthen and expand the scope of the FLSA by eliminating the type of fragmentation that existed under the test for individual coverage.[[196]](#footnote-197) The enterprise standard created coverage for an employer’s employees based on the interstate activities of the business as a whole rather than the activities of the individual employee. In *Maryland v. Wirtz*,[[197]](#footnote-198) the Supreme Court upheld the constitutionality of the enterprise scheme as a valid exercise of the power of Congress under the Commerce Clause.[[198]](#footnote-199)

As noted above, an “enterprise” under Section 203(r) is covered by the FLSA if it meets the requirements under Section 203(s)(1) to be an “enterprise engaged in commerce or in the production of goods for commerce.”[[199]](#footnote-200)

Each of the requirements for enterprise coverage in Sections 203(r) and 203(s), as well as their exceptions from coverage, is discussed in detail in the following sections.[[200]](#footnote-201)

It is important to note that the concept of “enterprise” is distinct from the terms “employer” and “establishment.”[[201]](#footnote-202) As defined in the FLSA, “the term ‘enterprise’ is roughly descriptive of a business rather than of an establishment or of any employer although on occasion the three may coincide.”[[202]](#footnote-203) The concept of an “entire business” encompassed within the term “enterprise” thus varies from the concept of an “establishment,” which is a “distinct physical place of business,”[[203]](#footnote-204) and from the term “employer,” which may operate more than one enterprise and includes “any person acting directly or indirectly in the interest of an employer in relation to an employee.”[[204]](#footnote-205) Some federal courts have applied a “single integrated enterprise” theory to find enterprise coverage.[[205]](#footnote-206) This theory grew out of a Title VII doctrine recognizing that multiple legally distinct entities can be liable as a single employer when the entities are a single integrated enterprise, as in the case of “parent and wholly-owned subsidiary corporations, or separate corporations under common ownership and management.”[[206]](#footnote-207)

B. Requirements of Section 203(r)

In order to constitute an “enterprise” under Section 203(r) of the FLSA, a business must be engaged in “related activities” that are performed for a “common business purpose,” through “common control” or a “unified operation.”[[207]](#footnote-208)

1. “Related Activities”

The regulations list three situations where activities are considered “related:”

(1) when they are the same or similar;

(2) when they are auxiliary and service activities, such as central office and warehousing activities, and bookkeeping, auditing, purchasing, advertising, and other services; and

(3) when they are part of a vertical structure, such as the manufacturing, warehousing, and retailing of a particular product or products under unified operation or common control for a common business purpose.[[208]](#footnote-209)

These activities came from a Senate Report on the 1966 Amendments stating that “related, even if somewhat different, business activities can frequently be part of the same enterprise, and that activities having a reasonable connection with the major purpose of an enterprise would be considered related.”[[209]](#footnote-210) The regulations also explain that whether certain activities are considered “related” or not will depend on whether they “serve a business purpose common to all the activities of the enterprise, or whether they serve a separate and unrelated business purpose.”[[210]](#footnote-211)

a. Same or Similar

The first criteria for “relatedness” is that the activities must be the same or similar.[[211]](#footnote-212) The regulations cite as an example where a company operates retail or service establishments and also engages in a separate and unrelated construction ­business.[[212]](#footnote-213) According to the regulations, the construction activities will not be related and will constitute a separate enterprise if they are conducted independently and apart from the retail operations. However, where the retail and construction activities are conducted for a common business purpose, they may be “related” and if performed through unified operation or common control, they will be part of a single enterprise.[[213]](#footnote-214)

In the case of an enterprise with one or more retail or service establishments “all of the activities which are performed for the furtherance of the common business purpose of operating the retail or service establishment are ‘related activities.’”[[214]](#footnote-215) As the regulations provide, “[i]t is not material that the enterprise sells different goods or provides different services, or that it operates separate retail or service establishments.”[[215]](#footnote-216) The enterprise comprises “all related activities whether performed in ‘one or more establishments.’”[[216]](#footnote-217) Because the activities performed by one retail or service establishment are the “same or similar” to the activities performed by another, they are, as such, “related activities.”[[217]](#footnote-218)

b. Auxiliary Activities

“Related activities” also include “auxiliary and service activities, such as central office and warehousing activities and bookkeeping, auditing, purchasing, advertising, and other similar services.”[[218]](#footnote-219) When such activities are performed through unified operation or common control, for a common business purpose, they will be included in the enterprise. The following are some additional examples of auxiliary activities that constitute “related activities” included in the enterprise:

(a) Credit rating and collection services;

(b) Promotional activities including advertising, sign painting, display services, stamp redemptions, and prize contests;

(c) Maintenance and repair services of plant machinery and equipment including painting, decorating, and similar services;

(d) Store or plant engineering, site location and related survey activities;

(e) Detective, guard, watchmen, and other protective services;

(f) Delivery services;

(g) The operation of employee or customer parking lots;

(h) The recruitment, hiring and training activities, and other managerial services;

(i) Recreational and health facilities for customers or employees including eating and drinking facilities (note that employees primarily engaged in certain food service activities in retail establishments may be exempt from the overtime provisions under section 13(b)(18) of the Act if the specific conditions are met; see §779.388);

(j) The operation of employee benefit and insurance plans; and

(k) Repair and alteration services on goods for sale or sold to customers.[[219]](#footnote-220)

Some courts apply a test of “operational interdependence” to ascertain whether certain auxiliary activities are related.[[220]](#footnote-221) Under this standard, entities that provide ­“mutually supportive services for the substantial advantage of each entity are operationally interdependent and may be treated as a single enterprise” for purposes of enterprise coverage.[[221]](#footnote-222) For example, in *Archie v. Grand Central Partnership, Inc.*,[[222]](#footnote-223) a federal district court considered whether three nonprofit enterprises were engaged in related activities when they cooperated in operating social service programs for the homeless. Given that the enterprises performed similar outreach services both to the homeless and to businesses, had similar missions, and shared funds, the court held that they “provided mutually supportive services and were operationally interdependent.”[[223]](#footnote-224)

The renting of office space by a bank in the building it partially occupies has been found to be auxiliary to the bank’s main activities.[[224]](#footnote-225) Further, it has been held that a corporation providing industrial-commercial cleaning services, a corporation providing septic tank cleaning and maintenance services, and a corporation providing maids for residential cleaning services were auxiliary to one another and thus constituted a single enterprise where the individual entities were cumulatively viewed as segments of a larger “cleaning” business.[[225]](#footnote-226)

Separate companies that hold themselves out as a single entity engaged in similar activities may constitute a single enterprise for purposes of the FLSA.[[226]](#footnote-227) By contrast, companies that are perceived to be related have not been characterized as a single enterprise when their operations, customers, resources, and income streams were kept separate.[[227]](#footnote-228) For example, a drugstore and a cafeteria that shared the same entrance and operated during the same business hours were held to be independent businesses free from enterprise coverage because the hiring, firing, accounting, and income-generating activities were all performed separately by the drugstore operator and the individual who leased the cafeteria from the operator.[[228]](#footnote-229)

c. Vertical Activities

Activities also are “related” when they are “part of a vertical structure.”[[229]](#footnote-230) Whether activities are vertically “related” and part of a single enterprise or instead constitute separate businesses is highly fact specific.[[230]](#footnote-231) The determining factor will be the extent to which the various activities of a business are interrelated and interdependent and whether they are performed to serve a common business objective.[[231]](#footnote-232) Common ownership by itself will not provide sufficient evidence of a vertically related enterprise.[[232]](#footnote-233) Thus, where a manufacturing and a retailing business are not carried on for the same business purpose and essentially exist as separate entities that operate on a wholly independent basis, there can be no finding of vertical relatedness.[[233]](#footnote-234) By contrast, where the manufacturing operations are performed in substantial part for the purpose of distributing the goods through retail stores, or the retail outlet serves to carry out a business purpose of the manufacturing plant, retailing and manufacturing will be “related” activities and performed by a “common business purpose.”[[234]](#footnote-235)

Courts that have analyzed or discussed whether activities are related have acknowledged that vertical structures are typically considered to be related activities for enterprise purposes.[[235]](#footnote-236)

d. Other Activities That May Be Part of the Enterprise

Certain activities that appear to be distinct from an establishment’s principal business may actually be part of the enterprise because of the manner in which they are performed.[[236]](#footnote-237) Examples of such activities by a retail store would include accepting payment for utility services, selling stamps, providing a notarial service, or selling bus or theater tickets or traveler’s checks.[[237]](#footnote-238) Although such incidental activities might, at first impression, appear foreign to the principal business, they may be included as part of a single enterprise if they are intermingled with the other activities of the primary business and have a reasonable connection to the same business purpose.[[238]](#footnote-239) On the other hand, where these activities are performed with attributes of independence—such as being performed in a physically separate establishment and operated as a functionally separate business that is separately controlled with separate employees, records, and objectives—those activities may not be included as part of a single enterprise.[[239]](#footnote-240)

2. “Common Business Purpose”

Enterprise coverage, as defined by Section 203(r), applies to “related activities” only where they are performed for a “common business purpose.”[[240]](#footnote-241)

a. “Common” Purpose

As the regulations explain, the term “common business purpose” encompasses “activities whether performed by one person or by more than one person, or corporation, or other business organization, that are directed to the same business objective or to similar business objectives in which the group has an interest.”[[241]](#footnote-242) Thus, for example, “retailing, wholesaling and manufacturing may, under certain circumstances be engaged in for a ‘common business purpose.’”[[242]](#footnote-243) However, a single corporation or individual may perform activities for different business purposes.[[243]](#footnote-244) For example, a company which owns several retail apparel stores and is also engaged in the lumbering business is not a single enterprise.[[244]](#footnote-245)

The question of whether a “common business purpose” exists depends on a “practical judgment” of the facts in light of the statutory provisions and the legislative intent.[[245]](#footnote-246) As the regulations explain,

[t]he answer ordinarily will be readily apparent from the facts. The facts may show that the activities are related to a single business objective or that they are so operated or controlled as to form a part of a unified business system which is directed to a single business objective. In such cases, it will follow that they are performed for a common business purpose.[[246]](#footnote-247)

b. “Business” Purpose

The activities described in Section 203(r) are included in an enterprise only when they are performed for a “‘business’ purpose.”[[247]](#footnote-248) Activities of eleemosynary, religious, or education organizations may be performed for a business purpose where such organizations engage in ordinary commercial activities, such as operating a printing and publishing plant.[[248]](#footnote-249) In such cases, the business activities will be treated under the FLSA as when they are performed by the ordinary business enterprise.[[249]](#footnote-250) However, the nonprofit educational, religious, and eleemosynary activities will not be included in the enterprise unless they are of the type listed in Section 203(r)(2) of the Act:

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency.[[250]](#footnote-251)

The activities of eleemosynary, religious, or education organizations are not regarded as performed for a business purpose where the activities do not compete with other similar for-profit businesses.[[251]](#footnote-252) For example, in *Jacobs v. New York Foundling Hospital*,[[252]](#footnote-253) former employees of a nonprofit organization providing foster care, adoption, and family services failed to establish enterprise coverage. The court explained that:

Extending FLSA overtime requirements to all non-profits that act in conjunction with city and state agencies would have serious financial or economic repercussions for a multitude of non-profits, and I am not convinced that Congress intended this result. Until Congress speaks by amending the statute, I cannot find that non-profit entities such as Foundling are subject to the FLSA, regardless of their extensive connection with municipal public agencies.[[253]](#footnote-254)

Several court decisions[[254]](#footnote-255) and Wage and Hour opinion letters[[255]](#footnote-256) have similarly declined to extend enterprise coverage to nonprofit organizations that do not engage in ordinary business activities, such as the provision of security or cleaning services.[[256]](#footnote-257) The DOL likewise has refused to extend enterprise coverage to nonprofit organizations utilizing service providers that have a “business” purpose, so long as the nonprofit’s use of these services is not for the purpose of competing with for-profit entities.[[257]](#footnote-258)

3. “Unified Operation” or “Common Control”

In order to meet the Section 203(r) requirements to be an “enterprise,” “related activities” performed for a “common business purpose” also must be conducted through a “unified operation” or through “common control.”[[258]](#footnote-259) The regulations explain that “the terms ‘unified operation’ and ‘common control’ do not have a fixed legal or technical meaning” and “must be given an interpretation consistent with the Congressional intention to be ascertained from the context in which they are used, the legislation of which they form a part, and the legislative history.”[[259]](#footnote-260) When the FLSA was amended in 1966, Congress further broadened coverage by redefining an “enterprise engaged in commerce or in the production of goods for commerce” in Section 203(s). By these actions, Congress intended to exclude certain arrangements or activities from the “enterprise” by specific provision under the prior and amended Act.[[260]](#footnote-261)

a. “Unified Operation”

Under the regulations, the term “unified operation” means combining, uniting, or organizing the performance of related activities so they are in effect a single business unit or an organized business system that is an economic unit directed to accomplishing a common business purpose.[[261]](#footnote-262) This unification may exist through agreements, franchises, grants, leases, or other arrangements designed to integrate or align the related activities.[[262]](#footnote-263) The mere existence of an agreement, franchise, or other such arrangement does not necessarily dictate that the operation is unified; instead, the analysis required to find a unified operation will depend on all the facts.[[263]](#footnote-264)

If related activities “are performed through unified operation they will be part of the enterprise whether they are performed by one company or by more than one company or other organizational unit.”[[264]](#footnote-265) Such “unified operation” may exist “where the related activities are separately owned or controlled but where, through arrangement, agreement or otherwise, they are so performed as to constitute a unified business system organized for a common business purpose.”[[265]](#footnote-266) The regulations illustrate such a “unified business system” with the following example:

A group of separately incorporated, separately owned companies may agree to conduct their activities in such manner as to be for all intents and purposes a single business system except for the fact that the ownership and control of the individual segments of the business are retained, in part or in whole, by the individual companies comprising the business system. The various units may operate under a single trade name; construct their establishment to appear identical; use identical equipment; sell generally the same goods or provide the same type of services, and, in some cases, at uniform standardized prices; and in other respects appear to the persons utilizing their services or purchasing their goods as being the same business. They also may arrange for group purchasing and warehousing; for advertising as a single business; and for standardization of their records, as well as their credit, employment, and other business policies and practices. In such circumstances the activities may well be performed through “unified operation” sufficient to consider all of the related activities performed by the group of units as constituting one enterprise, despite the separate ownership of the various segments and despite the fact that the individual units or segments may retain control as to some or all of their own activities.[[266]](#footnote-267)

b. “Common Control”

“Control,” according to the regulations, includes the power to direct, restrict, regulate, govern, or administer the performance of the related activities.[[267]](#footnote-268) Common control exists where performance of the described activities is controlled by one person or by a number of persons, corporations, or other organizational units that act together.[[268]](#footnote-269) Common ownership may indicate common control but is not a requirement.[[269]](#footnote-270) In fact, control may exist in instances of limited or no common ownership.[[270]](#footnote-271)

The regulations provide examples of situations where activities may be performed under “common control”:

* where an owner relinquishes control to another, or by agreement or other arrangement, restricts the right to exercise control so as to abandon or share control of the business activities with other persons or corporations;[[271]](#footnote-272)
* where “the power to control [is] reserved through agreement or arrangement between the parties so as to vest the control of the activities of one business in the hands of another”;[[272]](#footnote-273)
* even where, “because of the particular methods of operation, the power to control is only seldom used, as where the business has been in operation for a long time without change in methods of operation and practically no actual direction is necessary”;[[273]](#footnote-274)
* where “the control, although rarely visibly exercised, is evidenced by the fact that mere suggestions are adopted readily by the business being controlled”;[[274]](#footnote-275) and
* where, as in the retail industry, “there are many instances where, for business reasons, related activities performed by separate companies are so unified or controlled as to constitute a single enterprise.”[[275]](#footnote-276)

4. Leased Departments

Section 203(r)(1) of the FLSA provides that “departments of an establishment operated through leasing arrangements” are considered to be part of the related activities that constitute a single enterprise.[[276]](#footnote-277) The rationale behind this is that the activities of a leased department are typically related to the overall activities of the entire establishment.[[277]](#footnote-278)

Absent special circumstances, leased departments will normally be included as part of the primary establishment’s related activities.[[278]](#footnote-279) In determining if a leased department is included, the regulations provide the following guidance:

In the ordinary case, a retail or service establishment may control many of the operations of a leased department therein and unify its operation with its own. Thus, they may operate under a common trade name: The host establishment may determine, or have the power to determine, the leased department’s space location, the type of merchandise it will sell, its pricing policy, its hours of operation and some or all of its hiring, firing and other personnel policies; advertising, adjustment and credit operations, may be unified, and insurance, taxes, and other matters may be included as a part of the total operations of the establishment.[[279]](#footnote-280)

Some or all of these and other functions may be controlled or unified with the primary establishment so that the leased department and primary establishment will be considered a single establishment.[[280]](#footnote-281)

The regulations advise that determining whether the lessee’s operation is effectively independent and separate from the primary establishment requires consideration of all the facts, including any agreements and arrangements between the parties, as well as the manner in which overall operations are actually conducted.[[281]](#footnote-282) Factors tending to suggest separate activities include different physical locations or separate entrances, separate names, separate employees, and separate business records.[[282]](#footnote-283) However, an entity may share the same physical location as another entity yet remain sufficiently independent as to not constitute a “leased department.”[[283]](#footnote-284)

When consideration of these factors suggests independent operations, the relationship of the parties may only be that of landlord and tenant, and the lessee will not be regarded as a leased department for enterprise analysis purposes.[[284]](#footnote-285) Although the employees of a leased department may still be individually covered, they “would not be covered on an enterprise basis if such leased department is located in an establishment which is not itself a covered enterprise or part of a covered enterprise.”[[285]](#footnote-286)

5. Exceptions From the Section 203(r) Definition of “Enterprise”

The FLSA specifically excludes from the definition of “enterprise” three types of entities: (1) independently owned retail or service establishments operating under a franchise or similar arrangement; (2) independent contractors performing work for an enterprise; and (3) establishments whose only employees are immediate family members.[[286]](#footnote-287) Each of these exclusions is discussed below.

a. Retail or Service Franchises[[287]](#footnote-288)

Under the FLSA’s definition of “enterprise,” independently owned retail or service establishments that operate under franchise or similar arrangement will not be considered part of a larger enterprise:

[A] retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, including but not limited to, an agreement (A) that it will sell, or sell only, specific certain goods specified by a particular manufacturer, distributor or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of the manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases to other retail or service establishments.[[288]](#footnote-289)

To fall within this exception, the individual establishment:

* must be a retail or service establishment under the FLSA,[[289]](#footnote-290)
* must not itself be an enterprise large enough to fall within the FLSA’s coverage, and
* must be under independent ownership.[[290]](#footnote-291)

The regulations provide that if these three requirements are met, then the establishment:

may enter into the following arrangements without becoming a part of the larger enterprise, that is, without losing its status as a “separate and distinct enterprise” to which section 203(s) would not otherwise apply:

(a) Any arrangement, whether by agreement, franchise or otherwise, that it will sell, or sell only certain goods specified by a particular manufacturer, distributor, or advertiser.

(b) Any such arrangement that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area.

(c) Any such arrangement by which it will join with other similar *retail or service establishments* in the *same industry* for the purpose of collective purchasing … .

(d) Any arrangement whereby the establishment’s premises are leased from a person who also leases premises to other retail or service establishments.[[291]](#footnote-292)

The term “franchise” is not subject to a precise definition[[292]](#footnote-293) because, according to the regulations, it is difficult to identify specific rules determining when and if a franchise will be considered part of an enterprise.[[293]](#footnote-294) A factual analysis is required to determine the instances in which a franchise or other arrangement will have the effect of creating a larger enterprise.[[294]](#footnote-295)

If the factual analysis indicates the franchisee is prevented from making decisions that are crucial to the existence of an independent business, it is likely this transfer of control will justify a finding that the franchise establishment is part of a larger overall enterprise.[[295]](#footnote-296) The franchise contract and any other agreements between the parties must be examined.[[296]](#footnote-297)

Although every franchise arrangement involves an inherent surrender of some rights, the mere existence of a franchise does not by itself create an expanded enterprise.[[297]](#footnote-298) Where a franchise agreement establishes only a right to sell a particular product without an extensive transfer of control, that agreement generally will not create a larger enterprise.[[298]](#footnote-299) The regulations cite the “bona fide independent automobile dealer” as an example of such an arrangement.[[299]](#footnote-300)

On the other hand, a franchisor that has established a formal franchise system—such as a system including a formulated structure of rules and regulations, profit-sharing, franchise-wide administrative procedures, uniform fixture requirements, promotional and advertising campaigns, and limitations on product diversity—may be engaged as part of the primary enterprise.[[300]](#footnote-301) This will be the case when the franchisee lacks the business prerogatives that are necessary to establish or operate an independent entity.[[301]](#footnote-302)

b. Independent Contractors Performing Work “for” an Enterprise

The term “enterprise” does not include “the related activities performed for such enterprise by an independent contractor.”[[302]](#footnote-303) This exclusion applies where the services are performed “for” the enterprise by a separate entity.[[303]](#footnote-304) Typical examples of such services include window cleaning, repairs, transportation, warehousing, and collection services.[[304]](#footnote-305) However, independent contractors are not excluded from the enterprise where services are performed “by” the enterprise for a “common purpose through unified operation or common control.”[[305]](#footnote-306) Determining whether an independent contractor should be excluded from the enterprise involves a comprehensive analysis of the facts that surround the independent contractor’s attachment to the establishment.[[306]](#footnote-307) The factors generally used to distinguish employees from independent contractors under the FLSA are often used for this purpose.[[307]](#footnote-308)

c. Establishments Whose Only Regular Employees Are Owners and Immediate Family Members

Section 203(s)(2) provides a “mom and pop” exemption from enterprise coverage for “[a]ny establishment which has as its only regular employees the owner thereof or the parent, spouse, child or other member of the immediate family of such owner.”[[308]](#footnote-309) Such an establishment is not considered an “enterprise” under Section 203(r).[[309]](#footnote-310) According to the regulations, the immediate family members referenced in this provision “include relationships such as brother, sister, grandchildren, grandparents, and in-laws, but not distant relatives from separate households.”[[310]](#footnote-311)

C. Requirements of Section 203(s)

The FLSA covers an “enterprise” under Section 203(r) if it meets the requirements under Section 203(s)(1) to be an “enterprise engaged in commerce or in the production of goods for commerce.”[[311]](#footnote-312) As noted above, Section 203(s)(1) defines such an enterprise as one that

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or … has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.[[312]](#footnote-313)

This section addresses the requirements for enterprise coverage under Section 203(s)(1)(A)–(B). For a detailed discussion of FLSA coverage of public agencies, see Chapter 11, Government Employment.

The DOL has promulgated separate interpretive bulletins dealing with general enterprise coverage for employees engaged in construction work.[[313]](#footnote-314) These regulations broadened enterprise coverage for construction workers by designating all employees participating in a construction project as within the scope of enterprise coverage.[[314]](#footnote-315) However, in *Josendis v*. *Wall to Wall Residence Repairs, Inc*.,[[315]](#footnote-316) the Eleventh Circuit held that this regulatory provision was invalid because it went beyond the statutory language defining enterprise coverage.

1. Section 203(s)(1)(A)(i): Engagement in Commerce

The FLSA provides that for an enterprise to be covered under Section 203(s)(1)(A), it must have two or more employees:

(1) directly “engaged in commerce”;[[316]](#footnote-317)

(2) “engaged in the production of goods for commerce,” including employment in any “closely related process or occupation” that is “directly essential to the production” of goods for commerce;[[317]](#footnote-318) or

(3) engaged in “handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.”[[318]](#footnote-319)

Because enterprise coverage is determined on an annual basis, the employer is not required to have two or more employees engaged in such activities during every week.[[319]](#footnote-320) But if the employees perform the activities only on isolated or sporadic occasions, then the enterprise will not be covered.[[320]](#footnote-321)

Courts construe these statutory standards broadly, based on practical considerations rather than technical conceptions.[[321]](#footnote-322) For example, courts have emphasized that employees may be counted for coverage purposes even if they devote only a small percentage of time to interstate activities.[[322]](#footnote-323)

The application of the first two standards in Section 203(s)(1)(A)(i) is fully discussed in Sections II.B [Individual Coverage; “Engaged in Commerce”] and II.C [Individual Coverage; “Engaged in the Production of Goods”] of this chapter. The phrases “engaged in commerce” and “production of goods for commerce” have the same meaning as applied under both the requirements for individual coverage and the first two standards of enterprise coverage.[[323]](#footnote-324) Therefore, in determining whether the FLSA extends to an employer under the first two standards of the enterprise theory, courts may examine the interstate activities of employees under individual coverage principles.[[324]](#footnote-325)

a. The “Handling” Standard of Enterprise Coverage

The third standard in Section 203(s)(1)(A)(i) provides FLSA coverage for enterprises that have employees engaged in “handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce by any person.”[[325]](#footnote-326) Inclusion of this clause in the statute substantially expanded the FLSA’s reach by extending coverage to any enterprise whose employees have contact with “goods”[[326]](#footnote-327) or “materials”[[327]](#footnote-328) after the interstate portion of their movement.[[328]](#footnote-329)

The “handling” standard in Section 203(s)(1)(A)(i) includes handling goods that are consumed locally in the employer’s business,[[329]](#footnote-330) including, for example, soap used by employees in a laundry.[[330]](#footnote-331) Moreover, when an enterprise employs workers who handle goods or materials that have moved or have been produced in interstate commerce, local business activities have been subject to the FLSA.[[331]](#footnote-332) For example, in *Brennan v. Iowa*,[[332]](#footnote-333) the Eighth Circuit held that certain state institutions were covered by the FLSA because many of their employees, including nurses, housekeepers, and food servers, handled articles such as cleaning supplies, towels, and food manufactured or produced outside the state.[[333]](#footnote-334) Similarly, in *Marshall v. Brunner*,[[334]](#footnote-335) the Third Circuit held that a local garbage collection and scrap metal business that operated within a single county was covered under the enterprise theory because its employees used locally purchased trucks, tires, batteries, shovels, brooms, oil, and gas that had moved in interstate commerce.[[335]](#footnote-336)

Although Section 203(i) exempts from the definition of “goods” items that have been delivered into the possession of the “ultimate consumer,”[[336]](#footnote-337) most courts have held that the addition of the term “materials” in the 1974 Amendments subjects employers to enterprise coverage under the “handling” standard if they consume interstate articles during the course of their operations.[[337]](#footnote-338) For example, the Sixth Circuit held in *Secretary of Labor v. Timberline South, LLC*,[[338]](#footnote-339) that a timber-harvesting company was a covered enterprise because its employees handled covered “materials” when cutting down trees and transporting timber, even though all of its business activities occurred within the state.[[339]](#footnote-340)

Similarly, under the “handling” standard of coverage, it is not controlling for coverage purposes that the goods may have “come to rest”[[340]](#footnote-341) before being handled, sold, or worked on by the employees of the enterprise.[[341]](#footnote-342) For example, in *Donovan v. Scoles*,[[342]](#footnote-343) the Ninth Circuit held that a gasoline service station was a covered enterprise because the gasoline it purchased from an in-state agent had been sent by an out-of-state pipeline. The court emphasized that under the enterprise coverage amendments to the FLSA, the gasoline did not lose its interstate character merely because it had temporarily come to rest within the state at the agent’s premises before its handling and sale.[[343]](#footnote-344) The Eleventh Circuit reached the same conclusion in *Polycarpe v*. *E & S Landscaping Service, Inc*.,[[344]](#footnote-345) holding that because the statute’s reference to goods or materials that “have been moved in or produced for commerce”[[345]](#footnote-346) is in the past tense, there is “no requirement of continuity [of interstate travel] in the present.”[[346]](#footnote-347)

2. Section 203(s)(1)(A)(ii): The Business Dollar Volume Test

a. General Principles

To qualify for coverage under Section 203(s)(1)(A), an enterprise must meet the “dollar volume” test.[[347]](#footnote-348) Despite the desire to create uniform and expanded coverage under the enterprise concept, Congress maintained an exception for most small businesses[[348]](#footnote-349) by approving this test “to establish an economic standard that predicates coverage of the Act upon the size of the enterprise and its impact upon commerce.”[[349]](#footnote-350) In 1989, Congress set the minimum annual business volume for an enterprise at $500,000,[[350]](#footnote-351) except for businesses that are subject to a grandfathering provision.[[351]](#footnote-352) Before FLSA enterprise coverage can be applied, the enterprise must have an annual gross business volume not less than this statutory minimum.[[352]](#footnote-353)

The question of whether a defendant has sufficient sales volume to qualify as an enterprise engaged in commerce is a part of the plaintiff’s prima facie claim under the FLSA rather than a jurisdictional issue.[[353]](#footnote-354)

Although the dollar volume test limits enterprise coverage, it has been broadly construed by courts.[[354]](#footnote-355) These courts reason that a broad interpretation serves the purpose of the enterprise amendments by subjecting the greatest number of businesses to coverage.[[355]](#footnote-356) Thus, for example, the Fifth Circuit has broadly defined “sales” for purpose of the business volume test to “go beyond a restricted definition of the term” to include business activity, including rental income, loan interest, and service income, that reflects the “size of a business.”[[356]](#footnote-357)

Support for this rule of broad construction is found in two provisions of the FLSA that courts have found express Congress’s intention to define annual gross business volume broadly. First, the term “sale” is defined to include “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.”[[357]](#footnote-358) Second, the definition of “annual gross volume” includes both “sales made” and “business done.”[[358]](#footnote-359) These provisions illustrate that the term “sales” is not confined to a “narrow or technical interpretation” that captures only “typical commodity sales.”[[359]](#footnote-360)

b. Gross Receipts

The term “gross receipts” is generally used to identify revenues that are considered part of an enterprise’s business volume.[[360]](#footnote-361) The regulations define “gross receipts” as “the gross dollar volume (not limited to income) derived from all sales and business transactions including, for example, gross receipts from service, credit, or other similar charges.”[[361]](#footnote-362)

According to the regulations, gross volume is measured according to the price the purchaser pays for the property or service and not according to the “profit on goods sold or commissions on sales made for others.”[[362]](#footnote-363) Moreover, “the dollar value of sales or business of the entire enterprise in all establishments is added together to determine whether the applicable dollar test is met.”[[363]](#footnote-364) Thus, where enterprises consist of leased departments or franchises, the annual gross volumes of those entities are included in the annual gross volume of the enterprise of which they are a part.[[364]](#footnote-365)

Courts have determined that gross receipts include revenue derived from transactions other than sales of goods.[[365]](#footnote-366) For example, a service enterprise’s revenue, while not derived from the sale of goods, will constitute gross receipts for the dollar volume test.[[366]](#footnote-367) In addition, an institutional investor’s investment income, such as a bank’s interest income from loans and securities,[[367]](#footnote-368) an insurance company’s rental income from investment real estate,[[368]](#footnote-369) and a bank’s real estate rental income[[369]](#footnote-370) have been counted by courts as part of an enterprise’s dollar volume.[[370]](#footnote-371)

An enterprise’s operating expenses are neither included in its calculation of gross receipts,[[371]](#footnote-372) nor subtracted from ­revenues when determining dollar volume.[[372]](#footnote-373) This scheme reflects the intent to measure business done, not net profit.[[373]](#footnote-374)

Although an enterprise’s revenue generally will be its gross receipts, in some cases not all revenue qualifies as “receipts” for the dollar volume test. For example, only commissions themselves, not revenues on which commissions are based, will be counted toward dollar volume when the enterprise sells its services to a principal and becomes the principal’s agent.[[374]](#footnote-375) Thus, in *Falk v. Brennan*,[[375]](#footnote-376) the Supreme Court held that a real estate management company’s dollar volume was measured by the commissions it received from the building owner rather than by the rent it collected from tenants on behalf of the owner. The Court found that the real estate management company was selling its management services to the building owners, not “selling” the use of space to tenants.[[376]](#footnote-377) Similarly, gross receipts do not include transactions where the enterprise serves as a conduit between a customer and service provider, such as where a motel facilitates the payment of long-distance telephone charges.[[377]](#footnote-378)

Reimbursement from an insurance company for damaged or destroyed inventory and equipment also has been excluded when calculating the annual gross volume of sales and business done, because it is not a “price paid by the purchaser for … property or service.”[[378]](#footnote-379)

c. Exclusions From Gross Receipts

Certain items are specifically excluded from receipts when determining an employer’s business volume. For example, excise taxes that are separately stated to the customer at the retail level are not included in receipts for the dollar volume test.[[379]](#footnote-380) Under the regulations, these include excise taxes on fuel sold or used in a “diesel-powered highway vehicle” or on the sale of “special motor fuels” at the retail level.[[380]](#footnote-381) Generally, given that state, county, and municipal sales taxes are also levied at the retail level, if they are separately stated, they may also be excluded.[[381]](#footnote-382) The regulations provide guidance on how to determine if a tax is separately stated:

A tax is separately stated where it clearly appears that it has been added to the sales price as a separate, identifiable amount, even though there was no invoice or sales slip. In the absence of a sales slip or invoice, the amount of the tax may either be separately stated orally at the time of sale, or visually by means of a poster or other sign reasonable [sic] designed to inform the purchaser that the amount of the tax, either as a stated sum per unit or measured by the gross amount of the sale, or as a percentage of the price, is included in the sales price.[[382]](#footnote-383)

The regulations also provide that “the dollar volume of an establishment derived from transactions with other establishments in the same enterprise does not ordinarily constitute part of the annual gross volume of the enterprise as a whole.”[[383]](#footnote-384) Likewise, “[c]redits for goods returned or exchanged and rebates and discounts, and the like” also are not counted as gross receipts.[[384]](#footnote-385)

Enterprise coverage applies only to activities performed for a business purpose. As noted earlier,[[385]](#footnote-386) enterprise coverage does not extend to nonprofit charitable, religious, and educational organizations where their activities do not compete with other similar for-profit businesses.[[386]](#footnote-387) The DOL has opined that a private, nonprofit charitable organization may exclude from gross receipts contributions, cash donations, membership fees, or dues, because they did not come within the phrase “sales or business done” in Section 203(s).[[387]](#footnote-388) However, service fees provided for a business purpose in competition with other businesses, as well as interest and dividends on investments, were sales made or business done, and must be included.[[388]](#footnote-389)

d. Computing Annual Volume of Sales or Business: The “Rolling Quarter” Method

Under the regulations, a “rolling quarter” computation method is used to determine an enterprise’s business volume.[[389]](#footnote-390) Under this method, “an employer determines whether it is covered by the FLSA at the beginning of each quarter by calculating its annual dollar volume based on the sum of the four preceding quarters.”[[390]](#footnote-391) An enterprise may divide a year into quarters based on either a calendar year or its fiscal year, but once it selects a method of dividing quarters it must consistently use that method.[[391]](#footnote-392) The computation may be based upon the “sales records maintained as a result of the accounting procedures used for tax or other business purposes,” so long as the “same accounting procedure is used consistently and that such procedure accurately reflects the annual volume of sales or business.”[[392]](#footnote-393)

If an enterprise cannot make a timely computation, the regulations allow it to use a one-month grace period following the end of a quarter.[[393]](#footnote-394) If an enterprise uses the grace period, the quarter to which the computation applies will begin one month after the end of the last quarter on which the computation was based.[[394]](#footnote-395)

The regulations state that an enterprise need not compute its dollar volume if it knows the volume is “substantially in excess or substantially under the minimum dollar volume.”[[395]](#footnote-396) In addition, no quarterly computation is required once an enterprise exceeds the minimum dollar volume in its current income tax year.[[396]](#footnote-397) An enterprise is presumed to have satisfied the dollar volume test for the current year if its dollar volume exceeded the statutory minimum level in its previous fiscal year.[[397]](#footnote-398) However, this presumption can be rebutted by a showing that the dollar volume is below the minimum level under the rolling quarter computation method.[[398]](#footnote-399)

Courts have favored the rolling quarter method because it captures the most recent previous experience of the enterprise.[[399]](#footnote-400) However, if the method “works a manifest unfairness on the employer,” it will not be applied.[[400]](#footnote-401) The rolling quarter method could adversely affect an enterprise if its volume fluctuated around the minimum level, causing the enterprise to be covered during one quarter and not covered the next. In such a scenario, the rolling quarter method would force an enterprise to assume the burdens of coverage under the FLSA on a quarter-by-quarter basis, which could disrupt employer-employee relations and create a hardship for the business.[[401]](#footnote-402)

e. New Business Coverage

The requirements that apply to existing businesses also apply to new businesses. When it is readily apparent that a new business will clearly exceed or fall below the statutory minimum level, the new business will be subject to or exempt from enterprise coverage as if it were an existing business.[[402]](#footnote-403)

New businesses that are unable to gauge their dollar volume are subject to special provisions. Specifically, the dollar volume test for these new businesses is applied after the business completes its first quarter of operation.[[403]](#footnote-404) Thereafter, the enterprise’s total dollar volume at the end of each quarter is annualized:[[404]](#footnote-405) After one quarter, the enterprise’s dollar volume is multiplied by four; after two quarters, the total dollar volume for those two quarters is doubled; and after three quarters, the total dollar volume for the three quarters is multiplied by one and one third.[[405]](#footnote-406) The annualized figure is considered the annual dollar volume for determining the enterprise’s obligations under the FLSA.[[406]](#footnote-407)

f. Conglomerate Coverage Rules

The FLSA covers employees of small agricultural establishments actually controlled by a conglomerate.[[407]](#footnote-408) Section 213(g) of the FLSA defines such an entity as “an establishment … which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee.”[[408]](#footnote-409) For coverage to apply, a conglomerate must have an annual business volume that exceeds $10 million.[[409]](#footnote-410) This provision extends coverage to agricultural establishments that would not ordinarily be covered because either the establishments alone would not meet the business dollar test or they were not part of a larger enterprise because their activities were not sufficiently related to the conglomerate’s other businesses.[[410]](#footnote-411)

3. Section 203(s)(1)(B): Engagement in the Operation of a Hospital, Institution, or School

Included within the definition of an “enterprise engaged in commerce or in the production of goods for commerce” are:

* a hospital;[[411]](#footnote-412)
* an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution;
* a school for mentally or physically handicapped or gifted children; and
* a preschool, elementary or secondary school, or institution of higher education.[[412]](#footnote-413)

Enterprise coverage applies to these entities regardless of whether they are public or private or operated for profit or not for profit.[[413]](#footnote-414) They may include child care centers[[414]](#footnote-415) and residential care facilities[[415]](#footnote-416) in appropriate circumstances.

The Ninth Circuit examined what qualifies as an “institution primarily engaged in the care of the … mentally ill or defective who reside on the premises of such institution” in *Probert v. Family Centered Services of Alaska, Inc.*[[416]](#footnote-417)In *Probert,* the plaintiffs were “house parents” who worked in the defendant’s therapeutic family homes.[[417]](#footnote-418) The homes housed five children who were “severely emotionally disturbed.”[[418]](#footnote-419) Although the children participated in group therapy in the homes, they “received most of their medical or psychological treatment outside the Homes.”[[419]](#footnote-420) The Ninth Circuit held that the language of the statute did not cover the homes for two reasons. First, it held that “the language of the statute clearly suggests a covered institution must provide more than the general care of a residence.”[[420]](#footnote-421) Rather, the use of the term “care” in the statute was analogous to “treatment.”[[421]](#footnote-422) The court noted that although the children benefitted from the plaintiffs’ care as house parents, they were not “medical or social service professionals and were not primarily focused on providing that type of ‘care’ … .”[[422]](#footnote-423) Second, the court held that the homes were not “institutions” as that term is used in the FLSA.[[423]](#footnote-424) The court interpreted the term “institution” by reviewing “the neighboring parts of [Section B of 29 U.S.C. §203(s)(1)]” and found that the term should be informed by other establishments listed in the statute, “namely hospitals and schools.”[[424]](#footnote-425) “These facilities are staffed by professionals and provide more comprehensive medical, psychological, or educational programs, usually for a much larger population.”[[425]](#footnote-426) The court also dismissed the argument that the homes were like nursing homes and the related facilities listed in the *Field Operations Handbook.*[[426]](#footnote-427) “Children who live in the Homes spend much of their time … elsewhere. … Residents of nursing homes [spend] a vast majority of their time [in the nursing home].”[[427]](#footnote-428)

4. Section 203(s)(1)(C): Activity of a Public Agency

In 1974, Congress modified the definition of “enterprise” in Section 203(r) to provide that activities of a public agency are performed for a “business purpose” and defined in Section 203(s)(1)(C) that an enterprise engaged in commerce or in the production of goods for commerce included “public agencies.” See Chapter 11, Government Employment, Section II.A [Coverage Issues; What Constitutes a “Public Agency” for FLSA Coverage], for a discussion of coverage issues in public agencies.

IV. Geographic Limits of Coverage

The FLSA exempts from the minimum wage, overtime, recordkeeping, and child labor provisions of the FLSA work performed during a given workweek within a foreign country or within territory under the jurisdiction of the United States other than the following: Puerto Rico, the Virgin Islands, the Outer Continental Shelf lands, American Samoa, Guam, Wake Island, Enewetok Atoll, Kwajalein Atoll, and Johnston Island.[[428]](#footnote-429) Although the FLSA treats geographic limits of coverage as an exemption, some refer to this “geographic limit” as a coverage issue. See Chapter 6, Other Statutory Exemptions, for a discussion of the Section 213(f) exemption and Chapter 9, Minimum Wage Requirements, for a discussion of the minimum wage requirements in the above-referenced territories.

In 2019, the Supreme Court addressed whether California wage and hour law applied to workers on drilling platforms located off the California coast.[[429]](#footnote-430) The plaintiff claimed that under California law he was entitled to compensation for time on standby, when he could not leave the platform. It was undisputed that the drilling platforms were subject to the Outer Continental Shelf Lands Act (OCSLA),[[430]](#footnote-431) providing that federal law is controlling on the Outer Continental Shelf (OCS) and denying states any interest in or jurisdiction over the OCS. The OCSLA deemed the adjacent state’s laws recognizable only “to the extent that they are applicable and not inconsistent with” other federal laws.[[431]](#footnote-432)

The Court found that “the reference to ‘not inconsistent’ state laws presents only the question whether federal law has already addressed the relevant issue. If so, state law on the issue is inapplicable.”[[432]](#footnote-433) Applying this standard to the claim for standby pay, the Court concluded that “federal law already addresses the issue” because federal regulations expressly regulate the compensability of time when an employee resides on the employer’s premises.[[433]](#footnote-434) Relatedly, the Court found that, to the extent the plaintiff’s claims relied on the adoption of the California minimum wage, “the FLSA already provides for a minimum wage, … so the California minimum wage does not apply.”[[434]](#footnote-435)

1. These regulations are “interpretative bulletins.” For information regarding the deference standards accorded to these regulations, see Chapter 2, Operations and Functions of the Department of Labor. *See also* U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook chs. 11 (Individual Coverage: FLSA) and 12 (Enterprise Coverage), https://www.dol.gov/whd/FOH/ [hereinafter FOH]. The *Field Operations Handbook* reflects “policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator.” *Field Operations Handbook,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/field-operations-handbook (last visited Oct. 2, 2020). [↑](#footnote-ref-2)
2. 29 U.S.C. §§206(a), 207(a)(1). The child labor restrictions of the FLSA likewise apply to the use of “oppressive child labor in commerce or in the production of goods for commerce.” *Id*. §212(c). See Chapter 12, Child Labor, §V.C [General Scope of Statutory Provisions; Section 212(c): The “Direct Prohibition”], for a discussion of coverage under 29 U.S.C. §212(c). While the absence of individual or enterprise coverage relieves an employer of liability under the FLSA’s wage and hour provisions, it may not defeat a claim for retaliation under 29 U.S.C. §215(a)(3). For a discussion of this issue, see Chapter 13, Retaliation. [↑](#footnote-ref-3)
3. 29 U.S.C. §203(b). [↑](#footnote-ref-4)
4. Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 14 WH Cases 13 (1959); Kirschbaum Co. v. Walling, 316 U.S. 517, 2 WH Cases 34 (1942). [↑](#footnote-ref-5)
5. 29 U.S.C. §§206(a), 207(a)(1), 212(c). [↑](#footnote-ref-6)
6. Borden Co. v. Borella, 325 U.S. 679, 5 WH Cases 381 (1945). [↑](#footnote-ref-7)
7. *See, e.g.*,29 C.F.R. §776.0, stating:

   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 a covered enterprise as defined in the amendments. [↑](#footnote-ref-8)
8. *First Circuit:* Martinez v. Petrenko, 792 F.3d 173, 175 (1st Cir. 2015) (“[T]he facts capable of establishing individual coverage are different from those supporting a theory of enterprise coverage.”).

   *Second Circuit:* Boekemeier v. Fourth Universal Soc’y, 86 F. Supp. 2d 280, 285, 6 WH Cases2d 924 (S.D.N.Y. 2000) (finding insufficient evidence regarding enterprise coverage, but granting plaintiff summary judgment as to individual coverage based on frequent purchases of out-of-state custodial supplies, refrigerator, computer, and other electronic equipment).

   *Fifth Circuit:* Holland v. DA Tencil, Inc., 2015 WL 631389 (S.D. Tex. Feb. 12, 2015) (finding employer established that it was not subject to enterprise coverage, but plaintiff could establish individual coverage based on testimony that she took telephone orders from out-of-state customers and used wire service to place or receive interstate orders).

   *Eighth Circuit:* Reich v. Stewart, 121 F.3d 400, 405, 4 WH Cases2d 50 (8th Cir. 1997) (finding Secretary of Labor’s complaint based on individual coverage and ruling annual dollar volume test irrelevant).

   *Ninth Circuit:* Zorich v. Long Beach Fire Dep’t & Ambulance Serv., Inc., 118 F.3d 682, 3 WH Cases2d 1799 (9th Cir. 1997) (reversing grant of summary judgment for employer where, even though enterprise coverage was defeated under business dollar volume test, district court failed to consider whether requirements for individual coverage existed) [↑](#footnote-ref-9)
9. McLeod v. Threlkeld, 319 U.S. 491, 497, 2 WH Cases 75 (1943) (citing Overnight Motor Co. v. Missel, 316 U.S. 572, 575 (1942)); *see also* 29 C.F.R. §776.9, stating:

   Although [the phrase “engaged in commerce”] does not include employees engaged in activities which merely “affect” such interstate or foreign commerce, the courts have made it clear that coverage of the Act … extends to every employee employed “in the channels of” such commerce or such activities so closely related to such commerce, as a practical matter, that they should be considered part of it. [↑](#footnote-ref-10)
10. United States v. Darby, 312 U.S. 100, 123, 1 WH Cases 17 (1941) (“Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer.”). [↑](#footnote-ref-11)
11. Mabee v. White Plains Publ’g Co., 327 U.S. 178, 181–82, 5 WH Cases 877 (1946) (“Though we assume that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in [the FLSA’s] prohibition, there is no warrant for assuming that regular shipments in commerce are to be included or excluded dependent on their size.”); *see also Darby*, 312 U.S. at 123. [↑](#footnote-ref-12)
12. Walling v. Jacksonville Paper Co., 317 U.S. 564, 2 WH Cases 63 (1943). [↑](#footnote-ref-13)
13. For example, §§11a02–11w13 of the *Field Operations Handbook* analyze individual coverage as it applies to more than 100 occupations, discussing factors to consider in determining whether individual coverage exists. [↑](#footnote-ref-14)
14. *See, e.g.*,Thorne v. All Restoration Serv., Inc., 448 F.3d 1264, 1266 (11th Cir. 2006) (“[F]or an employee to be ‘engaged in commerce’ under the FLSA, he must be directly participating in the actual movement of persons or things in interstate commerce by (i) working for an instrumentality of interstate commerce, *e.g.*, transportation or communication industry employees, or (ii) by regularly using the instrumentalities of interstate commerce in his work, *e.g.*, regular and recurrent use of interstate telephone, telegraph, mails, or travel.”). [↑](#footnote-ref-15)
15. 29 U.S.C. §203(b); *see also* 29 C.F.R. §776.9 (“[I]t is clear that the employees who are covered by the wage and hour provisions of the Act as employees ‘engaged in commerce’ are employees doing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence) ‘among the several states or between any State and any place outside thereof.’”). [↑](#footnote-ref-16)
16. 29 C.F.R. §776.10(a) (“[T]he wage and hour provisions of the Act apply typically, but not exclusively, to employees such as those in the … transportation and shipping industries, since these industries serve as the actual instrumentalities and channels of interstate and foreign commerce.”).

    *See, e.g.*,

    *Supreme Court:* Overnight Motor Co. v. Missel, 316 U.S. 572, 2 WH Cases 47 (1942) (rate clerk for interstate motor transportation company).

    *Second Circuit:* Knudsen v. Lee & Simmons, Inc., 163 F.2d 95, 7 WH Cases 95 (2d Cir. 1947) (barge workers).

    *Third Circuit:* Walling v. Keansburg Steamboat Co., 162 F.2d 405, 6 WH Cases 1002 (3d Cir. 1947) (workers performing repairs on ships that transported passengers between states while ships moored in single state).

    *Fourth Circuit:* Rockton & Rion R.R. v. Walling, 146 F.2d 111, 4 WH Cases 912 (4th Cir. 1944) (railroad employees). [↑](#footnote-ref-17)
17. Wirtz v. B.B. Saxon Co., 365 F.2d 457, 17 WH Cases 415 (5th Cir. 1966) (truck drivers hauling fuel to airplanes engaged in commerce); Clougherty v. James Vernor Co., 187 F.2d 288, 10 WH Cases 110 (6th Cir. 1951) (truck drivers hauling products to port for shipment engaged in commerce, but drivers hauling locally produced product exclusively to local customers not engaged in commerce). [↑](#footnote-ref-18)
18. Wirtz v. Pepsi Cola Bottling Co., 342 F.2d 820, 16 WH Cases 812 (5th Cir. 1965) (route helpers that picked up empty beverage bottles that were reused and shipped interstate engaged in commerce). [↑](#footnote-ref-19)
19. Stewart-Jordan Distrib. Co. v. Tobin, 210 F.2d 427, 11 WH Cases 799 (5th Cir. 1954) (helpers on delivery truck employed by wholesale beer distributor that picked up returnable bottles for reuse in interstate commerce engaged in commerce). [↑](#footnote-ref-20)
20. Hayden v. Bowen, 404 F.2d 682, 18 WH Cases 664 (5th Cir. 1968) (limousine driver engaged to transport airline passengers to and from international airport engaged in commerce); Airlines Transp., Inc. v. Tobin, 198 F.2d 249 (4th Cir. 1952) (limousine drivers engaged to exclusively transport travelers and goods arriving on interstate flights engaged in commerce). [↑](#footnote-ref-21)
21. Russell Co. v. McComb, 187 F.2d 524, 10 WH Cases 120 (5th Cir. 1951) (watchman hired to guard interstate shipments loaded in freight cars, trucks, and warehouse engaged in commerce). [↑](#footnote-ref-22)
22. Gilreath v. Daniel Funeral Home, 18 WH Cases 514 (E.D. Ark. 1968); *see also* Gregory v. Quality Removal, Inc., 2014 WL 5494448 (S.D. Fla. Oct. 30, 2014) (to determine whether cadaver transport drivers fell within individual coverage, evaluating frequency with which drivers delivered bodies to Miami airport for transport to other states). [↑](#footnote-ref-23)
23. Casey v. Looney, 183 F. App’x 859 (11th Cir. 2006) (junkyard car salesman who sold vehicles manufactured out of state engaged in commerce); Kelley v. Stevens Auto Sales, Inc., 2009 WL 2762765 (N.D. Ind. Aug. 27, 2009) (employee who engaged in interstate travel to buy cars at auction for resale engaged in interstate commerce, even if vehicles did not cross state lines again after purchase);*see also* Mendoza v. Discount CV Joint Rack & Pinion Rebuilding, Inc., 101 F. Supp. 3d 1282 (S.D. Fla. 2015) (automobile repair technicians who assembled and rebuilt axles for out-of-state customers using parts shipped from out of state engaged in commerce). [↑](#footnote-ref-24)
24. 317 U.S. 564, 2 WH Cases 63 (1943). [↑](#footnote-ref-25)
25. 317 U.S. at 568. [↑](#footnote-ref-26)
26. *Id*. [↑](#footnote-ref-27)
27. *Id.* at 566. [↑](#footnote-ref-28)
28. *Id*. at 566–69. [↑](#footnote-ref-29)
29. *Id*. at 569–70. [↑](#footnote-ref-30)
30. FOH §11t09(b) (“The concept of transportation as an aspect of interstate movement is not limited to transportation that, in the narrowest view, involves the crossing of a state line … . Intrastate transportation is a part of interstate commerce if it forms a part of one larger movement in the course of which a state line is crossed.”); *see also* Alonso v. Garcia, 2005 WL 1901682 (11th Cir. Aug. 10, 2005) (employee who transported fumigation materials and chemicals throughout Florida covered by FLSA where materials had traveled in interstate commerce until they reached defendant’s customers within state); Wirtz v. Pepsi Cola Bottling Co*.*,342 F.2d 820, 16 WH Cases 812 (5th Cir. 1965) (route helpers who picked up empty soda bottles from in-state customers to be reused in interstate commerce engaged in commerce). [↑](#footnote-ref-31)
31. *Second Circuit:* Jian Long Li v. Li Qin Zhao, 35 F. Supp. 3d 300 (E.D.N.Y. 2014) (restaurant delivery person making all deliveries within state not engaged in commerce).

    *Fourth Circuit:* Rains v. East Coast Towing & Storage, LLC, 820 F. Supp. 2d 743, 746–48 (E.D. Va. 2011) (tow truck driver who did not tow cars across state lines not engaged in interstate commerce).

    *Fifth Circuit:* Sobrinio v. Medical Ctr. Visitor’s Lodge, Inc., 474 F.3d 828, 12 WH Cases2d 327 (5th Cir. 2007) (employee who transported visiting out-of-state patients of hospital hotel to local stores not engaged in commerce).

    *Sixth Circuit:* Clougherty v. James Vernor Co., 187 F.2d 288, 10 WH Cases 110 (6th Cir. 1951) (drivers who made intrastate deliveries of ginger ale bottled in state not engaged in commerce).

    *Seventh Circuit:* Reyes v. ML Enter.*,* 2022 BL 466254, 2022 WL 18025222, at \*5 (E.D. Wis. Dec. 30, 2022) (snow-removal worker who transported salt intrastate from yard to customer’s home not engaged in commerce, because salt “was one of the supplies that [the employer] used to perform [the] work,” and not the “deliver[y] [of] a product” to the employer’s customers).

    *Ninth Circuit:* Mateo v. Auto Rental Co., 240 F.2d 831 (9th Cir. 1957) (limousine drivers who primarily transported passengers from Honolulu airport to local hotels not engaged in commerce) [↑](#footnote-ref-32)
32. *Sobrinio*,474 F.3d 828. [↑](#footnote-ref-33)
33. Mitchell v. Hygrade Water & Soda Co., 285 F.2d 362 (8th Cir. 1960). [↑](#footnote-ref-34)
34. 29 U.S.C. §213(b)(1). [↑](#footnote-ref-35)
35. *Id.* §203(b). [↑](#footnote-ref-36)
36. Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 4 WH Cases 951 (1945) (determining telegraph lines instrumentalities of commerce, and messages passing over telegraph lines part of commerce itself); Western Union Tel. Co. v. McComb, 165 F.2d 65, 7 WH Cases 482 (6th Cir. 1947). [↑](#footnote-ref-37)
37. Walling v. Allied Messenger Serv., 47 F. Supp. 773, 2 WH Cases 734 (S.D.N.Y. 1942). [↑](#footnote-ref-38)
38. Wirtz v. Indiana Cablevision, 270 F. Supp. 973, 18 WH Cases 121 (S.D. Ind. 1967) (employees engaged in installing, operating, and servicing cable television equipment transmitting interstate broadcasts engaged in commerce). [↑](#footnote-ref-39)
39. Wabash Radio Corp. v. Walling, 162 F.2d 391, 6 WH Cases 987 (6th Cir. 1947) (radio and telegraph operators engaged in commerce); Wilson v. Shuman, 140 F.2d 644, 4 WH Cases 87 (8th Cir. 1944) (radio employee in charge of broadcasts engaged in commerce). [↑](#footnote-ref-40)
40. 29 C.F.R. §776.10(a) (“[E]mployees of such businesses as banking, insurance, newspaper publishing, and others which regularly utilize the channels of interstate and foreign commerce in the course of their operations, are generally covered by the Act.”). [↑](#footnote-ref-41)
41. *Id*. §776.10(b) (“[E]mployees whose work involves the continued use of the interstate mails, telegraph, telephone or similar instrumentalities for communication across State lines are covered by the Act.”).

    *See also*

    *Second Circuit:* Wood v. Mike Bloomberg 2020, Inc., 2022 BL 102840, 2022 WL 891052 (S.D.N.Y. Mar. 25, 2022) (employees of political campaign that regularly used telephones to contact prospective voters across state lines and emails to communicate with out-of-state campaign headquarters engaged in commerce under FLSA).

    *Seventh Circuit:* Mitchell v. E.G. Shinner & Co., 221 F.2d 260, 12 WH Cases 452 (7th Cir. 1955) (employees who performed payroll, accounting, and purchasing duties at headquarters of meat market with branches in four states engaged in commerce under FLSA); Kim v. Hopfauf, 2017 WL 85441 (N.D. Ill. Jan. 10, 2017) (employee who alleged telephone contact with supplier in New York and processed credit card transactions created sufficient dispute of fact to defeat employer’s motion for summary judgment as to individual coverage).

    *Eighth Circuit:* Phillips v. Meeker Coop. Light & Power Assoc., 63 F. Supp. 733, 5 WH Cases 709 (D. Minn. 1945) (employees who handled correspondence, mailed checks, and transmitted documents across state lines engaged in commerce).

    *Eleventh Circuit:* St. Elien v. All Cnty. Env’t Servs., Inc., 991 F.3d 1197, 1200 (11th Cir. 2021) (employee’s weekly phone calls to out-of-state vendors and customers sufficient to support finding that employee was “engaged in commerce” for purposes of individual coverage); Spears v. Bay Inn & Suites Foley, LLC, 2022 BL 273027, 2022 WL 3141878 (S.D. Ala. Aug. 5, 2022) (holding plaintiff hotel front desk employee who processed reservations received through phone calls from out-of-state guests and frequent handling of credit card transactions, emails, and online reservations, was engaged in commerce); Gashlin v. International Clinical Research-US, LLC, 2014 WL 3057383 (M.D. Fla. July 7, 2014) (denying summary judgment for employer based on plaintiff’s allegation that she regularly used mail, Federal Express, and telephones); Kendrick v. Eagle Int’l Group, LLC, 2010 WL 1257674 (S.D. Fla. Mar. 26, 2010) (denying motion to dismiss for lack of individual coverage because complaint alleged that employee’s duties included using telephone on daily basis, as well as using postal service and Internet); Lopez v. Yvette Pereyra Ans, M.D., P.A., 2010 WL 335638 (S.D. Fla. Jan. 29, 2010) (making out-of-state phone calls and receiving out-of-state mail sufficient to establish individual coverage).

    *Opinion Letters:* WH Op. FLSA2001-13, 2001 WL 1870156 (May 8, 2001) (members of nonprofit institution providing psychiatric rehabilitation programs who “regularly and repeatedly prepare, handle, or work on” clubhouse mailings sent out of state, or perform bookkeeping related to interstate transactions, engaged in commerce) [↑](#footnote-ref-42)
42. 29 C.F.R. §776.10(a); Goldstein v. Dabanian, 291 F.2d 208, 15 WH Cases 84 (3d Cir. 1961) (employees who cash nonpersonal checks drawn on out-of-state banks engaged in commerce); *cf.* Bozant v. Bank of N.Y., 156 F.2d 787, 6 WH Cases 157 (2d Cir. 1946) (maintenance workers at bank that generated commercial paper engaged in production of goods for commerce). [↑](#footnote-ref-43)
43. Wirtz v. Valco, Inc., 280 F. Supp. 449, 18 WH Cases 322 (S.D. Tex. 1968) (secretary and collectors employed by small interstate loan company engaged in commerce), *aff’d*, 407 F.2d 1322, 18 WH Cases 760 (5th Cir. 1969); Wirtz v. Welfare Fin. Corp., 263 F. Supp. 229, 17 WH Cases 601 (N.D. W. Va. 1967) (cashier-stenographer employed by small loan company engaged in commerce, but collectors performing duties solely within one state not engaged in commerce). [↑](#footnote-ref-44)
44. 29 C.F.R. §776.10(a); Wirtz v. Wardlaw, 339 F.2d 785, 16 WH Cases 763 (4th Cir. 1964). [↑](#footnote-ref-45)
45. Mabee v. White Plains Publ’g Co., 327 U.S. 178, 5 WH Cases 877 (1946); Oklahoma Press Publ’g Co. v. Walling, 327 U.S. 186, 5 WH Cases 864 (1946); Sun Publ’g Co. v. Walling, 140 F.2d 445, 4 WH Cases 126 (6th Cir. 1944). [↑](#footnote-ref-46)
46. 29 C.F.R. §776.10(b) (DOL’s position that employee engaged in commerce by continued use of interstate mails, telegraph, telephone, or similar instrumentalities of communication “does not mean that any use by an employee of the mails and other channels of communication is sufficient to establish coverage”). The DOL’s Wage and Hour Division (WHD), as a matter of enforcement policy, has stated that it will not extend individual coverage to residential schoolhouse parents based on occasional insubstantial interstate telephone, mail, or electronic communications. WH Op. FLSA2005-52, 2005 WL 3308623, at \*2 (Nov. 14, 2005) (“As a practical matter, the [WHD] will not assert that an employee who on isolated occasions spends an insubstantial amount of time performing individually covered work is individually covered by the FLSA.”); FOH §11a01.

    *See also*

    *Second Circuit:* Bowrin v. Catholic Guardian Soc’y, 417 F. Supp. 2d 449, 468 (S.D.N.Y. 2006) (employees who distributed personal mail for and assisted residents of group homes in picking up out-of-state personal phone calls not subject to individual coverage).

    *Fourth Circuit:* Aguilar v. LR Coin Laundromat, Inc., 2012 WL 1569552 (D. Md. May 2, 2012) (finding no individual coverage as to employees of laundromat basedon handling clothing and selling soap and other items from out of state, and receipt of out-of-state mail and responses to telephone calls); Russell v. Continental Rest., Inc., 430 F. Supp. 2d 521 (D. Md. 2006) (granting employer’s motion to dismiss on grounds that plaintiff waitress not employee engaged in commerce where, among other things, she made limited telephone calls to out-of-state vendors and credit card companies).

    *Fifth Circuit:* Jefferson v. Mike Bloomberg 2020 Inc., 2021 BL 182369, 2021 WL 1966844, at \*7–-9 (N.D. Tex. May 17, 2021) (field organizer for political campaign did not establish that her interstate phone calls were so regular and recurrent such that they were “‘directly and vitally related to the functioning’” of her employment); Armas v. St. Augustine Old Roman Cath. Church, 2019 WL 2929616 (N.D. Tex. July 8, 2019) (holding employee who performed janitorial work at local church was not “engaged in commerce”; single trip out of state to transport goods was not “regular and recurrent” use of instrumentalities of commerce).

    *Seventh Circuit:* Lehman v. Teamsters Retiree Hous. of Janesville, Wis., Inc., 2010 WL 1729880 (W.D. Wis. Apr. 27, 2010) (occasionally taking out-of-state phone calls and sending out-of-state mail insufficient to establish individual coverage).

    *Ninth Circuit:* Llanes v. Zalewski, 412 F. Supp. 3d 1266 (D. Or. 2019) (holding buying goods locally and receiving and distributing mail and food deliveries to residents on a weekly basis insufficient to establish individual coverage).

    *Eleventh Circuit:* Dent v. Giaimo, 606 F. Supp. 2d 1357, 1361 (S.D. Fla. 2009) (employee failed to establish she engaged in commerce where she regularly used telephone, Internet, and fax, but did not establish how often she engaged in these activities); Curry v. High Springs Family Practice & Diagnosis Ctr., Inc., 2009 WL 3163221 (N.D. Fla. Sept. 30, 2009) (same). *But see* Westley v. Love Pet Grooming Salon, Inc., 2019 WL 249716 (M.D. Fla. Jan. 17, 2019) (in contrast to *Dent*, plaintiffs alleged that they regularly made and received interstate telephone calls, text messages, and email inquiries in order to schedule services for pets of seasonal, out-of-state customers; this was sufficient to find that individual coverage had been adequately pled) [↑](#footnote-ref-47)
47. Fares v. H, B, & H, LLC, 2023 BL 203354, 2023 WL 3997040 (E.D. Wis. June 14, 2023) (holding dancers’ allegations that their employer used the internet to advertise was insufficient to establish coverage because analysis focuses on the employee’s, not employer’s, activity); Miller v. Centerfold Ent. Club, Inc., 2017 BL 278535, 2017 WL 3425887, at \*3–4 (W.D. Ark. Aug. 9, 2017) (finding exotic dancers regularly used instrumentality of interstate commerce because they streamed music over Internet as part of performance); Foster v. Gold & Silver Priv. Club, Inc., 2015 BL 404218, 2015 WL 8489998, at \*6 (W.D. Va. Dec. 9, 2015) (holding that exotic dancers regularly used instrumentality of commerce because they selected and streamed music over Internet as part of performance). *But see* Mays v. Rubiano, Inc., 560 F. Supp. 3d 1230, 1236–38 (N.D. Ind. 2021) (asserting that “[t]he internet is an instrumentality of commerce,” but holding exotic dancers were not regularly using Internet to stream music for performances because music was selected by others and streaming was not executed by dancers). [↑](#footnote-ref-48)
48. *See* Kim v. Hopfauf, 2017 WL 85441 (N.D. Ill. Jan. 10, 2017) (employee’s processing of “credit card transactions at least 10 times a day” sufficient to defeat employer’s motion for summary judgment as to individual coverage); Sandals v. Wright, 2013 WL 5497788 (E.D. Tex. Oct. 3, 2013) (employee engaged in commerce where she processed credit card payments for out-of-state customers, handled interstate mail, made interstate telephone calls, and booked reservations for out-of-state customers); Letter from DOL Assoc. Solicitor, Fair Labor Standards Div., to Gen. Counsel, National Rest. Ass’n (Mar. 30, 1990) (employees who regularly process credit card transactions engaged in commerce). [↑](#footnote-ref-49)
49. *Second Circuit:* Owusu v. Corona Tire Shop, Inc., 2013 WL 1680861 (E.D.N.Y. Apr. 17, 2013) (tire shop employee’s processing of credit card transactions once or twice per day insufficient to establish employee engaged in commerce).

    *Fifth Circuit:* Ecoquij-Tzep v. Hawaiian Grill, 2016 WL 8674569 (N.D. Tex. Dec. 16, 2016) (employees whose duties involved processing credit card transactions did not qualify for individual coverage).

    *Eleventh Circuit:* Thorne v. All Restoration Serv., Inc., 448 F.3d 1264 (11th Cir. 2006) (home restoration employee not engaged in commerce based on occasional use of credit card to purchase supplies from in-state retailer); Joseph v. Nichell’s Caribbean Cuisine, Inc., 862 F. Supp. 2d 1309 (S.D. Fla. 2012) (employees whose duties involved processing credit card transactions did not qualify for individual coverage); Dent v. Giaimo, 606 F. Supp. 2d 1357 (S.D. Fla. 2009) (same) [↑](#footnote-ref-50)
50. *Second Circuit:* Yupa v. Country Stone & Fence Corp., 2017 WL 27957 (E.D.N.Y. Jan. 3, 2017) (seasonal landscaper who worked with fencing, brick, stone, and transportation equipment that originated from outside the state was not engaged in commerce because handling goods after acquisition by a merchant for general local disposition is not sufficient for individual coverage); Jones v. SCO Family of Serv., 202 F. Supp. 3d 345, 351 (S.D.N.Y. 2016) (child placement worker failed to sufficiently allege that she was engaged in commerce based upon “regular use of items ordered from outside of New York” where allegations were vague and did not specify whether she was involved in ordering supplies); Jian Long Li v. Li Qin Zhao, 35 F. Supp. 3d 300 (E.D.N.Y. 2014) (delivery driver who used vehicle manufactured out of state and purchased gasoline that had traveled in interstate commerce not engaged in commerce); Xelo v. Mavros, 2005 WL 2385724 (E.D.N.Y. Sept. 28, 2005) (employee of bagel shop who had incidental contacts with goods once shipped in interstate commerce not engaged in commerce).

    *Fourth Circuit:* Bellows v. Darby Landscaping, 2016 WL 264914 (D. Md. Jan. 21, 2016) (plaintiff’s handling of interstate goods for purely local purposes is insufficient for individual coverage); Aguilar v. LR Coin Laundromat, Inc., 2012 WL 1569552 (D. Md. May 2, 2012) (employees handling soap, cleaning products, and other goods that moved through interstate commerce not engaged in commerce).

    *Fifth Circuit*: Dunlop v. Industrial Am. Corp., 516 F.2d 498 (5th Cir. 1975) (garbage removal employees using oil and gasoline purchased from in-state retailer previously shipped in interstate commerce not engaged in commerce); Mendoza v. Detail Solutions, LLC, 911 F. Supp. 2d 433 (N.D. Tex. 2012) (employee who detailed automobiles manufactured out of state for local dealerships not engaged in commerce).

    *Seventh Circuit:* Han Lin v. China Wok Hillsboro, Inc., 2022 BL 302283, 2022 WL 3716587, at \*3 (C.D. Ill. Aug. 29, 2022) (restaurant cook and waiter failed to establish individual coverage based upon their use of ingredients that traveled in interstate commerce to prepare food for local customers (collecting cases)); Fares v. H, B, & H, LLC, 2023 BL 203354, 2023 WL 3997040 (E.D. Wis. June 14, 2023) (dancers were not individually covered based on fact they occasionally performed services for customers who traveled from out-of-state); Aranda v. J. Vega’s Constr., Inc., 2018 WL 3232790 (N.D. Ill. July 2, 2018) (bricklayer’s allegation of purchasing and transporting materials and goods produced in interstate commerce did not support the plausible inference that bricklayer’s individual work was “directly and vitally” or “clearly related” to the movement of the commerce); Jacoby v. Schimka Auto Wreckers, Inc., 2010 WL 3171515 (N.D. Ill. Aug. 11, 2010) (tangential use of tools that may have traveled in interstate commerce fell under category of “isolated local activity” and did not qualify for individual coverage under FLSA).

    *Ninth Circuit: Zalewski,* 412 F. Supp. 3d 1266 (home care worker not “engaged in commerce” where she bought food and medications that had previously travelled in interstate commerce from a local store).

    *Eleventh Circuit:* Martinez v. Jade Palace, 414 F. App’x 243 (11th Cir. 2011) (following *McLeod v. Threlkeld*, 319 U.S. 491 (1943), and *Thorne v. All Restoration Serv., Inc*., 448 F.3d 1264 (11th Cir. 2006),to find no individual coverage where restaurant cook presented no evidence that he “engaged in commerce” or was required to travel across state lines or to transport materials that were moving in interstate commerce, and admitted that he did not use telephone, Internet, or mail as part of duties); Guzman v. Irmadan, Inc., 314 F. App’x 179 (11th Cir. 2008) (affirming district court’s holding that cabinet maker’s purchase of out-of-state materials at local hardware stores did not render him engaged in commerce); *Thorne*, 448 F.3d 1264 (home restoration employee using tools purchased from in-state retailer that previously had been shipped in interstate commerce not engaged in commerce); Ledbetter v. S.T.A.R. Sec. Corp., 2021 BL 116598, 2021 WL 1246013, at \*5–-6 (S.D. Fla. Mar. 26, 2021) (employee providing intrastate security services that used vehicles, weapons, and uniforms that traveled in interstate commerce not engaged in commerce); Wright v. Eagle Exterminating Co., 2010 WL 2653237 (M.D. Fla. July 2, 2010) (purchase of chemicals used for pest control manufactured out of state did not mean plaintiff engaged in interstate commerce because chemicals were purchased for use in Florida); Navarro v. Broney Auto. Repairs, Inc., 533 F. Supp. 2d 1223 (S.D. Fla. 2008) (commercial mechanic not engaged in commerce where he purchased and installed out-of-state parts); Junkin v. Emerald Lawn Maint. & Landscaping, Inc., 2005 WL 2862079 (M.D. Fla. Nov. 1, 2005) (concluding that no individual coverage triggered by use of cell phone or local transportation of herbicides and fertilizers that had previously moved in interstate commerce) [↑](#footnote-ref-51)
51. Fares v. H, B, & H, LLC, 2023 BL 203354, 2023 WL 3997040 (E.D. Wis. June 14, 2023) (dancers could not establish coverage based solely on fact that their employer used a website to advertise their business). [↑](#footnote-ref-52)
52. See§II.C.1 [Individual Coverage; “Engaged in the Production of Goods”; “Production”] of this chapter for a discussion of the scope of individual coverage for employees engaged in the production of goods for commerce. [↑](#footnote-ref-53)
53. See§III [Enterprise Coverage] of this chapter for a discussion of enterprise coverage. *See, e.g.*, Diaz v. Jaguar Rest. Grp., LLC, 649 F. Supp. 2d 1343 (S.D. Fla. 2009) (concluding employee could not establish individual coverage, but finding enterprise coverage); Exime v. E.W. Ventures, Inc., 591 F. Supp. 2d 1364 (S.D. Fla. 2008) (concluding employee could not establish individual coverage, but finding enterprise coverage on basis of plaintiff’s daily use in dry cleaning business of materials that had previously moved in interstate commerce, such as cleaning chemicals, vehicles, and machinery); Galdames v. N&D Inv. Corp., 2008 WL 4372889 (S.D. Fla. Sept. 24, 2008) (establishing enterprise coverage on basis of cleaning materials that had previously moved in commerce). [↑](#footnote-ref-54)
54. 29 C.F.R. §776.11(a) (“Another large category of employees covered as ‘engaged in commerce’ is comprised of employees performing the work involved in the maintenance, repair, or improvement of existing instrumentalities of commerce.”). [↑](#footnote-ref-55)
55. *Id.* [↑](#footnote-ref-56)
56. *Id.* §776.11(d). [↑](#footnote-ref-57)
57. *Id.* §776.11(b) (“It is well-settled that the work of employees involved in the maintenance, repair, or improvement of such instrumentalities of commerce is so closely related to interstate or foreign commerce as to be in practice and in legal contemplation part of it.”). [↑](#footnote-ref-58)
58. *Supreme Court:* Boutell v. Walling, 327 U.S. 463, 5 WH Cases 902 (1946) (employees working on vehicles used exclusively to transport goods across state lines engaged in commerce).

    *Second Circuit:* Skidmore v. Casale, Inc., 160 F.2d 527, 6 WH Cases 789 (2d Cir. 1947) (employees performing a substantial amount of work on vehicles used to transport goods across state lines engaged in commerce).

    *Third Circuit:* Walling v. Keansburg Steamboat Co., 162 F.2d 405, 6 WH Cases 1002 (3d Cir. 1947) (employees preparing and repairing steamboats engaged in commerce).

    *Fifth Circuit:* Wirtz v. B.B. Saxon Co., 365 F.2d 457, 17 WH Cases 415 (5th Cir. 1966) (employees repairing motor vehicles at Air Force base engaged in commerce); Bodden v. McCormick Shipping Corp., 188 F.2d 773, 10 WH Cases 218 (5th Cir. 1951) (employee working on navigable yacht as it waits in American port engaged in commerce) [↑](#footnote-ref-59)
59. *Supreme Court:* Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 212, 14 WH Cases 13 (1959) (extending FLSA coverage to draftsmen, fieldmen, clerks, and stenographers who “worked intimately” with plans and specifications prepared by engineering firm for repair and construction of air bases, roads, turnpikes, bus terminals, and radio and television stations); Mitchell v. Vollmer & Co., 349 U.S. 427, 12 WH Cases 522 (1955) (employees working on lock that would become part of the Gulf Intracoastal Waterway covered by FLSA because they were improving existing facility of interstate commerce); Fitzgerald Constr. Co. v. Pedersen, 324 U.S. 72, 5 WH Cases 242 (1945) (employees repairing bridges over which interstate railroad tracks were laid engaged in commerce); Overstreet v. North Shore Corp., 318 U.S. 125, 2 WH Cases 68 (1943) (employees who maintained and operated toll road and drawbridge over navigable waterway engaged in commerce).

    *First Circuit:* Mitchell v. Municipal Signal & Supply Co., 181 F. Supp. 152, 14 WH Cases 474 (D. Mass. 1960) (employees installing and servicing traffic signals engaged in commerce).

    *Fifth Circuit:* Wirtz v. Atlantic States Constr. Co., 357 F.2d 442, 17 WH Cases 257 (5th Cir. 1966) (employees constructing wharf to be added to existing facilities for maritime commerce engaged in commerce); Archer v. Brown & Root, Inc., 241 F.2d 663, 13 WH Cases 175 (5th Cir. 1957) (employees involved in construction of causeway linked to existing highway system engaged in commerce); Wirtz v. Peel, 276 F. Supp. 8, 16 WH Cases 681 (E.D. Tex. 1964) (employees cutting grass along interstate highways engaged in commerce).

    *Eighth Circuit:* Austford v. Goldberg, 292 F.2d 234, 15 WH Cases 135 (8th Cir. 1961) (employees involved in maintenance and repair of highways engaged in commerce) [↑](#footnote-ref-60)
60. *Supreme Court: Lublin, McGaughy & Assocs*., 358 U.S. 207.

    *Third Circuit:* Walling v. McCrady Constr. Co., 156 F.2d 932, 6 WH Cases 209 (3d Cir. 1946) (employees who repair, relocate, and construct telephone facilities engaged in commerce).

    *Fifth Circuit:* Taylor v. HD and Assocs., LLC, 45 F.4th 833, 838 (5th Cir. 2022) (cable installers engaged in commerce because they “work directly on the instrumentalities of interstate commerce, including phone and internet service”).

    *Seventh Circuit:* Wirtz v. Indiana Cablevision, 270 F. Supp. 973, 18 WH Cases 121 (S.D. Ind. 1967) (employees who install, operate, maintain, service, and construct equipment used by company relaying national television broadcasts engaged in commerce) [↑](#footnote-ref-61)
61. *Lublin, McGaughy & Assocs.*, 358 U.S. 207; *see also* Donovan v. Tehco, Inc., 642 F.2d 141, 24 WH Cases 1362 (5th Cir. 1981) (employees who build, maintain, and rehabilitate gasoline service stations under contract with oil company engaged in commerce). [↑](#footnote-ref-62)
62. 29 C.F.R. §776.23c (covered employees on construction project related to an instrumentality of commerce include “mechanics, laborers, handymen, truck drivers, watchmen, guards, timekeepers, inspectors, checkers, surveyors, payroll workers, and repairmen” as well as “clerical, bookkeeping, auditing, promotional, drafting, engineering, custodial, and stock room employees”). *See, e.g.*, *Lublin, McGaughy & Assocs.*, 358 U.S. 207 (clerks and stenographers that worked on projects for engineering firm that designed warehouses, streets, airplane taxiways, and other construction projects engaged in commerce); Wirtz v. Crystal Lake Crushed Stone Co., 327 F.2d 455, 16 WH Cases 348 (7th Cir. 1964) (truck drivers hauling highway construction materials engaged in commerce). [↑](#footnote-ref-63)
63. Russell Co. v. McComb, 187 F.2d 524, 10 WH Cases 120 (5th Cir. 1951) (night watchman who guarded grocery shipments loaded in freight cars and trucks waiting to be transported across state lines engaged in commerce); Bennett v. Loftis Co., 167 F.2d 286, 7 WH Cases 874 (4th Cir. 1948); Slover v. Wathen, 140 F.2d 258, 4 WH Cases 90 (4th Cir. 1944) (night watchman of pier where barges engaged in interstate commerce were tied engaged in commerce); Dimingo v. Midnight Xpress, Inc., 2018 WL 770428 (S.D. Fla. Jan. 16, 2018) (relying on *Russell*, finding that plaintiff’s security services contributed materially to defendant’s interstate business making plaintiff entitled to individual coverage); Marshall v. Nauta-Crete, Ltd., 1977 WL 1777, 23 WH Cases 599 (E.D. Va. Aug. 17, 1977) (watchman employed by builder of concrete barge that intended to and did move in commerce); *see also* 29 C.F.R. §776.11(b). *But see* Ledbetter v. S.T.A.R. Sec. Corp., 2021 BL 116598, 2021 WL 1246013, at \*7–8 (S.D. Fla. Mar. 26, 2021) (security employee who guarded trucks and warehouses of retailers following hurricane failed to establish he engaged in interstate commerce where employee offered no evidence that he guarded areas involved in interstate transportation of goods or performed other security assignments related to interstate commerce on more than an “infrequent or irregular” basis). [↑](#footnote-ref-64)
64. Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310, 6 WH Cases 338 (8th Cir. 1946) (employee who inspected and maintained tanks where petroleum products were temporarily stored engaged in commerce); Walling v. Mutual Wholesale Food & Supply Co., 141 F.2d 331, 4 WH Cases 277 (8th Cir. 1944) (warehouse watchman for wholesale grocery corporation engaged in commerce); Marshall v. Lutz, 1979 WL 1926, 24 WH Cases 516 (M.D. Fla. Aug. 9, 1979) (employees guarding research lab that engaged in interstate commerce and guarding scrap metal to be shipped across state lines engaged in commerce); 29 C.F.R. §776.11(b). [↑](#footnote-ref-65)
65. *Supreme Court:* D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 6 WH Cases 2 (1946) (service and maintenance employees of building occupied by tenants who participated in interstate commerce).

    *First Circuit:* Mitchell v. Dooley Bros., 286 F.2d 40, 14 WH Cases 842 (1st Cir. 1960) (employees performing janitorial services for businesses engaged in interstate commerce engaged in commerce).

    *Seventh Circuit:* Hargis v. Wabash R.R. Co., 163 F.2d 608, 6 WH Cases 580 (7th Cir. 1947) (railroad station janitor engaged in commerce) [↑](#footnote-ref-66)
66. 29 C.F.R. §776.23(c). [↑](#footnote-ref-67)
67. *Id.* §776.11(d); New Mexico Pub. Serv. Co. v. Engle, 145 F.2d 636, 4 WH Cases 809 (10th Cir. 1944) (employees of power plant providing electricity to interstate railroad, telephone, telegraph, postal, and express companies engaged in commerce). [↑](#footnote-ref-68)
68. Mitchell v. Owen, 292 F.2d 71, 15 WH Cases 139 (6th Cir. 1961) (employees supplying sand and gravel to naval air station engaged in commerce); Mitchell v. Emala & Assocs., 274 F.2d 781, 14 WH Cases 443 (4th Cir. 1960) (employee hauling fill dirt to highway construction site engaged in commerce); Goldberg v. Forcum-Lannom, Inc., 205 F. Supp. 119, 15 WH Cases 463 (W.D. Tenn. 1962) (employees supplying ready-mix concrete for highway expansion and improvements engaged in commerce). [↑](#footnote-ref-69)
69. Brennan v. Carrasco, 540 F.2d 454, 22 WH Cases 1243 (9th Cir. 1976) (employees of liquid waste disposal company who regularly removed liquid waste from plants producing goods for interstate commerce engaged in commerce); Mitchell v. Dooley Bros., 286 F.2d 40, 14 WH Cases 842 (1st Cir. 1960) (employees who removed garbage and ashes from local commercial firms and federal agencies engaged in commerce). [↑](#footnote-ref-70)
70. *Fourth Circuit:* Conway v. Takoma Park Volunteer Fire Dep’t, 666 F. Supp. 786, 28 WH Cases 314 (D. Md. 1987) (fire and rescue workers who, in responding to emergencies, regularly removed obstructions from roads and highways engaged in commerce).

    *Sixth Circuit:* Benson v. Universal Ambulance Serv., Inc., 675 F.2d 783, 786 (6th Cir. 1982) (ambulance service employees engaged in commerce because they “remove obstructions from … streets and highways as to enable commerce to move freely”).

    *Seventh Circuit:* Felker v. Southwest Emergency Med. Serv., Inc., 521 F. Supp. 2d 857, 864 (S.D. Ind. 2007) (emergency medical technicians and ambulance drivers engaged in commerce because their duties included responding “to emergency calls about accidents on highways and roadways”).

    *Tenth Circuit:* Tobin v. Pennington-Winter Constr. Co., 198 F.2d 334, 11 WH Cases 11 (10th Cir. 1952) (employees who removed debris from area where, as part of comprehensive program to improve existing navigable waterway, new reservoir was to be built engaged in commerce).

    *See also* Alvarez v. Amb-Trans, Inc., 2012 WL 4103876 (W.D. Tex. Sept. 17, 2012) (ambulance drivers engaged in commerce because they transported patients on interstate roadways and received payments from federal Medicare program) [↑](#footnote-ref-71)
71. 29 C.F.R. §776.11(c). [↑](#footnote-ref-72)
72. McLeod v. Threlkeld, 319 U.S. 491, 2 WH Cases 75 (1943). [↑](#footnote-ref-73)
73. Skidmore v. Casale, Inc., 160 F.2d 527, 6 WH Cases 789 (2d Cir. 1947); *see also* Durkin v. Girard Props., 206 F.2d 524, 11 WH Cases 552 (5th Cir. 1953) (service and maintenance workers in building partly occupied by telephone company not covered by FLSA because their work not integral to interstate commerce). [↑](#footnote-ref-74)
74. McCann v. W.C. Pitts Constr. Co., 2012 WL 3756608 (S.D. Miss. Aug. 28, 2012) (employees who performed general maintenance at military base not engaged in commerce). [↑](#footnote-ref-75)
75. *Fourth Circuit:* Rains v. East Coast Towing & Storage, LLC, 820 F. Supp. 2d 743 (E.D. Va. 2011) (finding no individual coverage of tow truck driver who handled vehicles that likely had crossed state lines because work not directly and vitally related to functioning of instrumentality of interstate commerce as to be part of it, rather than isolated, local activity).

    *Fifth Circuit:* Mendoza v. Detail Solutions, LLC, 911 F. Supp. 2d 433 (N.D. Tex. 2012) (employee who detailed automobiles manufactured out of state for local dealerships not engaged in commerce).

    *Sixth Circuit:* Jones v. Safeway Muffler Service Center, Inc., 2019 WL 670073 (E.D. Mich. Feb. 19, 2019) (auto technician at a muffler service center not engaged in commerce); Bauer v. Singh, 2010 WL 5088126 (S.D. Ohio Dec. 7, 2010) (auto salvage employee not engaged in commerce).

    *Seventh Circuit:* Rivas v. Marcelo Hand Care Wash Inc., 2010 WL 4386858 (N.D. Ill. Oct. 28, 2010) (employee who washed, vacuumed, and dried automobiles not engaged in commerce).

    *Eleventh Circuit:* Navarro v. Broney Auto. Repairs, Inc., 533 F. Supp. 2d 1223 (S.D. Fla. 2008) (commercial mechanic not engaged in commerce where he purchased and installed out-of-state parts) [↑](#footnote-ref-76)
76. 29 U.S.C. §§206(a), 207(a)(1), 212(c). [↑](#footnote-ref-77)
77. *Id.* §203(j). [↑](#footnote-ref-78)
78. *Id*. [↑](#footnote-ref-79)
79. Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 4 WH Cases 951 (1945). [↑](#footnote-ref-80)
80. 29 C.F.R. §776.15 (“[T]he Act’s ‘production’ coverage embraces many employees who serve productive enterprises in capacities which do not involve working directly on goods but which are nevertheless closely related and directly essential to successful operations in producing goods for interstate or foreign commerce.”). [↑](#footnote-ref-81)
81. Borden Co. v. Borella, 325 U.S. 679, 5 WH Cases 381 (1945) (maintenance employees at office building that housed executive officers and administrative employees for company that produced goods for interstate commerce were engaged in an “occupation necessary to the production of goods for interstate commerce”); Armour & Co. v. Wantock, 323 U.S. 126, 4 WH Cases 862 (1944) (fire guards employed by manufacturer of goods for interstate commerce employed in an “occupation necessary to the production of goods for interstate commerce”). Note, however, that although employees who perform these functions are considered to be subject to individual coverage, they may be exempt from the FLSA’s minimum wage and maximum hours requirements. See Chapter 5, White-Collar Exemptions, for a full discussion of such exemptions. [↑](#footnote-ref-82)
82. 29 C.F.R. §776.15(b) (stating that employee will be considered subject to coverage of FLSA “if he is working in a place of employment where goods sold or shipped in interstate or foreign commerce are being produced, unless the employer maintains the burden of establishing that the employee’s functions are so definitely segregated from production that they should not be regarded as closely related and directly essential thereto”); *cf. Armour*, 323 U.S. 126, 131 (fire guards at soap factory that produced goods for interstate commerce within coverage of FLSA because they “safeguarded the continuity of production against interruption by fire” and reduced cost of insurance premiums for production facility). [↑](#footnote-ref-83)
83. Roland Elec. Co. v. Walling, 326 U.S. 657, 658, 5 WH Cases 831 (1946) (“It is enough that the employee be employed … in an occupation which is necessary to the production of a part of any other ‘articles or subjects of commerce of any character’ which are produced for trade, commerce, or transportation among the several states.”); Kirschbaum Co. v. Walling, 316 U.S. 517, 524. 2 WH Cases 34 (1942) (“Nor can we find in the Act … any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production.”); 29 C.F.R. §776.15(b). [↑](#footnote-ref-84)
84. 29 C.F.R. §776.16(b). [↑](#footnote-ref-85)
85. *Id.* [↑](#footnote-ref-86)
86. *Id*. §776.16(c) (citing McComb v. Wyandotte Furniture Co., 169 F.2d 766, 8 WH Cases 244 (8th Cir. 1948); Walling v. Mutual Wholesale Food & Supply Co., 141 F.2d 331, 4 WH Cases 277 (8th Cir. 1944); West Ky. Coal Co. v. Walling, 153 F.2d 582, 5 WH Cases 880 (6th Cir. 1946); Walling v. Home Loose Leaf Tobacco Warehouse Co., 51 F. Supp. 914, 3 WH Cases 630 (E.D. Ky. 1943); and Walling v. Yeakley, 3 WH Cases 27 (D. Colo.), *modified and aff’d*, 140 F.2d 830, 4 WH Cases 93 (10th Cir. 1944)); *see also* Figueroa v. America’s Custom Brokers, Inc., 48 F. Supp. 2d 1372, 1375 (S.D. Fla. 1999) (referring to “early federal cases” and regulatory guidance in holding that employees who load and unload goods that are part of stream of commerce engaged in commerce for purposes of FLSA). [↑](#footnote-ref-87)
87. 29 C.F.R. §776.16(c) (citing Bracey v. Luray, 138 F.2d 8, 3 WH Cases 597 (4th Cir. 1943)). [↑](#footnote-ref-88)
88. *Id*. (citing Walling v. Friend, 156 F.2d 429, 6 WH Cases 162 (8th Cir. 1946); Fleming v. Swift & Co., 41 F. Supp. 825, 1 WH Cases 778 (N.D. Ill. 1941), *aff’d*, 131 F.2d 249, 2 WH Cases 186 (7th Cir. 1942); McComb v. Benz Co., 9 WH Cases 277 (S.D. Ind. 1949)). [↑](#footnote-ref-89)
89. *Id*. (citing Walling v. Villaume Box & Lumber Co., 58 F. Supp. 150, 3 WH Cases 328 (D. Minn. 1943)). [↑](#footnote-ref-90)
90. *Id*. (citing Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655, 2 WH Cases 120 (10th Cir. 1942); Boling v. R.J. Allison Co., 4 WH Cases 500 (N.D. Okla. 1944)). [↑](#footnote-ref-91)
91. *Id*. (citing Hanson v. Lagerstrom, 133 F.2d 120, 3 WH Cases 72 (8th Cir. 1943)). [↑](#footnote-ref-92)
92. 29 C.F.R. §776.16(c) (citing Walling v. Griffin Cartage Co., 62 F. Supp. 696, 5 WH Cases 575 (E.D. Mich. 1945), *aff’d*, 153 F.2d 587, 5 WH Cases 896 (6th Cir. 1946); Walling v. Comet Carriers, 151 F.2d 107, 5 WH Cases 549 (2d Cir. 1945)). [↑](#footnote-ref-93)
93. *Id*. (citing Slover v. Wathen, 140 F.2d 258, 4 WH Cases 90 (4th Cir. 1944)). [↑](#footnote-ref-94)
94. *Id*. (citing Hertz Drivurself Stations v. United States, 150 F.2d 923, 5 WH Cases 558 (8th Cir. 1945); Walling v. Armbruster, 51 F. Supp. 166, 3 WH Cases 619 (W.D. Ark. 1943); McComb v. Weller, 9 WH Cases 53 (W.D. Tenn. 1949); Walling v. Sturm & Sons, 6 WH Cases 131 (D.N.J. 1946)). [↑](#footnote-ref-95)
95. *Id*. (citing Engebretsen v. Albrecht, 150 F.2d 602, 5 WH Cases 455 (7th Cir. 1945); Guess v. Montague, 140 F.2d 500, 3 WH Cases 590 (4th Cir. 1943)). [↑](#footnote-ref-96)
96. *Id*. (citing Walling v. Belikoff, 147 F.2d 1008, 5 WH Cases 155 (2d Cir. 1945); Phillips v. Star Overall Dry Cleaning Laundry Co., 149 F.2d 416, 5 WH Cases 16 (2d Cir. 1945); Campbell v. Zavelo, 10 So. 2d 29, 2 WH Cases 1029 (Ala. 1942)). [↑](#footnote-ref-97)
97. 29 C.F.R. §776.16(c); *see also* Marshall v. Lutz, 24 WH Cases 516 (M.D. Fla. 1979) (considering salvage company that prepared and shipped metals out of state to be producer of goods for commerce); Pedreyra v. Cornell Prescription Pharms., 465 F. Supp. 936, 23 WH Cases 1282 (D. Colo. 1979) (holding that FLSA applied to pharmacy that employed person who regularly handled drugs shipped in interstate commerce). [↑](#footnote-ref-98)
98. 29 C.F.R. §776.16(c). [↑](#footnote-ref-99)
99. *Id*. §776.16(b), (c). [↑](#footnote-ref-100)
100. Borden Co. v. Borella, 325 U.S. 679, 683, 5 WH Cases 381 (1945); *see also Id*. §776.16(d). [↑](#footnote-ref-101)
101. *Borden*, 325 U.S. at 683. [↑](#footnote-ref-102)
102. 29 C.F.R. §776.16(d). [↑](#footnote-ref-103)
103. 29 U.S.C. §203(i). [↑](#footnote-ref-104)
104. 29 C.F.R §776.20(b) (citing Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 4 WH Cases 951 (1945)). [↑](#footnote-ref-105)
105. *Id*. (citing Walling v. Friend, 156 F.2d 429, 6 WH Cases 162 (8th Cir. 1946)). [↑](#footnote-ref-106)
106. *Id*. (citing Walling v. DeSoto Creamery & Produce Co., 51 F. Supp. 938, 3 WH Cases 395 (D. Minn. 1943)). [↑](#footnote-ref-107)
107. *Id*. (citing Walling v. Haile Gold Mines, 136 F.2d 102, 3 WH Cases 307 (4th Cir. 1943); Fox v. Summit King Mines, 143 F.2d 926, 4 WH Cases 581 (9th Cir. 1944)). [↑](#footnote-ref-108)
108. *Id*. (citing Slover v. Wathen, 140 F.2d 258, 4 WH Cases 90 (4th Cir. 1944)). [↑](#footnote-ref-109)
109. 29 C.F.R. §776.20(b) (citing Hertz Drivurself Stations v. United States, 150 F.2d 923, 5 WH Cases 558 (8th Cir. 1945)). [↑](#footnote-ref-110)
110. *Id*. (citing Jackson v. Northwest Airlines, 75 F. Supp. 32, 6 WH Cases 559 (D. Minn. 1947)). [↑](#footnote-ref-111)
111. *Id*. (citing Phillips v. Star Overall Dry Cleaning Laundry Co., 149 F.2d 416, 5 WH Cases 16 (2d Cir. 1945)). [↑](#footnote-ref-112)
112. *Id*. (citing Hamlet Ice Co. v. Fleming, 127 F.2d 165, 2 WH Cases 131 (4th Cir. 1942); Atlantic Co. v. Walling, 131 F.2d 518, 2 WH Cases 198 (5th Cir. 1942)). [↑](#footnote-ref-113)
113. *Id*. (citing Enterprise Box Co. v. Fleming, 125 F.2d 897, 2 WH Cases 104 (5th Cir. 1942); Fleming v. Schiff, 1 WH Cases 893 (D. Colo. 1941)). [↑](#footnote-ref-114)
114. 29 C.F.R. §776.20(b) (citing Roberg v. Henry Phipps Est., 156 F.2d 958, 6 WH Cases 177 (2d Cir. 1946); Baldwin v. Emigrant Indus. Sav. Bank, 150 F.2d 524, 5 WH Cases 463 (2d Cir. 1945); Bittner v. Chicago Daily News Printing Co., 4 WH Cases 837 (N.D. Ill. 1944); Schineck v. 386 Fourth Ave. Corp., 49 N.Y.S.2d 872, 4 WH Cases 546 (N.Y.C. Ct. 1944)). [↑](#footnote-ref-115)
115. *Id*. (citing Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 4 WH Cases 951 (1945)). [↑](#footnote-ref-116)
116. *Id*. (citing Mabee v. White Plains Publ’g Co., 327 U.S. 178, 5 WH Cases 877 (1946); Yunker v. Abbye Emp. Agency, 32 N.Y.S.2d 715, 2 WH Cases 837 (N.Y.C. Mun. Ct. 1942); Berry v. 34th Irving Place Corp., 52 F. Supp. 875, 4 WH Cases 15 (S.D.N.Y. 1943); Ullo v. Smith, 62 F. Supp. 757, 5 WH Cases 606 (S.D.N.Y. 1945), *aff’d*, 177 F.2d 101, 9 WH Cases 115 (2d Cir. 1949)). [↑](#footnote-ref-117)
117. *Id*. (citing Phillips v. Meeker Coop. Light & Power Assoc., 63 F. Supp. 733, 5 WH Cases 709 (D. Minn. 1945), *aff’d*, 158 F.2d 698, 6 WH Cases 49 (8th Cir. 1946); Lofther v. First Nat’l Bank, 48 F. Supp. 692, 2 WH Cases 721 (N.D. Ill. 1942)). *But see* Kelly v. Ford, Bacon & Davis, Inc., 162 F.2d 555, 6 WH Cases 1027 (3d Cir. 1947); Bozant v. Bank of N.Y., 156 F.2d 787, 6 WH Cases 157 (2d Cir. 1946) (suggesting such things are “goods” only when they are articles of trade). [↑](#footnote-ref-118)
118. *See* 29 C.F.R. §779.107 (including sample books, letterheads, envelopes, shipping tags, labels, checkbooks, blankbooks, book covers, advertising circulars, and wrappers and other packing materials within definition of “goods”); *see also* Donovan v. Micro-Chart Co., 653 F. Supp. 1159, 27 WH Cases 1595 (S.D. Ohio 1986) (holding that microfilm made from customer records considered “goods” under FLSA). [↑](#footnote-ref-119)
119. 29 C.F.R. §§776.20(c), 779.14. [↑](#footnote-ref-120)
120. *Id*. §776.20(c) (citing D.A. Schulte Inc. v. Gangi, 328 U.S. 108, 6 WH Cases 2 (1946)). [↑](#footnote-ref-121)
121. *Id*. §776.21(b)(1). [↑](#footnote-ref-122)
122. *Id*. §776.21(b) (citing Lewis v. Florida Power & Light Co., 154 F.2d 751, 5 WH Cases 978 (5th Cir. 1946)); *see also* Walling v. Connecticut Co., 154 F.2d 552, 5 WH Cases 970 (2d Cir. 1946). [↑](#footnote-ref-123)
123. 29 C.F.R. §776.21(b) (citing Hamlet Ice Co. v. Fleming, 127 F.2d 165, 2 WH Cases 131 (4th Cir. 1942)). [↑](#footnote-ref-124)
124. *Id*. §776.21(b)(2). [↑](#footnote-ref-125)
125. *Id*. *See also*

     *Supreme Court:* Alstate Constr. Co. v. Durkin, 345 U.S. 13, 11 WH Cases 274 (1953).

     *Fifth Circuit:* Mitchell v. Hooper Equip. Co., 279 F.2d 893, 14 WH Cases 651 (5th Cir. 1960).

     *Eighth Circuit:* Tobin v. Johnson, 198 F.2d 130, 11 WH Cases 38 (8th Cir. 1952) [↑](#footnote-ref-126)
126. 29 C.F.R. §776.20(b); Engebretsen v. Albrecht, 150 F.2d 602, 5 WH Cases 455 (7th Cir. 1945); Kenney v. Wigton-Abbot Corp., 80 F. Supp. 489, 8 WH Cases 320 (D.N.J. 1948). [↑](#footnote-ref-127)
127. Mitchell v. Kroger Co., 150 F. Supp. 30 (W.D. Mo. 1957), *rev’d on other grounds*, 248 F.2d 935, 13 WH Cases 471 (8th Cir. 1957). [↑](#footnote-ref-128)
128. Harder v. Anderson, 173 F. Supp. 135, 14 WH Cases 234 (D. Minn. 1959). [↑](#footnote-ref-129)
129. Mitchell v. Hygrade Water & Soda Co., 285 F.2d 362, 14 WH Cases 835 (8th Cir. 1960); Clougherty v. James Vernor Co., 74 F. Supp. 364, 7 WH Cases 202 (E.D. Mich. 1947), *modified*, 187 F.2d 288, 10 WH Cases 110 (6th Cir. 1951). [↑](#footnote-ref-130)
130. Byrne v. Metcalfe Constr. Co., 99 F. Supp. 635, 10 WH Cases 416 (D. Neb. 1951); *Kenney*, 80 F. Supp. 489. Although military installations may not constitute “goods” for purposes of the FLSA, they may qualify as “instrumentalities of commerce” if, for example, “interstate flights both land at and take off from them, and men, materials, and mail move through them from distant points.” Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 213 (1959). [↑](#footnote-ref-131)
131. St. Johns River Shipbuilding Co. v. Adams, 164 F.2d 1012, 7 WH Cases 498 (5th Cir. 1947). The Fifth Circuit concluded that ships built solely for military use were “goods produced for war, not commerce.” *Id.* at 1015. However, three years later, in *Powell v. U.S. Cartridge Co.*, the Supreme Court held that the production of munitions “for transportation outside of the state and for use by the United States in the prosecution of war, but not for sale or exchange” were “goods” for “commerce” under the FLSA. 339 U.S. 497, 511 (1950). [↑](#footnote-ref-132)
132. Young v. Kellex Corp., 82 F. Supp. 953, 7 WH Cases 562 (E.D. Tenn. 1948). [↑](#footnote-ref-133)
133. Mitchell v. Krout, 150 F. Supp. 857, 13 WH Cases 285 (N.D. Cal. 1957). [↑](#footnote-ref-134)
134. Robinson v. Massachusetts Mut. Life Ins. Co., 158 S.W.2d 441, 1 WH Cases 1196 (Tenn. 1941). [↑](#footnote-ref-135)
135. Sealy v. Mitchell, 249 F.2d 327, 13 WH Cases 493 (5th Cir. 1957). [↑](#footnote-ref-136)
136. Billeaudeau v. Temple Assocs., 213 F.2d 707, 12 WH Cases 197 (5th Cir. 1954). [↑](#footnote-ref-137)
137. Scholl v. McWilliams Dredging Co., 169 F.2d 729, 8 WH Cases 160 (2d Cir. 1948). [↑](#footnote-ref-138)
138. Mitchell v. H.B. Zachry Co., 362 U.S. 310, 14 WH Cases 525 (1960). [↑](#footnote-ref-139)
139. Stevens v. Welcome Wagon Int’l, 390 F.2d 75, 18 WH Cases 458 (3d Cir. 1968). [↑](#footnote-ref-140)
140. 29 U.S.C. §203(j) (employees “engaged in the production of goods for commerce” ifthey, inter alia, are “employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods”); 29 C.F.R. §776.21 (where goods are produced “for commerce,” “every employee engaged in ‘production’ … of such goods (including any ingredient thereof) is within the general coverage of the wage and hour provisions of the Act”). [↑](#footnote-ref-141)
141. 29 U.S.C. §203(b); 29 C.F.R. §776.21(a). [↑](#footnote-ref-142)
142. Powell v. U.S. Cartridge Co., 339 U.S. 497, 512 (1950) (holding that munitions transported interstate for purposes of “use by the United States in the prosecution of war, but not for sale or exchange” were produced “for commerce”). [↑](#footnote-ref-143)
143. 29 C.F.R. §776.21(a). [↑](#footnote-ref-144)
144. *Id*.; D.A. Schulte Inc. v. Gangi, 328 U.S. 108, 108–09, 6 WH Cases 2 (1946) (individual products need not be traced; “[i]t is sufficient that, from the circumstances of production, a trier of fact may reasonably infer that a producer has grounds to anticipate that his products will move interstate”); Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 2 WH Cases 52 (1942) (oil drilling contractor had reasonable basis to believe any extracted oil would move in interstate commerce); United States v. Darby, 312 U.S. 100, 101, 1 WH Cases 17 (1941) (“production for commerce” includes “production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce”). [↑](#footnote-ref-145)
145. 29 C.F.R. §776.21(a); *see also* Johnstone v. Spacefone Corp., 26 WH Cases 267 (11th Cir. 1983) (employee who worked as designer/draftsman assisting employer in development of cordless telephone “engaged in the production of goods for commerce” even though project remained in experimental stage and mass production had not yet begun); Brock v. Kentucky Ridge Mining Co., 27 WH Cases 1409 (W.D. Ky. 1985) (employees of coal mining facility engaged in production of goods for commerce where employer expected some if not all coal to be moved out of state). [↑](#footnote-ref-146)
146. 29 C.F.R. §776.21(a); *Warren-Bradshaw Drilling*, 317 U.S. 88 (employer that drilled exploratory holes for oil exploration covered by FLSA even though it did not extract oil; expectation that other entities would extract oil and ship it in interstate commerce sufficient to meet standard).

     *See also*

     *First Circuit:* Baldrich, Inc. v. Mitchell, 214 F.2d 703 (1st Cir. 1954) (employees engaged in printing payroll forms and other stationery used by local companies engaged in production of goods for interstate commerce).

     *Fourth Circuit:* Dize Box Co. v. Maddrix, 144 F.2d 584, 4 WH Cases 683 (4th Cir. 1944), *aff’d*, 324 U.S. 697, 5 WH Cases 232 (1945) (employees who produced boxes and barrels used by local companies in shipment of crabs and oysters in interstate commerce); Bracey v. Luray, 138 F.2d 8, 3 WH Cases 597 (4th Cir. 1943); Hamlet Ice Co. v. Fleming, 127 F.2d 165, 2 WH Cases 131 (4th Cir. 1942) (employees who produced ice for use by common carriers in transportation of goods and passengers); Mitchell v. Tippett, 163 F. Supp. 7, 13 WH Cases 774 (W.D.N.C. 1958).

     *Fifth Circuit:* Tobin v. Celery City Printing Co., 197 F.2d 228, 10 WH Cases 682 (5th Cir. 1952) (employees engaged in printing labels, bills, sales tickets, and invoices destined for interstate and foreign commerce engaged in production of goods for commerce); Enterprise Box Co. v. Fleming, 125 F.2d 897, 2 WH Cases 104 (5th Cir. 1942) (employees engaged in production of cigar boxes used by local companies to ship cigars in interstate commerce engaged in production of goods for commerce).

     *Sixth Circuit:* Fleming v. Rex Oil & Gas Co., 43 F. Supp. 950, 1 WH Cases 828 (W.D. Mich. 1941) (employees of oil company engaged in production of goods for commerce where employer had reason to believe its locally sold oil would move in interstate commerce).

     *Eighth Circuit:* Walling v. Villaume Box & Lumber Co., 58 F. Supp. 150, 3 WH Cases 328 (D. Minn. 1943) (employees manufacturing boxes and containers sold locally to customers who shipped them interstate engaged in production of goods for commerce).

     *Ninth Circuit:* Tobin v. Grant, 79 F. Supp. 975, 8 WH Cases 361 (N.D. Cal. 1948) (employees employed by book manufacturer that sold books to intrastate purchaser knowing they were destined for another state engaged in production of goods for commerce).

     *Tenth Circuit:* Wirtz v. White, 272 F. Supp. 70, 18 WH Cases 181 (N.D. Okla. 1967) (employees who produced surveys or plats sold locally where employer anticipated their movement in interstate commerce engaged in production of goods for commerce), *aff’d*, 402 F.2d 145, 18 WH Cases 644 (10th Cir. 1968). [↑](#footnote-ref-147)
147. 29 C.F.R. §776.21(c)(2), (d).

     *See also*

     *First Circuit:* Torres v. Lock Joint Pipe Co., 84 F. Supp. 5, 9 WH Cases 27 (D.P.R. 1949) (employees engaged in pipe production not covered by FLSA where pipe intended for installation at local naval station).

     *Fifth Circuit:* Mitchell v. W.E. Belcher Lumber Co., 279 F.2d 789, 14 WH Cases 647 (5th Cir. 1960) (finding no FLSA coverage where lumber company employees could not prove reasonable expectation that goods would eventually be sold in interstate commerce).

     *Seventh Circuit*: Roos v. Tomorrow Sols, LLC, 2023 BL 145070, 2023 WL 3161035, at \*2 (S.D. Ind. Apr. 28, 2023) (holding no FLSA coverage because plaintiff cannabis farmer “only performed ‘localized agricultural activities’”; finding plaintiff’s affidavit stating he understood defendants intended to sell their product interstate insufficient).

     *Wisconsin:* Grippentrog v. Cheese Makers’ Mfg. Co., 13 N.W.2d 391, 4 WH Cases 400 (Wis. 1944) (finding no FLSA coverage where evidence insufficient to establish that cheese produced by manufacturer moved in interstate commerce or that employer intended, hoped, or expected it would so move) [↑](#footnote-ref-148)
148. 29 C.F.R. §776.21(a). [↑](#footnote-ref-149)
149. *Id.* §776.21(b)(2). [↑](#footnote-ref-150)
150. *Id*. (quoting Hamlet Ice Co. v. Fleming, 127 F.2d 165 (4th Cir. 1942)). [↑](#footnote-ref-151)
151. United States v. Darby, 312 U.S. 100, 1 WH Cases 17 (1941) (employees who produced finished lumber for use in production of goods shipped in interstate commerce engaged in production of goods for interstate commerce); D.A. Schulte Inc. v. Gangi, 328 U.S. 108, 6 WH Cases 2 (1946) (maintenance employees of office building that included tenants that shipped garments in interstate commerce engaged in production of goods for interstate commerce).

     *See also*

     *Second Circuit:* Walling v. Cimi Embroidery & Novelty Co., 63 F. Supp. 601, 5 WH Cases 545 (S.D.N.Y. 1945) (homeworkers producing goods sold directly to manufacturers that produced garments destined for interstate shipment engaged in production of goods for commerce).

     *Third Circuit:* Walling v. Kerr, 47 F. Supp. 852, 2 WH Cases 768 (E.D. Pa. 1942) (employees of company that dyed products for local companies, which in turn shipped them interstate, engaged in production of goods for commerce).

     *Fifth Circuit:* Mitchell v. Jaffe, 261 F.2d 883, 13 WH Cases 892 (5th Cir. 1958) (salvage company employees engaged in production of goods for commerce where parts were sold to junkyard, which in turn sold scrap to iron and steel mills engaged in interstate commerce).

     *Ninth Circuit:* Consolidated Timber Co. v. Womack, 132 F.2d 101, 2 WH Cases 11 (9th Cir. 1942) (employees engaged in production of goods for commerce where logging company sold its timber to mills that manufactured lumber for interstate commerce).

     *Tenth Circuit:* Walling v. Peoples Packing Co., 132 F.2d 236, 2 WH Cases 227 (10th Cir. 1942) (employee of meatpacking company that sold hides and offal locally with expectation that they would move in interstate commerce after further processing engaged in production of goods for commerce).

     *But see* Mitchell v. Moore, 241 F.2d 249, 13 WH Cases 132 (6th Cir. 1957) (employees producing livestock for sale to meat producers not engaged in production of goods for commerce even though some meat subsequently shipped out of state). [↑](#footnote-ref-152)
152. Reich v. Stewart, 121 F.3d 400, 404–05, 4 WH Cases2d 50 (8th Cir. 1997). [↑](#footnote-ref-153)
153. 29 C.F.R. §776.21(d). [↑](#footnote-ref-154)
154. 29 U.S.C. §203(j) (emphasis added). The 1949 amendments inserted “closely related” before “process” and substituted “directly essential” for “necessary” after “occupation.” Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, 63 Stat. 910 (codified as amended at 29 U.S.C. §203(j)). Prior to that, the text read: “any process or occupation necessary to the production.” Fair Labor Standards Act of 1938 §3(j), Pub. L. No. 75-718, 52 Stat. 1060. [↑](#footnote-ref-155)
155. 29 C.F.R. §776.17. [↑](#footnote-ref-156)
156. 29 C.F.R. §776.17(c). [↑](#footnote-ref-157)
157. *Id*. [↑](#footnote-ref-158)
158. *Id*. §776.17(b). [↑](#footnote-ref-159)
159. *Id*. §776.17(c). [↑](#footnote-ref-160)
160. Kirschbaum Co. v. Walling, 316 U.S. 517, 525–26, 2 WH Cases 34 (1942). [↑](#footnote-ref-161)
161. *Id*. [↑](#footnote-ref-162)
162. *Id*. at 525–26; *see also* Borden Co. v. Borella, 325 U.S. 679, 683–84, 5 WH Cases 381 (1945). [↑](#footnote-ref-163)
163. 325 U.S. 578, 5 WH Cases 377 (1945). [↑](#footnote-ref-164)
164. *Id.* at 583; *see also* Mitchell v. H.B. Zachry Co., 362 U.S. 310, 319–20, 14 WH Cases 525 (1960) (employees engaged in construction of dam and other facilities for water supply district not engaged in work closely related and directly essential to production of goods for commerce). [↑](#footnote-ref-165)
165. *Callus*, 325 U.S. at 584–85. [↑](#footnote-ref-166)
166. 29 C.F.R. §776.18. [↑](#footnote-ref-167)
167. *Id.* [↑](#footnote-ref-168)
168. Kirschbaum Co. v. Walling, 316 U.S. 517, 520, 2 WH Cases 34 (1942) (“To search for a dependable touchstone by which to determine whether employees are ‘engaged in commerce or the production of goods for commerce’ is as rewarding as an attempt to square the circle.”). [↑](#footnote-ref-169)
169. 513 F.2d 1324, 22 WH Cases 100 (10th Cir. 1975). [↑](#footnote-ref-170)
170. *Id.* at 1327; *see also* Brennan v. Carrasco, 540 F.2d 454, 456, 22 WH Cases 1243 (9th Cir. 1976) (concluding that liquid waste disposal corporation’s employees, who regularly removed liquid waste from industrial firms that produced goods for interstate commerce and from airlines engaged in interstate transportation, engaged in production of goods for commerce); Shultz v. Instant Handling, Inc., 418 F.2d 1019, 1022–23, 19 WH Cases 249 (5th Cir. 1969) (“[T]he removal of trash bear(s) a close and essential relationship to the functioning of industrial plants or office buildings in which productive operations for commerce are carried on.”); *cf*. Wirtz v. Modern Trashmoval, Inc., 323 F.2d 451, 461, 16 WH Cases 184 (4th Cir. 1963) (finding that, because of remoteness from production for commerce and lack of dedication to production for commerce, trash removal service employees’ work “not ‘closely related’ or ‘directly essential’ to production for commerce”). [↑](#footnote-ref-171)
171. 451 F.2d 526, 20 WH Cases 328 (5th Cir. 1971). [↑](#footnote-ref-172)
172. *Id.* at 529; *see also* Chao v. Casting, Acting & Sec. Talent, Inc., 79 F. App’x 327, 9 WH Cases2d 608 (9th Cir. 2003) (holding that company supplying security guards for movie production engaged in commerce under §203(j) under “closely related” or “directly essential” test). [↑](#footnote-ref-173)
173. Thorne v. All Restoration Servs., Inc., 448 F.3d 1264, 1268, 11 WH Cases2d 773 (11th Cir. 2006). [↑](#footnote-ref-174)
174. 29 C.F.R. §776.19(a)(1). *See, e.g.*,Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 92 (1942) (rejecting argument that oil driller not engaged in production of goods for commerce because it was “independent contractor not financially interested in the wells” that produced oil for interstate shipment); 29 C.F.R. §776.21(d) (“[G]oods are produced ‘for’ commerce whether they are purchased f.o.b. at 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.”). [↑](#footnote-ref-175)
175. 29 C.F.R. §776.19(a)(3). [↑](#footnote-ref-176)
176. *Id.* [↑](#footnote-ref-177)
177. Tobin v. Hayes, 11 WH Cases 140 (S.D. Fla. 1952). [↑](#footnote-ref-178)
178. *Id.* [↑](#footnote-ref-179)
179. Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655, 2 WH Cases 120 (10th Cir. 1942). [↑](#footnote-ref-180)
180. Kaferle v. Frederick, 360 F.2d 536, 17 WH Cases 421 (3d Cir. 1966). [↑](#footnote-ref-181)
181. Thorne v. All Restoration Serv., Inc., 448 F.3d 1264, 1268 (11th Cir. 2006) (employee engaged in mold and water damage restoration work for commercial and residential customers not engaged in production of goods for commerce where his “services had little effect on commercial establishments, let alone the ­production of goods for commerce”); *Kaferle*, 360 F.2d at 536 (coal workers not engaged in production of goods for commerce where sales were primarily intrastate and only coal used for interstate commerce was sold to broker who later sold it to other companies producing goods for interstate commerce). [↑](#footnote-ref-182)
182. For a detailed discussion of individual coverage under the FLSA, see §II [Individual Coverage] of this chapter. [↑](#footnote-ref-183)
183. For a detailed discussion of this term as used in the FLSA, see §II.B [Individual Coverage; “Engaged in Commerce”] of this chapter. [↑](#footnote-ref-184)
184. For a detailed discussion of this term as used in the FLSA, see §II.C [Individual Coverage; “Engaged in the Production of Goods”] of this chapter. [↑](#footnote-ref-185)
185. See §II [Individual Coverage] of this chapter. [↑](#footnote-ref-186)
186. *See* Roberg v. Henry Phipps Estate, 156 F.2d 958, 6 WH Cases 177 (2d Cir. 1946) (noting that whether building maintenance workers were covered by FLSA was contingent on activities of building tenants); 29 C.F.R. §776.2(a). [↑](#footnote-ref-187)
187. *See, e.g*.*,* Marshall v. Whitehead, 463 F. Supp. 1329, 1341, 24 WH Cases 659 (M.D. Fla. 1978) (“[A]n employee may be covered in one workweek and not the next, depending upon his activities.”). For an explanation of the “workweek” standard, *see* 29 C.F.R. §776.4. [↑](#footnote-ref-188)
188. 29 U.S.C. §203(s); Pub. L. No. 87-30, 75 Stat. 65 (1961); *see also* 29 C.F.R. §779.200 (“The 1961 amendments for the first time … provided that all employees in a particular business unit are covered by the Act.”). This coverage was expanded in 1966. *See* 29 U.S.C. §203(r), (s); Pub. L. No. 101-157 (1989) (providing coverage for certain types of firms such as schools and hospitals). For general commentary on enterprise coverage under the FLSA, *see* Mack A. Player, *Enterprise Coverage Under the Fair Labor Standards Act: An Assessment of the First Generation*, 28 Vand. L. Rev. 283 (1975). [↑](#footnote-ref-189)
189. Pub. L. No. 87-30, 75 Stat. 65 (enacted May 5, 1961). [↑](#footnote-ref-190)
190. “A preschool” was added by the Education Amendments of 1972. [↑](#footnote-ref-191)
191. Pub. L. No. 89-601, 80 Stat. 830 (1990). [↑](#footnote-ref-192)
192. Pub. L. No. 93-259, 88 Stat. 55 (1974). [↑](#footnote-ref-193)
193. As amended by §203(a) of the Fair Labor Standards Amendments of 1989. Prior to April 1, 1990, the dollar volume test for enterprise coverage (except in the case of an enterprise comprised exclusively of one or more retail or service establishments; or one engaged in construction or reconstruction; or one engaged in laundering, cleaning, or repairing clothing or fabrics; or one described in §3(s)(1)(B) or (C)) was $250,000. For retail enterprises the dollar volume test was $362,500. There was no dollar volume test for the other enterprises. [↑](#footnote-ref-194)
194. 29 U.S.C. §203(s)(1) was enacted as Pub. L No. 87-30, 75 Stat. 65 (1961). It was amended in 1966 by Pub. L. No. 89-601, 80 Stat. 830 (1966), in 1974 by Pub. L. No. 93-259, 88 Stat. 55 (Apr. 8, 1974), and in 1989 by Pub. L. 101-157, 103 Stat. 938 (Nov. 17, 1989). [↑](#footnote-ref-195)
195. 29 U.S.C. §203(s)(2) was added to the Act in 1989 by Pub. L. 101-157, 103 Stat. 938 (Nov. 17, 1989). [↑](#footnote-ref-196)
196. Montalvo v. Tower Life Bldg., 426 F.2d 1135, 1139, 19 WH Cases 472 (5th Cir. 1970) (citing S. Rep. No. 87-145 (1961), *reprinted in* 1961 U.S.C.C.A.N. 1620, 1650); *accord* Wirtz v. First Nat’l Bank & Tr. Co., 365 F.2d 641, 645, 17 WH Cases 424 (10th Cir. 1966). [↑](#footnote-ref-197)
197. 392 U.S. 183, 18 WH Cases 445 (1968). [↑](#footnote-ref-198)
198. 392 U.S. at 191 (reasoning that enterprise definition of coverage was rational means chosen by Congress to protect interstate commerce from disruptive labor disputes that frequently arose over wages and hours). [↑](#footnote-ref-199)
199. 29 U.S.C. §203(s)(1). See §III.C [Enterprise Coverage; Requirements of Section 203(s)] of this chapter. [↑](#footnote-ref-200)
200. *See also* FOH ch. 12 (Enterprise Coverage). [↑](#footnote-ref-201)
201. 29 C.F.R. §779.203 (explaining that the terms “employer,” “establishment,” and “enterprise” “are not synonymous”). [↑](#footnote-ref-202)
202. 29 C.F.R. §779.203. [↑](#footnote-ref-203)
203. *Id.*; *see also, e.g.*,29 C.F.R. §779.23. [↑](#footnote-ref-204)
204. 29 C.F.R. §§779.19, 779.203. [↑](#footnote-ref-205)
205. Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005). [↑](#footnote-ref-206)
206. Tecocoatzi-Ortiz v. Just Salad LLC, 2022 BL 65577, 2022 WL 596831, at \*7 (S.D.N.Y. Feb. 25, 2022) (quoting *Arculeo*). [↑](#footnote-ref-207)
207. *Id*.; *see generally* Reich v. Bay, Inc., 23 F.3d 110, 2 WH Cases2d 136 (5th Cir. 1994) (deeming contractor and subcontractor single enterprise where contractor provided subcontractor with bookkeeping, payroll, recruitment, and advertising services and where they shared office space, shared several officers and directors, kept business records in same area, and employed same individual to control those records); Dole v. Odd Fellows Home Endowment Bd., 912 F.2d 689, 29 WH Cases 1537 (4th Cir. 1990) (finding boards that managed and funded home operated by fraternal organization for sick or aged residents constitute single enterprise where activities of boards were related); Donovan v. Grim Hotel Co., 747 F.2d 966, 26 WH Cases 1647 (5th Cir. 1984) (holding that five hotels located in different cities and owned by five corporations that were owned by one family, sole assets of which were hotels, constituted single enterprise based on related activities and common control). [↑](#footnote-ref-208)
208. 29 C.F.R. §779.206(a) (citing S. Rep. No. 87-145, at 41 (1961)). [↑](#footnote-ref-209)
209. *Id*. (citing S. Rep. No. 89-1487, at 7 (1966)). [↑](#footnote-ref-210)
210. *Id*. §779.206(b) (providing example of “unrelated activities” where company operates retail or service establishment and separate construction business). [↑](#footnote-ref-211)
211. *Id*. §779.206(a). [↑](#footnote-ref-212)
212. *Id.* [↑](#footnote-ref-213)
213. *Id.* [↑](#footnote-ref-214)
214. 29 C.F.R. §779.207. [↑](#footnote-ref-215)
215. *Id.* [↑](#footnote-ref-216)
216. *Id.* [↑](#footnote-ref-217)
217. *Id.; see also*

     *Second Circuit:* Bowrin v. Catholic Guardian Soc’y, 417 F. Supp. 2d 449, 461 (S.D.N.Y. 2006) (four group homes providing care for neglected children engaged in “same or similar” activities because they “perform[ed] identical activities”).

     *Fourth Circuit:* Gilbert v. Freshbikes, LLC, 32 F. Supp. 3d 594 (D. Md. 2014) (four retailers selling bicycles and related gear, catering to similar clientele, and operating loosely under same name were conducting related activities).

     *Ninth Circuit:* Reich v. Japan Enters., Inc., 91 F.3d 154 (9th Cir. 1996) (unpublished decision) (three nightclubs in Saipan were engaged in “same or similar” activities because they all catered to visiting businessmen, served alcohol, and featured hostesses and dancers). [↑](#footnote-ref-218)
218. 29 C.F.R. §779.206(a) (quoting S. Rep. No. 145, 87th Cong., 1st Sess., at 41). [↑](#footnote-ref-219)
219. *Id*. §779.208. [↑](#footnote-ref-220)
220. *Fourth Circuit:* Dole v. Odd Fellows Home Endowment Bd., 912 F.2d 689 (4th Cir. 1990).

     *Fifth Circuit:* Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 1367 (5th Cir. 1973) (assessing whether separate entities are single enterprise based on whether there is “operational interdependence in fact”).

     *Eleventh Circuit:* Donovan v. Easton Land & Dev., Inc., 723 F.2d 1549 (11th Cir. 1984) (same) [↑](#footnote-ref-221)
221. Archie v. Grand Cent. P’ship, Inc., 997 F. Supp. 504, 525, 4 WH Cases2d 783 (S.D.N.Y. 1998). [↑](#footnote-ref-222)
222. *Id.* [↑](#footnote-ref-223)
223. *Id.* at 525–26. [↑](#footnote-ref-224)
224. Wirtz v. Savannah Bank & Tr. Co., 362 F.2d 857, 17 WH Cases 374 (5th Cir. 1966) (holding that bank’s operation of 15-story building it built to locate to desirable downtown area, provide space for future expansion, improve profit position, and strengthen public image constituted auxiliary service rendering those activities sufficiently related to bank’s business purpose so as to make it single enterprise). [↑](#footnote-ref-225)
225. Brennan v. Veterans Cleaning Serv. Inc., 482 F.2d 1362 (5th Cir. 1973) (finding that corporations involved in industrial, residential, and septic tank cleaning were held out as part of larger “cleaning” business where vehicles of two of entities were interchanged and employees of all three corporations were interchanged); *see also* Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843, 22 WH Cases 441 (8th Cir. 1975) (holding that dress store and shoe store engaged in related activities because each sold “articles of wearing apparel” to public entering premises that housed both stores). [↑](#footnote-ref-226)
226. *See, e.g*., Donovan v. Janitorial Servs., Inc., 672 F.2d 528, 25 WH Cases 487 (5th Cir. 1982) (determining that three connected companies engaged in different but related aspects of janitorial services constituted single enterprise because they were held out to public as one entity operating under trade name and offered package deals under that name); Chao v. Barbeque Ventures, LLC, 2007 WL 4395571 (D. Neb. Dec. 12, 2007) (deeming five restaurants selling barbeque under same name satisfied concept of “related activities”). [↑](#footnote-ref-227)
227. *See, e.g*., Donovan v. Easton Land & Dev., Inc., 723 F.2d 1549 (11th Cir. 1984) (deeming activities of hotel and lounge located in same building not related for enterprise purposes where lounge did not add income to hotel, did not strengthen its public image, and did not serve same clientele); Hodgson v. University Club Tower, Inc., 466 F.2d 745, 20 WH Cases 841 (10th Cir. 1972) (finding activities of hotel and two apartment buildings, although owned by parent corporation and its subsidiary, respectively, unrelated because they attracted and served different customers, furnished different products, did not interchange employees, and did not use common bookkeeping). [↑](#footnote-ref-228)
228. Donovan v. Weber, 723 F.2d 1388, 26 WH Cases 911 (8th Cir. 1984) (holding drugstore and cafeteria physically located within that drugstore not subject to enterprise coverage because cafeteria operated as independent business, did not share profits, and was not considered “leased department” of drugstore, particularly where lessee independently controlled hiring, firing, and budgeting). [↑](#footnote-ref-229)
229. 29 C.F.R. §779.206(a). [↑](#footnote-ref-230)
230. *Id*. §779.209(b). [↑](#footnote-ref-231)
231. *Id*. [↑](#footnote-ref-232)
232. *Id*. [↑](#footnote-ref-233)
233. *Id*. [↑](#footnote-ref-234)
234. Id. [↑](#footnote-ref-235)
235. *Fifth Circuit:* Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 21 WH Cases 218 (5th Cir. 1973) (quoting S. Rep. No. 87-145 (1961)), *reprinted in* 1961 U.S.C.C.A.N. 1620, 1660) (acknowledging that vertical structure constitutes related activities); Wirtz v.Savannah Bank & Tr. Co., 362 F.2d 857, 17 WH Cases 374 (5th Cir. 1966) (quoting S. Rep. No. 87-145 (1961)).

     *Sixth Circuit:* Marshall v. Shan-An-Dan, Inc., 747 F.2d 1084, 1086, 26 WH Cases 1594 (6th Cir. 1984) (analyzing whether defendants were part of enterprise and quoting federal magistrate who found that “[t]he franchisor sells transmission parts to the franchisee in a wholesaler/retailer relationship, thus establishing a vertical structure”).

     *Eighth Circuit:* Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843, 22 WH Cases 441 (8th Cir. 1975) (quoting S. Rep. No. 87-145 (1961)).

     *Tenth Circuit:* Hodgson v. University Club Tower, Inc., 466 F.2d 745, 20 WH Cases 841 (10th Cir. 1972) (explaining that S. Rep. No. 87-145 included vertical business structures in its description of related activities). [↑](#footnote-ref-236)
236. 29 C.F.R. §779.210(a). [↑](#footnote-ref-237)
237. *Id*. [↑](#footnote-ref-238)
238. *Id*. §779.210(b); *see also* Wirtz v. Tyson’s Poultry, Inc., 355 F.2d 255, 259, 17 WH Cases 212 (8th Cir. 1966) (egg-handling and processing activities of corporation engaged in assembling, grading, sizing, candling, packing, and shipping of eggs not “segregated from the entire enterprise” because those activities were incidental to entire agricultural endeavor of company); Perez v. Oak Grove Cinemas, Inc., 68 F. Supp. 3d 1234 (D. Or. 2014) (movie theater and property management companies related where employees of theater were used to provide maintenance and construction services for property management companies). [↑](#footnote-ref-239)
239. 29 C.F.R. §779.210(b). [↑](#footnote-ref-240)
240. 29 U.S.C. §203(r)(1). [↑](#footnote-ref-241)
241. 29 C.F.R. §779.212. [↑](#footnote-ref-242)
242. *Id*. [↑](#footnote-ref-243)
243. *Id*. [↑](#footnote-ref-244)
244. *Id.*; *see also* Rodriguez v. Shan Namkeen, Inc., 2017 WL 76929 (N.D. Tex. Jan. 9, 2017) (holding that plaintiff failed to allege sufficient facts to show common business purpose between a commonly owned commercial food manufacturer and coin-operated laundry, where plaintiff offered no explanation as to how they were “engaged in complementary businesses”). [↑](#footnote-ref-245)
245. 29 C.F.R. §779.213. [↑](#footnote-ref-246)
246. *Id*. [↑](#footnote-ref-247)
247. *Id*. §779.214. [↑](#footnote-ref-248)
248. *Id.*; *see also* Dobrosmylov v. DeSales Media Grp., Inc., 2021 BL 249907, 2021 WL 2779303 (E.D.N.Y. July 2, 2021) (religious news organization operated with “business purpose” because it competed for viewers by broadcasting “secular news” and solicited advertising); Johnson v. 5147 Dogwood Charitable Grp., 2021 WL 4144768, at \*6, 2021 BL 354144 (N.D. Fla. Sept. 7, 2021) (although bingo establishment did not compete with “ordinary commercial bingo halls” because state restricted bingo to charitable organizations, it nonetheless was “engage[d] in what (in economic reality) [were] ordinary commercial activities,” and thus was subject to enterprise coverage). [↑](#footnote-ref-249)
249. *Id.* [↑](#footnote-ref-250)
250. 29 U.S.C. §203(r)(2). Section III.C.3 of this chapter addresses the requirements for enterprise coverage under §203(r)(2)(A). For a detailed discussion of FLSA coverage of public agencies, see Chapter 11, Government Employment. [↑](#footnote-ref-251)
251. 29 C.F.R. §779.214; *see also* Armas v. St. Augustine Old Roman Cath. Church, 2019 WL 2929616, at \*6 (N.D. Tex. July 8, 2019) (“[T]he FLSA includes certain types of entities, including non-profit schools, in ‘enterprise’ coverage, regardless of whether these entities perform activities for a ‘business purpose’ and regardless of whether these entities compete in the marketplace with ordinary commercial enterprises.”). [↑](#footnote-ref-252)
252. 483 F. Supp. 2d 251 (E.D.N.Y. 2007), *aff’d*, 577 F.3d 93 (2d Cir. 2009). [↑](#footnote-ref-253)
253. *Jacobs*, 483 F. Supp. 2d at 263 (finding no enterprise coverage of nonprofit organization not competing with for-profit companies); *see also* *Jacobs*, 577 F.3d 93 (holding, in case of first impression, that nonprofit organization providing foster care, adoption, and family services to children and families for public agency did not perform activities “in connection with” that of public agency and thus was not “enterprise” under FLSA). [↑](#footnote-ref-254)
254. *See, e.g.,*

     *Third Circuit:* Katz v. DNC Serv. Corp., 2018 WL 692164, at \*5–6 (E.D. Pa. Feb. 2, 2018) (holding that state political party was not an “enterprise engaged in commerce” because its “primary focus is the election of democratic candidates to local state and national office”).

     *Fifth Circuit:* Jefferson v. Mike Bloomberg 2020 Inc., 2021 BL 182369, 2021 WL 1966844, at \*7–-9 (N.D. Tex. May 17, 2021) (holding that presidential campaign did not receive “commercial income” from its sale of campaign materials thus did not have a business purpose).

     *Seventh Circuit:* Joles v. Johnson Cnty. Youth Serv. Bureau, Inc., 885 F. Supp. 1169 (S.D. Ind. 1995) (holding nonprofit group home for troubled youth not covered enterprise).

     *Ninth Circuit:* Ray v. Yamhill Cmty. Action P’ship, 2011 WL 5865952 (D. Or. Nov. 22, 2011) (holding that private, nonprofit Oregon corporation, which, among other things, provided transitional housing for homeless individuals and families in Yamhill County, not covered enterprise).

     *Eleventh Circuit:* Johnson v. Trump for President, Inc., 2019 BL 220188, 2019 WL 2492122, at \*4 (M.D. Fla. June 14, 2019) (holding that presidential campaign was not an “enterprise engaged in commerce” because there were no allegations “commercial competition was a primary, secondary, or even tertiary endeavor” of campaign).

     *D.C. Circuit:* Benton v. Laborers’ Joint Training Fund, 121 F. Supp. 3d 41, 50 (D.D.C. 2015) (holding nonprofit that provided labor training was not covered enterprise because organization did not “serve the general public in competition with ordinary commercial enterprises”). [↑](#footnote-ref-255)
255. WH Op. FLSA2009-20, 2009 WL 649022 (Jan. 16, 2009) (citing rule from 29 C.F.R. §779.214 that enterprise coverage does not extend to religious, educational, or charitable activities of nonprofit entities unless they engage in ordinary commercial activities); WH Op. FLSA2005-12NA, 2005 WL 5419048 (Sept. 23, 2005) (concluding church that does not receive financial support from commercial ventures not operated for business purpose); WH Op. FLSA2005-8NA, 2005 WL 5419044 (Sept. 2, 2005) (concluding tax-exempt nonprofit home for dependent, neglected, and pre-delinquent children not operated for business purpose); WH Op. FLSA2004-30NA, 2004 WL 5303058 (Dec. 13, 2004) (concluding private nonprofit corporation that operated foster homes for abused, abandoned, or neglected children, and was not operated in conjunction with a school, hospital, or covered institution, lacked business purpose); WH Op. FLSA2004-3NA, 2004 WL 5303031 (Apr. 9, 2004) (concluding nonprofit association providing support for individuals suffering from traumatic brain injuries not operated for business purpose); WH Op. FLSA2001-13, 2001 WL 1870156 (May 8, 2001) (concluding private nonprofit institutions providing psychiatric rehabilitation programs do not perform activities for business purpose). [↑](#footnote-ref-256)
256. *See* Archie v. Grand Cent. P’ship, Inc., 997 F. Supp. 504, 528–29, 4 WH Cases2d 783 (S.D.N.Y. 1998) (nonprofit entities subject to enterprise coverage where they operated employment training programs for homeless that provided security and recycling services to private businesses for fee);*see also* Apple v. Atlantic Yards Dev. Co., 2014 WL 5450030 (E.D.N.Y. Oct. 27, 2014) (nonprofit entity could be subject to enterprise coverage if for-profit entity had such control over nonprofit that its activities were performed for common business purpose). [↑](#footnote-ref-257)
257. WH Op. FLSA2009-20, 2009 WL 649022 (Jan. 16, 2009) (concluding that enterprise coverage does not extend to religious, educational, or charitable activities of nonprofit entities that use private employee leasing company to supply labor to nonprofit organization, so long as nonprofit organization does not use employees to engage in ordinary commercial activities). [↑](#footnote-ref-258)
258. 29 U.S.C. §203(r). [↑](#footnote-ref-259)
259. 29 C.F.R. §779.216. [↑](#footnote-ref-260)
260. *Id.*  [↑](#footnote-ref-261)
261. *Id*. §779.217.

     *See also*

     *Second Circuit:* Rosso v. Pi Mgmt. Assocs., L.L.C., 2005 WL 3535060 (S.D.N.Y. Dec. 23, 2005) (defendant who managed 12 commercial real estate properties, along with other companies owned by same individual, was part of unified operation, where all businesses shared same address, mutually advantageous services, and control of a single owner); Chao v. Vid-Tape, Inc., 196 F. Supp. 2d 281, 291, 8 WH Cases2d, 1327 (E.D.N.Y. 2002) (determining that employers were “unified operation” where 90 percent of sales were from one employer to the other and employers shared office and warehouse space), *aff’d as modified*, 66 F. App’x 261, 8 WH Cases2d 1344 (2d Cir. 2003).

     *Fifth Circuit:* Reich v. Bay, Inc., 23 F.3d 110, 2 WH Cases2d 136 (5th Cir. 1994) (contractor and subcontractor had unified operation where contractor provided subcontractor with bookkeeping, payroll, recruitment, and advertising services and where they shared office space, several officers, and directors, kept business records in same area, and employed same individual to control those records).

     *Eleventh Circuit:* Cornell v. CF Ctr., LLC, 410 F. App’x 265 (11th Cir. 2011) (corporate defendants functioned as single unit for purpose of selling and installing flooring). [↑](#footnote-ref-262)
262. 29 C.F.R. §779.218. [↑](#footnote-ref-263)
263. *Id*.

     *See also*

     *Fifth Circuit:* Dunlop v. Ashy, 555 F.2d 1228, 23 WH Cases 376 (5th Cir. 1977) (holding restaurant and motor inn not part of unified operation where lease held by restaurant was merely arm’s-length transaction, records were kept separately, and businesses were operated separately by different individuals, notwithstanding that motor inn and restaurant were housed in same building and restaurant lessee was employed as manager of another motel owned by same operator).

     *Sixth Circuit:* Dunlop v. Lourub Pharm., Inc., 525 F.2d 235, 22 WH Cases 570 (6th Cir. 1975) (holding drugstore and its liquor department under “unified operation or common control” where they were operated in one building, consisted of one management, used primarily same employees, and used same utilities and parking spaces).

     *Eighth Circuit:* Donovan v. Weber, 723 F.2d 1388, 1392–93, 26 WH Cases 911, 914 (8th Cir. 1984) (holding that, although unified operation was suggested by some practices of drugstore and leased cafeteria—such as reciprocal discounts, use of cafeteria after hours for drugstore meetings, drugstore personnel occasionally carrying in cafeteria shipments, cafeteria’s use of drugstore safe, and references to cafeteria in drugstore advertising—these practices showed only “close working relationship between drugstore and cafeteria” and “[t]he statute and regulations … require more”). [↑](#footnote-ref-264)
264. 29 C.F.R. §779.219. [↑](#footnote-ref-265)
265. *Id*. §779.220. [↑](#footnote-ref-266)
266. *Id*. [↑](#footnote-ref-267)
267. *Id*. §779.221. [↑](#footnote-ref-268)
268. *Id*.

     *See also*

     *Fourth Circuit:* Brock v. Hamad, 867 F.2d 804, 29 WH Cases 277 (4th Cir. 1989) (holding employer’s rental operations constituted single enterprise, in part because all properties managed by employer were controlled by him and also owned by him and different members of his family).

     *Fifth Circuit:* Shultz v. Mack Farland & Sons Roofing Co., 413 F.2d 1296, 19 WH Cases 49 (5th Cir. 1969) (finding common control based on fact that two corporations were dominated by single person who exercised control over the operations and essentially used corporations as single enterprise).

     *Eighth Circuit:* Brock v. Best W. Sundown Motel, 883 F.2d 51, 29 WH Cases 743 (8th Cir. 1989) (holding common control satisfied by showing that adjacent motel and restaurant had same owners, had overlapping operations, and shared telephones, laundry facilities, and advertising); Wirtz v. Barnes Grocer Co., 398 F.2d 718, 18 WH Cases 511 (8th Cir. 1968) (finding common control of three corporations existed where one family owned all stock in wholesale grocery and wholesale grocery in turn owned majority of stock in individual retail corporations).

     *Ninth Circuit:* Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 8 WH Cases2d 1865 (9th Cir. 2003) (holding single enterprise as to two in-home health services companies, only one of which satisfied the $500,000 revenue test, due to common control over employees and operations of both companies); Perez v. Oak Groves Cinemas, Inc., 68 F. Supp. 3d 1234 (D. Or. 2014) (finding three companies under common control of spouses who together owned 100% of the entities and made employment-related decisions).

     *Opinion Letters:* WH Op. FLSA2004-21NA, 2004 WL 5303049 (Oct. 8, 2004) (concluding that separately incorporated health care providers that operated facilities in close proximity with common CEO/executive director, board of directors members, and fiscal management constituted single enterprise based on common control). [↑](#footnote-ref-269)
269. 29 C.F.R. §779.222.

     *See also*

     *Second Circuit:* Archie v. Grand Cent. P’ship, Inc., 997 F. Supp. 504, 526, 4 WH Cases2d 783 (S.D.N.Y. 1998) (holding three nonprofit entities providing employment program for homeless single enterprise under §779.222 despite “absence of common ownership”).

     *Fourth Circuit:* Dole v. Odd Fellows Home Endowment Bd., 912 F.2d 689, 29 WH Cases 1537 (4th Cir. 1990) (holding boards that managed and funded home operated by fraternal organization for sick or aged residents constituted single enterprise where common control was satisfied because boards were mutually supportive entities that operated and maintained homes under control of same persons and where performance of related activities was conclusive).

     *Eighth Circuit:* Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843, 22 WH Cases 441 (8th Cir. 1975) (holding that dress shop and two shoe stores owned unequally by members of same family did not constitute unified operation but did operate under common control where dress shop and one shoe store were located on premises and shared common entrance, dress shop and two shoe stores shared office facilities, and all customer accounts were combined on single statement).

     *Eleventh Circuit:* Donovan v. Easton Land & Dev., Inc., 723 F.2d 1549, 26 WH Cases 1001 (11th Cir. 1984) (holding that controlling ownership in enterprise sufficient to support finding of common control where entity that owned hotel and lounge had right to control them). [↑](#footnote-ref-270)
270. 29 C.F.R. §779.223; *see also* Shultz v. Falk, 439 F.2d 340, 19 WH Cases 949 (4th Cir. 1971) (holding that activities of group of partners who managed approximately 30 apartment buildings for their respective owners were conducted under common control where they exercised power to hire, fire, supervise, and set wages of maintenance employees); Chao v. Vid-Tape, Inc., 196 F. Supp. 2d 281, 292, 8 WH Cases2d, 1327 (E.D.N.Y. 2002) (finding common control established where, even though shareholders, officers, and directors of two defendants were not same people, evidence showed combined enterprise was “a family business”), *aff’d as modified*, 66 F. App’x 261, 8 WH Cases2d 1344 (2d Cir. 2003); *cf*. Marshall v. Shan-An-Dan, Inc., 747 F.2d 1084, 26 WH Cases 1594 (6th Cir. 1984) (holding franchised transmission repair shop and franchisor manufacturer-distributor not under common control where they had entirely different shareholders, managers, directors, auditors, and facilities). [↑](#footnote-ref-271)
271. 29 C.F.R. §779.224(a). [↑](#footnote-ref-272)
272. *Id*. [↑](#footnote-ref-273)
273. *Id*. §779.224(b). [↑](#footnote-ref-274)
274. *Id*. [↑](#footnote-ref-275)
275. 29 C.F.R. §779.224(c). [↑](#footnote-ref-276)
276. 29 U.S.C. §203(r)(1). The FLSA also provides that “related activities performed for such enterprise by an independent contractor” shall not be included as part of the enterprise. *Id*. [↑](#footnote-ref-277)
277. 29 C.F.R. §779.225. [↑](#footnote-ref-278)
278. *Id*. §779.225(c). [↑](#footnote-ref-279)
279. *Id*. §779.225(b). [↑](#footnote-ref-280)
280. *Id*. [↑](#footnote-ref-281)
281. *Id*. §779.225(d). [↑](#footnote-ref-282)
282. *Id*. [↑](#footnote-ref-283)
283. Donovan v. Weber, 723 F.2d 1388, 26 WH Cases 911 (8th Cir. 1984) (finding that, although hours of cafeteria were “controlled” by drugstore to certain extent, because customers could not enter cafeteria when drugstore was closed, leased cafeteria and drugstore were not represented overtly as same entity and operator of cafeteria was independently responsible for hiring, firing, budgeting, and scheduling). See discussion of this case in §III.B.1.b [Enterprise Coverage; Requirements of Section 203(r); “Related Activities”; Auxiliary Activities] of this chapter. [↑](#footnote-ref-284)
284. 29 C.F.R. §779.225(d). [↑](#footnote-ref-285)
285. *Id*. §779.225(e). [↑](#footnote-ref-286)
286. 29 U.S.C. §203(r)(1), (s). [↑](#footnote-ref-287)
287. See Chapter 3, The Employment Relationship, §IV.A [Employer Status; Joint Employers], for a discussion of franchisors as joint employers. [↑](#footnote-ref-288)
288. *Id.* §203(r)(1). [↑](#footnote-ref-289)
289. *Id.* Section 213(a)(2) provided a definition of a “retail or service establishment.” This provision of the Act was repealed in 1989 (Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, §3(c)(1), 103 Stat. 988, 939); however, DOL regulations have provided that the definition of a retail and service establishment found in the former §213(a)(2) should be applied in interpreting the language of §203(r)(1). 29 C.F.R. §779.227. For a discussion of what constitutes a “retail or service establishment” under the FLSA, see Chapter 6, Other Statutory Exemptions, §V.B [Section 207 Exceptions From the Overtime Requirements of the FLSA; Section 207(i) Exception: Commissioned Employees in Retail or Service Establishments]. [↑](#footnote-ref-290)
290. 29 C.F.R. §779.227; *see* *also* Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 916 n.4, 8 WH Cases2d 1865 (9th Cir. 2003) (holding that §203(r)(1) did not apply to business entity because it was not under “independent ownership”). [↑](#footnote-ref-291)
291. *Id*. §779.228 (emphasis added). To provide further guidance regarding these arrangements, the regulations cite the Senate Report as explaining that:

     the mere fact that a group of independently owned and operated stores join together to combine their purchasing activities or to run combined advertising will not for these reasons mean that their activities are performed through unified operation or common control and they will not for these reasons be considered a part of the same “enterprise.”

     29 C.F.R. §779.229 (quoting S. Rep. No. 87-145, at 42 (1961)). [↑](#footnote-ref-292)
292. *Id*. §779.230(b). [↑](#footnote-ref-293)
293. *Id*. §779.232(b). [↑](#footnote-ref-294)
294. 29 C.F.R. §779.230(a). [↑](#footnote-ref-295)
295. *Id*. §779.232(b), (c). [↑](#footnote-ref-296)
296. *Id*. §779.230(b). [↑](#footnote-ref-297)
297. *Id*. §779.231(a); *see also* Marshall v. Shan-An-Dan, Inc., 747 F.2d 1084, 26 WH Cases 1594 (6th Cir. 1984) (holding that, even though franchisor and franchisee participated in joint advertising, sold transmission parts to other dealers at wholesale prices, shared profits, and contemplated long-term relationship in franchise agreement, they were engaged in sale of automobile transmission parts and services rather than same enterprise because there was lack of factual evidence establishing common control); Donovan v. Breaker of Am., Inc., 566 F. Supp. 1016, 26 WH Cases 615 (E.D. Ark. 1983) (holding retail food franchisor and franchisees not part of common enterprise because franchisees had discretion and authority to hire and fire employees; set their own individual hours of operation; determine wages, terms of employment, and number of employees needed; purchase supplies from any source they chose; and determine whether to issue dividends). [↑](#footnote-ref-298)
298. 29 C.F.R. §779.231(a); *see also* Marshall v. Conditt, 1980 WL 2103, 24 WH Cases 1019 (M.D. Tenn. Aug. 24, 1980) (holding that franchisor who sold contracts for local employment-agency franchises in which franchisee was bound by franchisor’s “format” of operations did not constitute single enterprise even though franchisees were required to use franchisor’s logo, “employment counselors” were required to pay $500 to franchisee as initial investment on which contract royalties were owed to franchisor, franchisees paid monthly royalty based on gross receipts, each franchise was required to report monthly to franchisor, and franchisor was authorized to inspect franchise locations for unspecified reasons). [↑](#footnote-ref-299)
299. 29 C.F.R. §779.231. [↑](#footnote-ref-300)
300. *Id.* §779.232(b); *see also* Wirtz v. Lunsford, 404 F.2d 693, 697, 18 WH Cases 532, 535 (6th Cir. 1968) (including distributors who paid nominal monthly fee for use of facilities owned by oil company as part of overall enterprise where leases were only valid for as long as they continued to operate in compliance with consignment agreement and sale prices were determined by oil company’s invoice prices). In *Lunsford*, the Sixth Circuit explained that “[w]hile it is true that defendants own their rolling stock, control their employees, and have a substantial investment in their business, they do not have all of the elements of ownership usually associated with an independently owned business.” 404 F.2d at 697. [↑](#footnote-ref-301)
301. 29 C.F.R. §779.232(c). [↑](#footnote-ref-302)
302. 29 U.S.C. §203(r)(1); 29 C.F.R. §779.233(a). [↑](#footnote-ref-303)
303. 29 C.F.R. §779.233(a). [↑](#footnote-ref-304)
304. *Id.* §779.233(c). [↑](#footnote-ref-305)
305. *Id*. [↑](#footnote-ref-306)
306. *Id.* [↑](#footnote-ref-307)
307. See Chapter 3, The Employment Relationship, §III.A [Employee Status; Employee or Independent Contractor] for a discussion of those factors. [↑](#footnote-ref-308)
308. 29 U.S.C. §203(s)(2); *see, e.g*., Martin v. Bedell, 955 F.2d 1029, 30 WH Cases 1321 (5th Cir. 1992) (applying “mom and pop” exclusion to employer that employs owner, wife, and child). [↑](#footnote-ref-309)
309. 29 U.S.C. §203(s)(2); 29 C.F.R. §779.234. [↑](#footnote-ref-310)
310. 29 C.F.R. §779.234. [↑](#footnote-ref-311)
311. 29 U.S.C. §203(s)(1). [↑](#footnote-ref-312)
312. *Id.* [↑](#footnote-ref-313)
313. 29 C.F.R. §776.23. [↑](#footnote-ref-314)
314. *Id.* §776.23(c). [↑](#footnote-ref-315)
315. 662 F.3d 1292 (11th Cir. 2011). [↑](#footnote-ref-316)
316. Applying the Supreme Court’s decision in *Arbaugh v. Y&H Corp*., 546 U.S. 500 (2006), at least two circuit courts have held that the enterprise element of an FLSA cause of action is not jurisdictional, and is therefore subject to waiver or forfeiture. *See* Biziko v. Van Horne, 981 F.3d 418, 419 (5th Cir. 2020) (holding FLSA’s “enterprise” element is not jurisdictional in character); Martinez v. Petrenko, 792 F.3d 173 (1st Cir. 2015) (same); Chao v. Hotel Oasis, Inc., 493 F.3d 26 (1st Cir. 2007) (same). [↑](#footnote-ref-317)
317. The “closely related” and “directly essential” test is derived from the language contained in the final clause of §203(j) of the FLSA, which defines the term “produced.” 29 U.S.C. §203(j). *See also* 29 C.F.R. §776.17 (“Employees who are not actually ‘producing … or in any other manner working on’ goods for commerce are, nevertheless, engaged in the ‘production’ of such goods within the meaning of the Act and therefore within its general coverage if they are employed ‘in any closely related process or occupation directly essential to the production thereof, in any State.’” (footnote omitted)). [↑](#footnote-ref-318)
318. 29 U.S.C. §203(s)(1)(A)(i); *compare, e.g.,* Jaramillo v. Moaz, Inc., 2020 BL 317901, 2020 WL 5752263, at \*3 (S.D. Fla. Aug. 19, 2020) (concluding that no claim for enterprise coverage was alleged because the complaint lacked allegations that two or more of defendants’ employees engaged in commerce) (citing Villafana v. Our Children’s Planet Corp., 2016 BL 214472, 2016 WL 3470013, at \*3 (S.D. Fla Mar. 24, 2016) (finding that plaintiff failed to properly allege enterprise coverage where plaintiff did not allege how many employees beside plaintiff handled the materials); Saunders v. Amplus Air Conditioning Contractor, Inc., 2020 BL 114202, 2020 WL 1452364, at \*6 (S.D. Fla. Mar. 25, 2020) (finding that plaintiff failed to properly allege enterprise coverage where complaint did not allege “generally the number of workers employed by defendants nor sets forth facts for the Court to reasonably infer that two or more employees were engaged in interstate commerce”); Gurgel v. Boss Rain Forest Pet Resort, Inc., No. 16-62819, 2017 WL 7796318, at \*3 (S.D. Fla. Feb. 10, 2017) (finding that plaintiff failed to adequately allege enterprise coverage where plaintiff failed “to plead that at least two of Defendants’ employees were involved in interstate commerce or handled goods or material that have moved in interstate commerce on a regular and recurrent basis”) *with* Radulescu v. Moldowan, 845 F. Supp. 1260, 1262 (N.D. Ill. 1994) (janitors sufficiently alleged enterprise coverage where they claimed to have worked with pipes, faucets, windows, detergents, and other materials and supplies that moved in interstate commerce). [↑](#footnote-ref-319)
319. 29 C.F.R. §779.238. *But see* Marshall v. Whitehead, 463 F. Supp. 1329, 1359, 24 WH Cases 659 (M.D. Fla. 1978) (holding that enterprise coverage can be applied on individual workweek basis to cover all employer’s employees for particular workweeks, although such application “may appear anomalous”). [↑](#footnote-ref-320)
320. 29 C.F.R. §779.238. [↑](#footnote-ref-321)
321. Donovan v. S & L Dev. Co., 647 F.2d 14, 17. n.5, 24 WH Cases 1407 (9th Cir. 1981) (“It is well established that the Act’s coverage provisions are to be construed broadly to apply to the furthest reaches consistent with congressional direction.”); *see also* Wirtz v. Modern Trashmoval, Inc., 323 F.2d 451, 456, 16 WH Cases 184 (4th Cir. 1963) (stating FLSA coverage based on activities of employee “governed by practical considerations rather than technical conceptions”); 29 C.F.R. §776.9 (observing courts interpret “in commerce” provision consistent with its practical meaning in particular cases to effectuate intent of Congress). [↑](#footnote-ref-322)
322. *Fourth Circuit:* Wirtz v. Durham Sandwich Co., 367 F.2d 810, 812, 17 WH Cases 474 (4th Cir. 1966).

     *Fifth Circuit:* Montalvo v. Tower Life Bldg., 426 F.2d 1135, 1143–44, 19 WH Cases 472 (5th Cir. 1970).

     *Tenth Circuit:* Harding v. Kurco, Inc., 650 F.2d 228, 230, 24 WH Cases 1410 (10th Cir. 1981).

     *See also* 29 C.F.R. §779.109 (stating that FLSA makes no distinction as to what percentage, volume, or amount of activities of either employee or employer constitutes engaging in commerce or in production of goods for commerce). [↑](#footnote-ref-323)
323. 29 C.F.R. §§779.237, 779.239; *see also* Maryland v. Wirtz, 392 U.S. 183, 188, 18 WH Cases 445 (1968) (observing that the 1961 Amendments, which define enterprise as one that has employees “engaged in commerce or in the production of goods for commerce” had effect of “extend[ing] protection to the fellow employees of any employee who would have been protected by the original Act”). [↑](#footnote-ref-324)
324. *See, e.g*., *S & L Dev. Co*., 647 F.2d at 16 n.4 (noting that interstate commerce requirement for enterprise coverage may be satisfied if enterprise has employees who are “traditionally covered”); Hodgson v. Travis Edwards, Inc., 465 F.2d 1050, 1051, 20 WH Cases 749 (5th Cir. 1972) (inquiring whether business operation employed employees involved in commerce to determine whether FLSA applies to operation’s owner). Although courts may consider pre-1961 cases analyzing individual coverage to be relevant to analyzing the phrases “engaged in commerce” and “production of goods for commerce” for purposes of enterprise coverage, some courts do not consider this authority binding. *See* Wirtz v. First Nat’l Bank & Tr. Co., 365 F.2d 641, 643, 17 WH Cases 424 (10th Cir. 1966) (deeming Supreme Court case decided in 1943 not controlling on question whether operation maintenance employees of building owned by bank were covered under FLSA enterprise amendments because case was decided before amendments were enacted). [↑](#footnote-ref-325)
325. 29 U.S.C. §203(s)(1)(A)(i). The regulations provide that the phrase “produced for commerce” has the same meaning for coverage purposes under the enterprise coverage standard as it does under 29 U.S.C. §203(j). 29 C.F.R. §779.243. [↑](#footnote-ref-326)
326. “Goods” are defined under the FLSA as:

     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, 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.

     29 U.S.C. §203(i). For a complete discussion of the term as used in the FLSA, see §II.C.2 [Individual Coverage; “Engaged in the Production of Goods”; “Goods”] of this chapter. [↑](#footnote-ref-327)
327. Unlike the term “goods,” “materials” is not defined in the statute or the DOL’s regulations. The Eleventh Circuit has held the term means “tools or other articles necessary for doing or making something—in the context of its use and if the employer has employees ‘handling, selling, or otherwise working on’ the item for the employer’s commercial (and not just any) purposes.” Polycarpe v. E & S Landscaping Serv., Inc., 616 F.3d 1217, 1227 (11th Cir. 2010); *see also* Asalde v. First Class Parking Sys. LLC, 898 F.3d 1136 (11th Cir. 2018) (applying its interpretation of “materials” to valet tickets, and remanding for jury to decide whether tickets had a significant connection to the valet activity); Bautista Hernandez v. Tadala’s Nursery, Inc., 34 F. Supp. 3d 1229 (S.D. Fla. 2014) (finding that trucks are “materials” for purposes of FLSA because they were tools or articles used by employer in performance of nursery business) (citing *Polycarpe*, 616 F.3d 1217); Burman v. Everkept, Inc., 2017 WL 1150664 (W.D. Mich. Mar. 27, 2017) (finding that trucks and component parts used by waste collection company were “materials” for purposes of §203(s) because they were essential to employer’s collection operations). [↑](#footnote-ref-328)
328. *Second Circuit:* Wirtz v. Melos Constr. Corp., 408 F.2d 626, 628 (2d Cir. 1969).

     *Fifth Circuit:* Dunlop v. Industrial Am. Corp., 516 F.2d 498, 501 (5th Cir. 1975).

     *Eleventh Circuit:* Marshall v. Child Care Ctr., 23 WH Cases 477, 479 (S.D. Fla. 1977). [↑](#footnote-ref-329)
329. The Senate Report on the Fair Labor Standards Amendments of 1974 states, in relevant part:

     The bill also adds [to section 203(s)] the word “or materials” after the word “goods” to make clear the Congressional intent to include within this additional basis of coverage the handling of goods consumed in the employer’s business, as, *e.g*., the soap used by a laundry.

     S. Rep. No. 93-690, at 17 (1974) (referring to 1974 Amendments to the FLSA, adopted Apr. 8, 1974). Several courts have approved of this interpretation of §203(s). *See, e.g*.,

     *Third Circuit:* Marshall v. Brunner, 668 F.2d 748, 751 (3d Cir. 1982) (“[T]he words ‘or materials’ … clarified the meaning of the act with respect to those businesses, which in the course of their own operations, use materials which have been moved in or produced for commerce.”).

     *Seventh Circuit:* Brennan v. Indiana, 517 F.2d 1179, 1182 (7th Cir. 1975) (holding that materials handled by hospital and school employees resulted in enterprise FLSA coverage and that final consumer exception did not apply to employer because students and patients were true final consumers of materials, even though they did not pay for materials); Radulescu v. Moldowan, 845 F. Supp. 1260, 1263 (N.D. Ill. 1994).

     *Eleventh Circuit:* Marshall v. Whitehead, 463 F. Supp. 1329, 1337 (M.D. Fla. 1978). [↑](#footnote-ref-330)
330. S. Rep. No. 93-690, at 17 (1974); *see also* Walker v. Washbasket Wash & Dry, 2001 WL 770804, 7 WH Cases2d 482 (E.D. Pa. July 5, 2001) (holding that §203(s) applied to coin-operated laundromat because it provided washing machines and clothes dryers that had been purchased in interstate commerce). [↑](#footnote-ref-331)
331. *See, e.g.,*

     *Second Circuit:* Rocha v. Bakhter Afghan Halal Kababs, Inc., 44 F. Supp. 3d 337 (E.D.N.Y. 2014) (holding that restaurant could be covered enterprise where employee handled cleaning supplies and food products that had moved in interstate commerce).

     *Fourth Circuit:* Brock v. Hamad, 867 F.2d 804, 807, 29 WH Cases 277 (4th Cir. 1989) (deeming local property rental business covered enterprise where owner bought goods that had moved in interstate commerce and goods were used by employees during their work); Morataya v. Nancy’s Kitchen of Silver Spring, Inc., 2015 WL 165305 (D. Md. Jan. 12, 2015) (holding restaurant covered enterprise where employees handled alcohol produced out of state but purchased locally); Donovan v. Kentwood Dev. Co., 549 F. Supp. 480, 483–84, 25 WH Cases 792 (D. Md. 1982) (holding corporation that purchased apartment complex whose employees handled and worked with appliances purchased from interstate suppliers was covered under enterprise theory and not within ultimate consumer exception).

     *Fifth Circuit:* Brennan v. Hatton, 474 F.2d 9 (5th Cir. 1973) (holding that sole proprietorship engaged in business of installing and repairing air conditioning and heating systems was covered enterprise because most parts used by employees in their work were manufactured out of state and had moved in commerce); Reyes v. Rite-Way Janitorial Serv., Inc., 2016 WL 625064 (S.D. Tex. Feb. 16, 2016) (holding janitorial service covered enterprise, where service stipulated it handled materials, such as soap, cleaning supplies, mops, and vacuums, that had traveled in interstate commerce, because “materials,” unlike goods, are not subject to the ultimate-consumer exception); Dole v. Bishop, 740 F. Supp. 1221, 1225, 29 WH Cases 1410 (S.D. Miss. 1990) (deeming seafood restaurants covered enterprises because waitresses, cooks, and busboys of both establishments regularly handled food items and cleaning supplies shipped from outside state).

     *Seventh Circuit: Moldowan*, 845 F. Supp. at 1263 (determining that apartment managing business was covered enterprise because janitor employees handled and used materials such as soap, waxes, light bulbs, and other cleaning supplies manufactured outside of and shipped into state).

     *Tenth Circuit:* Donovan v. Pointon, 717 F.2d 1320, 1322–23, 26 WH Cases 748 (10th Cir. 1983) (determining employer that engaged in clearing raw land for development was covered enterprise because employees—in readying land for building—handled goods and materials such as construction equipment and replacement parts that had moved in interstate commerce).

     *Eleventh Circuit:* Marshall v. Sunshine & Leisure, Inc., 496 F. Supp. 354 (M.D. Fla. 1980) (finding operator of rest homes to be covered enterprise because employees regularly purchased and handled products during work such as soap, appliances, and food items that had moved in interstate commerce); Marshall v. Child Care Ctr., 23 WH Cases 477, 480 (S.D. Fla. 1977) (concluding child care center covered under enterprise theory where employees handled food, toys, diapers, soap, and cleaning materials that traveled in interstate commerce and “ultimate consumers” of such products were children at center and not center itself). [↑](#footnote-ref-332)
332. 494 F.2d 100, 21 WH Cases 592 (8th Cir. 1974). [↑](#footnote-ref-333)
333. *Id.* at 103; *see also* Hines v. Detail Dynamics, Inc., 2011 WL 1060985 (M.D. Fla. Mar. 1, 2011) (granting default judgment and accepting plaintiffs’ supplemental affidavit establishing enterprise coverage both as matter of gross revenue and also because defendants’ employees used cleaning supplies produced outside Florida); Pareja v. Priority Care Serv., Inc., 2011 WL 17633 (M.D. Fla. Jan. 4, 2011) (denying employer’s motion for summary judgment for lack of coverage where employee’s affidavit stated he used cleaning products produced out of state). *But see* Collado v. Florida Cleanex, Inc., 727 F. Supp. 2d 1369 (S.D. Fla. 2010) (holding that employees did not handle goods or materials that have moved in interstate commerce if out-of-state products are purchased locally). [↑](#footnote-ref-334)
334. 668 F.2d 748 (3d Cir. 1982). [↑](#footnote-ref-335)
335. *Id*. at 751–52. [↑](#footnote-ref-336)
336. 29 U.S.C. §203(i) (providing that “[g]oods” for coverage purposes does not include “goods after their delivery into the actual physical possession of the ultimate consumer thereof”). [↑](#footnote-ref-337)
337. *See, e.g*.,

     *Third Circuit: Brunner*, 668 F.2d at 751 (finding enterprise coverage of garbage hauling business that handled various equipment from interstate sources; holding that “[w]hen the 1974 amendment to section 203(s) added the words ‘or materials’ to that statute, it clarified the meaning of the Act with respect to those businesses, which in the course of their own operations, use materials which have been moved in or produced for commerce”).

     *Fourth Circuit:* Dole v. Odd Fellows Home Endowment Bd., 912 F.2d 689, 29 WH Cases 1537 (4th Cir. 1990) (rejecting “ultimate consumer” exception and finding group home subject to enterprise coverage because it used interstate materials when preparing food, washing laundry, and cleaning home); Brock v. Hamad, 867 F.2d 804, 29 WH Cases 277 (4th Cir. 1989) (rejecting application of “ultimate consumer” exception and finding enterprise coverage of rental property company that used materials from interstate sources).

     *Fifth Circuit:* Dunlop v. Industrial Am. Corp., 516 F.2d 498, 500 (5th Cir. 1975) (holding that gasoline consumed by intrastate garbage removal service subject to “ultimate consumer” exception under pre-1974 version of FLSA, but suggesting in dicta that exception would not apply to “materials” provision of handling clause after 1974 Amendments); Dole v. Bishop, 740 F. Supp. 1221, 1225, 29 WH Cases 1410 (S.D. Miss. 1990) (holding that “ultimate consumer” exception does not apply to handling clause because of inclusion of term “materials” in 1974 Amendments).

     *Tenth Circuit:* Brennan v. Dillion, 483 F.2d 1334, 1336, 21 WH Cases 272 (10th Cir. 1973) (finding apartment building not ultimate consumer of materials used to maintain building because “the cost [was] passed on to the tenants and, hence there [was] in effect a resale”).

     *Eleventh Circuit:* Rodriguez v. Gold Star, Inc. 858 F.3d 1368 (11th Cir. 2017) (clarifying that items left in employee’s care for the performance of a service, such as when a car is left for a valet to park, are “goods” rather than “materials” and subject to the ultimate consumer exception); Polycarpe v. E & S Landscaping Serv., Inc., 616 F.3d 1217, 1222 (11th Cir. 2010) (holding that “ultimate consumer” exception “applies to some ‘goods’ but never to ‘materials’” in context of enterprise coverage); Leon v. Tapas & Tintos, Inc., 51 F. Supp. 3d 1290 (S.D. Fla. 2014) (denying motion to dismiss claims based on inference that goods and materials used in restaurant moved in interstate commerce before delivery to restaurant); Diaz v. Jaguar Rest. Grp.,649 F. Supp. 2d 1343, 1348–60 (S.D. Fla. 2009) (holding “ultimate consumer exception” does not apply to handling of “materials” and discussing history of cases addressing issue). Prior to the Eleventh Circuit’s decision in *Polycarpe,* several district courts found that the Eleventh Circuit’s opinion in *Thorne v. All Restoration Servs., Inc*.,448 F.2d 1264 (11th Cir. 2006) compelled application of the “ultimate consumer” exception to enterprise coverage. Subsequent cases from courts in these districts concluded that the holding in *Thorne* was restricted to the issue of individual coverage and did not control whether the “ultimate consumer” exception applies to enterprise coverage. *See, e.g.*, *Jaguar,* 649 F. Supp. 2d at 1348–60. [↑](#footnote-ref-338)
338. 925 F.3d 838 (6th Cir. 2019). [↑](#footnote-ref-339)
339. *Id.* at 845–49. [↑](#footnote-ref-340)
340. “The ‘coming to rest’ doctrine is the belief that interstate goods or materials can lose their interstate quality if the items have already come to rest within a state before intrastate purchase by a business.” *Polycarpe*, 616 F.3d at 1221. [↑](#footnote-ref-341)
341. *See* 29 C.F.R. §779.242 (“For purposes of section 3(s), goods will be considered to ‘have been moved … in commerce’ when they have moved across State lines before they are handled, sold, or otherwise worked on by the employees. It is immaterial in such a case that the goods may have ‘come to rest’ within the meaning of the term ‘in commerce’ as interpreted in other respects, before they are handled, sold, or otherwise worked on by the employees in the enterprise.”).

     *See, e.g*.,

     *Second Circuit:* Wirtz v. Melos Constr. Corp., 408 F.2d 626, 18 WH Cases 794 (2d Cir. 1969) (rejecting “coming to rest” doctrine and holding construction company subject to enterprise coverage because its employees used ready-mix concrete product that contained ingredient that originated from outside state).

     *Fifth Circuit:* Brennan v. Greene’s Propane Gas Serv., Inc., 479 F.2d 1027 (5th Cir. 1973) (rejecting “coming to rest” doctrine and holding propane gas company subject to enterprise coverage because it utilized materials that had traveled in interstate commerce); *Dole*, 740 F. Supp. at 1225 (holding “coming to rest” doctrine no longer viable following enterprise coverage amendments to FLSA). *See also* Molina-Aranda v. Black Magic Enters., 983 F.3d 779 (5th Cir. 2020) (relying on *Greene’s Propane Gas Serv.* and holding that “the legislation was designed to regulate enterprises dealing in articles *acquired intrastate* after travel in interstate commerce”); Brewer v. Sake Hibachi Sushi & Bar, Inc., 2022 BL 17108, 2022 WL 348990 (N.D. Tex. Jan. 19, 2022) (relying on *Molina-Aranda* and holding that claimed handling of food and food service items purchased across state lines or traveled in interstate commerce or both by local restaurant sufficient to allege enterprise coverage).

     *Ninth Circuit:* Donovan v. Scoles, 652 F.2d 16 (9th Cir. 1981) (rejecting “coming to rest” doctrine and holding service station covered by enterprise coverage when it purchased gasoline that was shipped interstate).

     *Eleventh Circuit: Polycarpe*, 616 F.3d at 1221 (holding that “coming-to-rest doctrine” is “at odds with [the] statutory text” of the handling clause). [↑](#footnote-ref-342)
342. 652 F.2d 16 (9th Cir. 1981). [↑](#footnote-ref-343)
343. *Id*. at 18. [↑](#footnote-ref-344)
344. 616 F.3d 1217 (11th Cir. 2010). [↑](#footnote-ref-345)
345. *Id*. at 1221 (quoting 29 U.S.C. §203(s)(1)(A)(i)). [↑](#footnote-ref-346)
346. *Id*. (quoting *Greene’s Propane Gas Serv.*, 479 F.2d at 1030). *See also* Asalde v. First Class Parking Sys. LLC, 898 F.3d 1136 (11th Cir. 2018) (reversing summary judgment in suit brought by parking valets, finding issues of material fact regarding whether valet tickets were materials necessary for providing services). [↑](#footnote-ref-347)
347. 29 U.S.C. §203(s)(1)(A)(ii). [↑](#footnote-ref-348)
348. *Supreme Court:* Brennan v. Arnheim & Neely, Inc., 410 U.S. 512, 521, 20 WH Cases 1160 (1973) (“[O]ne purpose of the dollar volume limitation in the statutory definition of ‘enterprise’ is the exemption of small businesses.”), *reh’g denied*, 411 U.S. 940 (1973).

     *Third Circuit:* Reich v. Gateway Press, 13 F.3d 685, 694, 1 WH Cases2d 1313 (3d Cir. 1994) (stating that Congress intended to exclude local businesses from FLSA and did this by requiring enterprise to have minimum gross business volume).

     *Tenth Circuit:* Brennan v. Dillion, 483 F.2d 1334, 1337, 21 WH Cases 272 (10th Cir. 1973) (“The enterprise concept was used to provide a broad sweep of coverage to employees of businesses which met the economic test of amount of business done.”). [↑](#footnote-ref-349)
349. Falk v. Brennan, 414 U.S. 190, 205, 21 WH Cases 418 (1973) (Brennan, J., concurring in part and dissenting in part) (citing H.R. Rep. No. 87-75, at 3, 7, 13 (1961)); S. Rep. No. 87-145, at 6–7, 31 (1961), *reprinted in* 1961 U.S.C.C.A.N. 1620). [↑](#footnote-ref-350)
350. 29 U.S.C. §203(s)(1)(A)(ii). Before this amendment, the statutory minimum was $250,000, and retail establishments had a separate level of $362,500. [↑](#footnote-ref-351)
351. Pub. L. No. 101-157, §3(b), 103 Stat. 938 (codified in the notes to 29 U.S.C. §203). [↑](#footnote-ref-352)
352. *First Circuit:* Chen v. C & R Rock, Inc., 2016 WL 1117416 (D.N.H. Mar. 22, 2016) (holding business dollar volume test met where restaurant “average[d] between $70,000 and $80,000 in sales every month”).

     *Second Circuit:* Juarez v. Wheels Pizza, Inc., 2015 WL 3971732 (S.D.N.Y. June 30, 2015) (holding that business dollar volume determined by “actual revenue” and not only “reported revenues”); Jian Long Li v. Li Qin Zhao, 35 F. Supp. 3d 300 (E.D.N.Y. 2014) (holding that enterprise coverage did not apply to restaurant that did not have more than $500,000 in gross receipts).

     *Fourth Circuit:* Brock v. Hamad, 867 F.2d 804, 29 WH Cases 277 (4th Cir. 1989) (holding that FLSA applied to apartment manager/owner whose annual business volume exceeded statutory minimum); Brock v. Executive Tower, 796 F.2d 698, 1 WH Cases2d 298 (4th Cir. 1986) (determining FLSA applicable to corporation operating adult entertainment enterprise with annual gross sales over statutory minimum); Brock v. Commercial Index Bureau, 642 F. Supp. 1140, 1142, 27 WH Cases 1384 (D. Md. 1986) (deeming investigative agency with annual business volume of about $900,000 covered by FLSA).

     *Sixth Circuit:* Guyot v. Ramsey, 2016 WL 2866403 (E.D. Mich. May 17, 2016) (holding that enterprise coverage did not apply based on employer’s uncontroverted evidence that it never generated $500,000 in revenue at any point).

     *Seventh Circuit:* Mays v. Rubiano, Inc., 530 F. Supp. 3d 1230, 1236–38 (N.D. Ind. 2021) (holding adult entertainment company not a covered enterprise where annual revenue reflected in income tax returns was less than $500,000 and not rebutted with competent evidence); Radulescu v. Moldowan, 845 F. Supp. 1260, 1264 (N.D. Ill. 1994) (concluding FLSA covered real estate manager whose annual business volume exceeded $500,000); Lenca v. Laran Enters., 388 F. Supp. 782, 784, 22 WH Cases 130 (N.D. Ill. 1974) (holding that FLSA does not apply to enterprise with annual business volume under $100,000).

     *Eighth Circuit:* Donovan v. Sideris, 688 F.2d 74, 75, 25 WH Cases 922 (8th Cir. 1982) (finding FLSA covered hotel enterprise satisfying statutory minimum for business volume).

     *Ninth Circuit:* Longbao Yan v. General Pot, Inc., 78 F. Supp. 3d 997 (N.D. Cal. 2015) (finding restaurant with annual gross sales that did not exceed $350,000 not a covered enterprise).

     *Eleventh Circuit:* Vig v. All Care Dental, P.C., 588 F. App’x 900 (11th Cir. 2014) (per curiam); Ledbetter v. S.T.A.R. Sec. Corp., 2021 BL 116598, 2021 WL 1246013, at \*3 (S.D. Fla. Mar. 26, 2021) (holding security company not a covered enterprise where employee failed to produce sufficient evidence to rebut security company’s revenue information from tax returns and invoices that showed company had annual gross receipts of less than $500,000); Mendoza v. Discount CV Joint Rack & Pinion Rebuilding, Inc., 101 F. Supp. 3d 1282 (S.D. Fla. 2015) (holding automobile repair company with annual gross sales of less than $500,000 not a covered enterprise). [↑](#footnote-ref-353)
353. *First Circuit:* Chao v. Hotel Oasis, Inc., 493 F.3d 26, 33 (1st Cir. 2007) (deeming sales volume standard not a jurisdictional issue).

     *Second Circuit:* Rocha v. Bakhter Afghan Halal Kababs, Inc., 44 F. Supp. 3d 337 (E.D.N.Y. 2014) (collecting cases).

     *Fourth Circuit:* Maravilla v. Ngoc Anh Rest., Ltd., 2016 WL 6821090 (E.D. Va. Nov. 17, 2016) (holding that enterprise and individual coverage are “not a jurisdictional issue”).

     *Tenth Circuit:* Murphy v. Allstaff Med. Res., Inc*.*, 2017 WL 2224530 (D. Colo. May 22, 2017) (holding that “a challenge to either individual or enterprise coverage under the FLSA is non-jurisdictional”).

     *Eleventh Circuit:* Turcios v. Delicias Hispanas Corp., 275 F. App’x 879, 882 (11th Cir. 2008) (stating that “the question of enterprise coverage is … intertwined with the merits of an FLSA claim”).

     *But see* Longbao Yan v. General Pot, Inc., 78 F. Supp. 3d 997 (N.D. Cal. 2015) (dismissing FLSA claim for lack of subject matter jurisdiction because defendant did not have gross receipts in excess of $500,000). [↑](#footnote-ref-354)
354. Dunlop v. Ashy, 555 F.2d 1228, 1234, 23 WH Cases 376 (5th Cir. 1977) (recognizing courts’ liberal but reasonable interpretation of FLSA); Brennan v. Dillion, 483 F.2d 1334, 1337–38, 21 WH Cases 272 (10th Cir. 1973) (cautioning that courts must not construe FLSA “in a narrow, grudging manner”). [↑](#footnote-ref-355)
355. Hodgson v. University Club Tower, Inc., 466 F.2d 745, 746, 20 WH Cases 841 (10th Cir. 1972) (“[B]readth of coverage is vital to the Act’s mission.”) (citing Powell v. U.S. Cartridge Co., 339 U.S. 497, 516, 9 WH Cases 362 (1950)). In *Hodgson*, the Tenth Circuit also explained that “[t]he purpose of the 1961 amendments … was ‘to strengthen and extend the scope of the act.’” 466 F.2d at 746 (quoting Wirtz v. First Nat’l Bank & Tr. Co., 365 F.2d 641, 643, 17 WH Cases 424 (10th Cir. 1966)). [↑](#footnote-ref-356)
356. Wirtz v. Savannah Bank & Tr. Co., 362 F.2d 857, 862, 17 WH Cases 374 (5th Cir. 1966) (stating that Congress “intended to go beyond a restricted definition of the term ‘sales’ to establish a standard of coverage based upon the size of a business”); S. Rep. No. 89-1487, at 7–8 (1966), *reprinted* *in* 1966 U.S.C.C.A.N. 3009 (explaining that Congress was concerned with an enterprise’s size and impact on commerce, not its income or profit). [↑](#footnote-ref-357)
357. 29 U.S.C. §203(k). [↑](#footnote-ref-358)
358. *Id*. §203(s)(1)(A)(ii); *see also* Wirtz v. Columbian Mut. Life Ins. Co., 380 F.2d 903, 908–09, 18 WH Cases 97 (6th Cir. 1967) (stating that “business done” was added in 1966 to clarify that dollar volume requirement applies to business transactions of enterprise regardless of whether such transactions are technically sales). [↑](#footnote-ref-359)
359. Falk v. Brennan, 414 U.S. 190, 206–07, 21 WH Cases 418 (1973) (Brennan, J., concurring in part and dissenting in part). Use of the cash basis of accounting which records payments on the date the money is received instead of the day the sale is made may be used to determine gross receipts. *See* Collar v. Abalux, Inc., 895 F.3d 1278 (11th Cir 2018). [↑](#footnote-ref-360)
360. 29 C.F.R. §779.259(a). [↑](#footnote-ref-361)
361. *Id*. [↑](#footnote-ref-362)
362. *Id*. [↑](#footnote-ref-363)
363. *Id*. [↑](#footnote-ref-364)
364. *Id*. §779.259(b), (c). [↑](#footnote-ref-365)
365. Falk v. Brennan, 414 U.S. 190, 197–98, 21 WH Cases 418 (1973) (considering that “revenue derived from securities, rentals, or loans, even though perhaps not literally sales,” are included in business volume); Wirtz v. Savannah Bank & Tr. Co., 362 F.2d 857, 863, 17 WH Cases 374 (5th Cir. 1966) (finding restrictive definition of “sales” inappropriate and that the term “sales” is at least broad enough to encompass certain service enterprises); Cooper v. Parker Promotions, Inc., 2019 WL 639016 (M.D. Ga. Dec. 14, 2019) (holding that jury could conclude whether beverage sales, door entry fees, money that dancers paid to club for house fees, security, and DJs resulted in gross revenues in excess of $500,000). [↑](#footnote-ref-366)
366. Marshall v. Woods Hole Oceanographic Inst., 485 F. Supp. 709, 718–19, 23 WH Cases 1272 (D. Mass. 1978) (determining oceanographic research institute satisfied business volume test on basis of research funds received from governmental and nongovernmental sources and from funds received through contracts with U.S. Navy). [↑](#footnote-ref-367)
367. *Savannah Bank & Tr.*, 362 F.2d at 863 (deeming it “not farfetched to interpret ‘sales’ to include interest on loans and securities and rental from office space”). [↑](#footnote-ref-368)
368. Wirtz v. Columbian Mut. Life Ins. Co., 380 F.2d 903, 908, 18 WH Cases 97 (6th Cir. 1967) (holding that rental income from real estate investment constituted receipts for business volume test). [↑](#footnote-ref-369)
369. Wirtz v. First Nat’l Bank & Tr. Co., 365 F.2d 641, 645, 17 WH Cases 424 (10th Cir. 1966); *see also* Centeno-Bernuy v. Becker Farms, 564 F. Supp. 2d 166, 175–76 (W.D.N.Y. 2008) (holding that government grants and set-aside payments, workers’ compensation refunds, dividends, and rental income were part of total revenue of farm for purposes of business dollar volume test). [↑](#footnote-ref-370)
370. *See Columbian Mut. Life*, 380 F.2d at 907 (citing legislative history and finding that “finance” companies, “whose income would certainly be interest, were intended to be embraced with the enterprise provisions of the 1961 amendments”). [↑](#footnote-ref-371)
371. Jensen v. Johnson City Baseball League, 838 F. Supp. 1437, 1443, 1 WH Cases2d 1436, 1439–40 (D. Kan. 1993) (holding that lease payments made by employer to third party are not included in gross receipts). [↑](#footnote-ref-372)
372. Montalvo v. Tower Life Bldg., 426 F.2d 1135, 1142, 19 WH Cases 472 (5th Cir. 1970) (holding that commissions paid to insurance agents may not be excluded from gross volume of sales of insurance company). [↑](#footnote-ref-373)
373. *See* Wirtz v. Savannah Bank & Tr. Co., 362 F.2d 857, 862, 17 WH Cases 374 (5th Cir. 1966). [↑](#footnote-ref-374)
374. In this arrangement, the enterprise collects money from third parties for the principal, and the principal pays a percentage of the money collected to the enterprise. The enterprise’s business volume is the commission earned, not the money collected from the third parties. *See* Falk v. Brennan, 414 U.S. 190, 199, 21 WH Cases 418 (1973). [↑](#footnote-ref-375)
375. 414 U.S. 190, 21 WH Cases 418 (1973). [↑](#footnote-ref-376)
376. *Id.* at 199. The Court considered but rejected an analogy between the enterprise’s commission-based compensation and a typical product seller’s profit margin. *Id*. at 200. Although the Court recognized that the management company arguably “sold” space to tenants because it arranged new leases, it concluded that the method used to calculate the commission supported a finding that the company sold a service rather than building space. *Id*. at 199–202. The Court based this conclusion on the fact that the management company was paid a percentage of the rents it actually collected, not a percentage of future rents for leases it executed. *Id*. at 200–201. Only the commissions paid to the management company were therefore part of its business volume, not the amount of rent collected on behalf of the building’s owner. *Id*. at 201. [↑](#footnote-ref-377)
377. Burnley v. Short, 730 F.2d 136, 26 WH Cases 1111 (4th Cir. 1984) (motel’s commission on long-distance telephone calls includable in gross receipts, but service charges imposed by telephone service provider and billed to guest not included in business volume). [↑](#footnote-ref-378)
378. Martinez-Pinillos v. Air Flow Filters, Inc., 738 F. Supp. 2d 1268 (S.D. Fla. 2010). [↑](#footnote-ref-379)
379. 29 U.S.C. §203(s)(1)(A)(ii). Note, however, that excise taxes that do not meet this precise definition, such as excise taxes at the manufacturer or wholesaler level, are included in gross receipts. *See* Wirtz v. Charleston Coca-Cola Bottling Co., 356 F.2d 428, 17 WH Cases 230 (4th Cir. 1966) (holding taxes part of gross receipts because they were paid by bottling company, not retailer). [↑](#footnote-ref-380)
380. 29 C.F.R. §779.262(a). [↑](#footnote-ref-381)
381. *Id*. [↑](#footnote-ref-382)
382. *Id*. §779.264. [↑](#footnote-ref-383)
383. *Id*. §779.259(a). *See* Marckenson v. LAL Peker, LLC, 2011 WL 5023422 (S.D. Fla. Oct. 19, 2011) (holding that “gross volume of sales” does not include unrealized revenue attributable to coupons or discounts provided to customers, under 29 C.F.R. §779.259). [↑](#footnote-ref-384)
384. *Id*. [↑](#footnote-ref-385)
385. See §III.B.2 [Enterprise Coverage; Requirements of Section 203(r); “Common Business Purpose”] of this chapter. [↑](#footnote-ref-386)
386. *See* 29 C.F.R. §779.214. [↑](#footnote-ref-387)
387. *See* WH Op. FLSA2008-8, at 2, 2008 WL 4906282 (Sept. 29, 2008). [↑](#footnote-ref-388)
388. *See* *id*. at 3 (concluding that fees for pet adoptions and spaying and neutering must be included in gross receipts because these services compete with private, for-profit enterprises). [↑](#footnote-ref-389)
389. 29 C.F.R. §779.266(b). [↑](#footnote-ref-390)
390. Collar v. Abalux, Inc., 895 F.3d 1278 (11th Cir. 2018); Burnley v. Short, 730 F.2d 136, 139, 26 WH Cases 1111 (4th Cir. 1984); Marshall v. Duncan, 480 F. Supp. 62, 63, 24 WH Cases 422 (E.D. Tenn. 1979). [↑](#footnote-ref-391)
391. 29 C.F.R. §779.266(b). [↑](#footnote-ref-392)
392. *Id.* An employer’s tax returns may be used for this purpose although they will not always be dispositive. *Compare* Yupa v. Country Stone & Fence Corp., 2017 WL 27957 (E.D.N.Y. Jan. 3, 2017) (finding that defendant did not have more than $500,000 in gross volume of sales based upon tax returns), *with* Fu v. Red Rose Nail Salon, Inc., 2017 WL 985893 (S.D.N.Y. Mar. 13, 2017) (finding genuine dispute of material fact as to whether employer met $500,000 business volume threshold notwithstanding tax returns that showed gross sales below the threshold, where plaintiffs offered specific evidence that tax returns were inaccurate and defendant underreported its actual gross sales). [↑](#footnote-ref-393)
393. *Id*. §779.268. [↑](#footnote-ref-394)
394. *Id*. [↑](#footnote-ref-395)
395. 29 C.F.R. §779.266(a). [↑](#footnote-ref-396)
396. *Id*. [↑](#footnote-ref-397)
397. *Id*.; *see also* Walsh v. Dayem Org., Inc., 608 F. Supp. 3d 715 (S.D. Ill. 2022) (relying on the rolling quarter method to establish coverage in 2020 where employer met $500,000 threshold in 2019); Exime v. E.W. Ventures, Inc., 591 F. Supp. 2d 1364, 1374–75 (S.D. Fla. 2008) (rejecting use of rolling quarter method where business satisfied $500,000 test in prior year). [↑](#footnote-ref-398)
398. 29 C.F.R. §779.266(a); Mendoza v. Discount C.V. Joint Rack & Pinion Rebuilding, Inc., 101 F. Supp. 3d 1282 (S.D. Fla. 2015) (presumption rebutted by employer’s tax returns). [↑](#footnote-ref-399)
399. Burnley v. Short, 730 F.2d 136, 139, 26 WH Cases 1111 (4th Cir. 1984)   
     (“[T]he ‘rolling quarters’ method provides for a more current and less speculative assessment of FLSA applicability.”); Donovan v. I-20 Motels, 664 F.2d 957, 959, 25 WH Cases 259 (5th Cir. 1981) (finding that rolling quarter method substantially furthers FLSA’s purpose by providing more current and less speculative assessment of applicability of its provisions). [↑](#footnote-ref-400)
400. *Short*, 730 F.2d at 139; *I-20 Motels*, 664 F.2d at 959; Usery v. Associated Drugs, 538 F.2d 1191, 1193, 22 WH Cases 1273 (5th Cir. 1976) (upholding district court’s refusal to apply rolling quarter method where its use would be unfair to employer because of no practical way to adjust wages on quarterly basis without disrupting relations with employees). [↑](#footnote-ref-401)
401. *Associated Drugs*, 538 F.2d at 1193. [↑](#footnote-ref-402)
402. 29 C.F.R. §779.269 (“[W]here the new business consists of a large department store, or a supermarket, it may be clear from the outset that the business will meet the annual dollar volume tests so as to be subject to the requirements of the Act.”). [↑](#footnote-ref-403)
403. *Id*. [↑](#footnote-ref-404)
404. *Id*. [↑](#footnote-ref-405)
405. *Id*. [↑](#footnote-ref-406)
406. *Id*. [↑](#footnote-ref-407)
407. 29 U.S.C. §213(g) (establishing coverage for agricultural establishments that are part of conglomerates). Before the 1989 Amendments to the FLSA, conglomerate coverage also applied to certain retail establishments; such coverage became unnecessary after the exemptions for retail establishments were repealed in 1989. For a discussion of FLSA provisions that are specific to the agricultural industry, see Chapter 7, Agricultural Exemptions. [↑](#footnote-ref-408)
408. *Id*. §213(g). [↑](#footnote-ref-409)
409. *Id*. [↑](#footnote-ref-410)
410. *Id*. [↑](#footnote-ref-411)
411. *See also* Brock v. Cruz, 357 F. Supp. 3d 581 (S.D. Tex. 2019) (dismissing complaint where plaintiff nurses failed to allege that staffing agency that placed them to work in hospitals was an enterprise engaged in the operation of a hospital for enterprise coverage). [↑](#footnote-ref-412)
412. 29 U.S.C. §203(s)(1)(B). [↑](#footnote-ref-413)
413. *Id.* [↑](#footnote-ref-414)
414. Perez v. Contingent Care, LLC, 820 F.3d 288 (8th Cir. 2016) (custodial child day care center that provided educational services to preschool**-**age children qualified as “preschool” for purposes of §203(s)(1)(B)); Smith v. Goforth, 2016 WL 6091546 (W.D. Tex. Oct. 18, 2016) (day care facility qualified as“preschool” for purposes of §203(s)(1)(B)). [↑](#footnote-ref-415)
415. Ferrer v. Spring House Care, Inc., 2009 WL 3514422, at \*6 (C.D. Cal. Oct. 27, 2009) (holding that residential care facility for mentally disabled residents covered as enterprise “engaged in the operation of a hospital, [or] an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises” under 29 U.S.C. §203(s)(1)(B)). *But see* Anderson v. Hearts with Hope Found., 713 F. App’x 278 (5th Cir. 2017) (nonprofit organization operating two group homes, providing residential care for children who have been the victims of abuse, abandonment, and neglect, was not covered enterprise, relying on FOH §12g18). [↑](#footnote-ref-416)
416. 651 F.3d 1007, 1008–09 (9th Cir. 2011) (citing 29 U.S.C. §203(r)(2)(a)). [↑](#footnote-ref-417)
417. *Id.* at 1009. [↑](#footnote-ref-418)
418. *Id.* [↑](#footnote-ref-419)
419. *Id.* [↑](#footnote-ref-420)
420. *Id* at 1011. [↑](#footnote-ref-421)
421. *Id* at 1010. [↑](#footnote-ref-422)
422. *Id* at 1010–11. [↑](#footnote-ref-423)
423. *Id* at 1011. [↑](#footnote-ref-424)
424. *Id*. [↑](#footnote-ref-425)
425. *Id.* *See also* Llanes v. Zalewski, 412 F. Supp. 3d 1266 (D. Or. 2019) (resident care manager employed by foster care facility that provides room and board to five residents over age 65 with medical or psychological conditions not entitled to enterprise coverage, relying on *Probert*). [↑](#footnote-ref-426)
426. *Probert,* 651 F.3d at 1012 (referencing FOH ch. 12, §12g02). [↑](#footnote-ref-427)
427. *Id*. at 1012. [↑](#footnote-ref-428)
428. *Id*. §213(f). [↑](#footnote-ref-429)
429. Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881 (2019). [↑](#footnote-ref-430)
430. 43 U.S.C. §1333(a)(2)(A). [↑](#footnote-ref-431)
431. *Id.* [↑](#footnote-ref-432)
432. 139 S. Ct. at 1889. [↑](#footnote-ref-433)
433. *Id*. at 1893 (citing 29 C.F.R. §785.23). [↑](#footnote-ref-434)
434. *Id*. [↑](#footnote-ref-435)