Chapter 7

**AGRICULTURAL EXEMPTIONS**

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I. Overview

Originally, the Fair Labor Standards Act (FLSA) exempted all agricultural employees from its minimum wage and overtime requirements. Congress later narrowed the class of agricultural workers exempt from the FLSA’s minimum wage protections[[1]](#footnote-1) and limited the minimum wage exemption to small farms, family farms, local hand-harvest laborers, and migrant hand-harvest laborers.[[2]](#footnote-2) Today, agricultural workers may be exempt from the following FLSA requirements:

(1) minimum wage and overtime requirements;

(2) overtime requirements only;

(3) child labor, minimum wage, and overtime requirements; or

(4) overtime requirements on a time-limited basis.

This chapter discusses each of these exemption categories.[[3]](#footnote-3)

The definition of the term “agriculture,” as found in Section 203(f) of the FLSA, is key to many of these exemptions. Long ago, the U.S. Supreme Court opined that the definition of “agriculture” has two distinct branches: one branch is the primary meaning of “agriculture,” which includes farming and all of its branches; the other is the broader meaning, which includes practices, whether or not themselves farming practices, that are performed either by a farmer or on a farm, incidentally to or in conjunction with “such” farming operations.[[4]](#footnote-4) The latter branch encompasses activities such as “preparation for market, delivery to storage or to market or to carriers for transportation.”[[5]](#footnote-5) As many of the agricultural exemptions found in the FLSA build on an understanding of these two branches of the term “agriculture,” this chapter opens with a discussion of the terms “primary agriculture” and “secondary agriculture” before discussing the agricultural exemptions themselves.

The following regulations are directly relevant to the matters treated in this chapter:

• 29 C.F.R. Part 780, Agricultural Exemptions;

• 29 C.F.R. Part 536.3, Area of Production;

• 29 C.F.R. Part 570, Child Labor Regulations; and

• 29 C.F.R. Part 788, Forestry Operations.

In addition, the U.S. Department of Labor (DOL) Wage and Hour Division’s *Field Operations Handbook* sets forth the Department’s enforcement positions.[[6]](#footnote-6)

II. General Scope of the Term “Agriculture”

**A. Introduction**

Section 203(f) of the FLSA defines the term “agriculture” as follows:

“Agriculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.[[7]](#footnote-7)

In 1947, in *Farmers Reservoir & Irrigation Co. v. McComb*,[[8]](#footnote-8) the Supreme Court characterized this definition as having “two distinct branches.” First, “there is the primary meaning” of “agriculture,” which includes “farming in all its branches.” The Court noted that the FLSA specifies certain practices “such as cultivation and tillage of the soil, dairying, etc.” as being included in “this primary meaning.” The second, “broader meaning” of the term “agriculture” goes beyond farming to include “any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with ‘such’ farming operations.”[[9]](#footnote-9)

The “Exemptions Applicable to Agriculture” regulation discusses the impact of specialization on the scope of agriculture:

The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity. The farmhand who cares for the farmer’s mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions, not agriculture.[[10]](#footnote-10)

Employment that is not within the scope of either the primary or secondary definition of “agriculture” is not employment in agriculture. “In other words, employees not employed in farming or by a farmer or on a farm are not employed in agriculture … .”[[11]](#footnote-11)

**B. “Primary” Agriculture**

When an employee is engaged in direct farming operations that are included in the “primary” definition of agriculture, that person is an agricultural employee regardless of the purpose of the employer.[[12]](#footnote-12) It is immaterial whether the agricultural commodities are grown in “enclosed houses … or in an open field.”[[13]](#footnote-13)

***1. Farming in All Its Branches***

The regulations provide that “farming in all its branches” includes all activities, regardless of whether they are listed in FLSA Section 203(f), that constitute farming or a branch thereof.[[14]](#footnote-14) Section 203(f) provides that the following activities, among others, are included in the term “farming in all its branches”:

• cultivation and tillage of the soil;

• dairying;

• the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act); and

• the raising of livestock, bees, fur-bearing animals, or poultry.[[15]](#footnote-15)

In determining whether an operation not specified in Section 203(f) constitutes a part of “farming in all its branches,” it may be necessary to consider the

nature and purpose of the operations of the employer, the character of the place where the employee performs his [or her] duties, the general types of activities conducted [in that place], the purpose and function of the activities with respect to the operations carried on by the employer, … [and] a consideration of the principles contained in §780.104.[[16]](#footnote-16)

For example, in *Barks v. Silver Bait*,[[17]](#footnote-17) the Sixth Circuit addressed whether the term “agriculture” under the FLSA included the growing and raising of worms for sale as fishing bait. The court began its analysis by looking to see whether raising worms fell within the illustrative examples provided in Section 203(f). After a thorough analysis, the court concluded that raising worms was not expressly exempt within the meaning of any of the statutory examples. The court then turned to the concept of farming and concluded that Silver Bait’s operations resembled a traditional farm:

Silver Bait houses the worms, feeds them, monitors their growth, and eventually harvests them. … Although the use of sorting machines and concrete worm beds evoke comparison to industrial production, modern farming of livestock and poultry similarly has many industrial qualities. …

Thus … there is little to distinguish Silver Bait from a traditional farm other than the unfamiliarity of worm farming.[[18]](#footnote-18)

On the other hand, in the citrus fruit industry, when an employer purchases fruit that is unsuitable for packing, and then transports and sells that fruit to canning plants, such operations do not qualify as farming and, therefore, employees engaged in such operations are not employed in agriculture.[[19]](#footnote-19) However, employees gathering the fruit at the groves are considered agricultural workers because they are engaged in harvesting operations.[[20]](#footnote-20)

***2. Cultivation and Tillage of the Soil***

Cultivation and tillage of the soil includes all operations that are necessary to prepare a suitable seedbed, eliminate weed growth, and improve the physical condition of the soil.[[21]](#footnote-21) Operations such as grading or leveling land, removing rocks or other matter to prepare the ground for a proper seedbed, building terraces to control soil erosion, and applying water, fertilizer, or limestone to farmland are included.[[22]](#footnote-22)

***3. Dairying***

According to the regulations, “dairying” includes caring for and milking cows or goats and putting milk in containers, cooling it, and storing it, where such activities are performed on a farm.[[23]](#footnote-23) Milk processing operations such as separating cream from milk, bottling milk and cream, or making butter and cheese may be considered “dairying” under some circumstances, or they may be considered practices under the secondary meaning of “agriculture” when performed by a farmer or on a farm, provided these operations are not performed on milk produced by other farmers or produced on other farms.[[24]](#footnote-24) Handling milk and cream at receiving stations is not included under the definition of “dairying.”[[25]](#footnote-25)

An employee who transports a “dairy product” from the farm to the processor is engaged in activities within the secondary meaning of “agriculture” and is exempt from the FLSA’s overtime requirements. In *Williams v. Hilarides*,[[26]](#footnote-26) the court considered whether the product the plaintiff transported from the defendant’s farm to a cheese plant was a dairy product or an industrial product. The milk product being hauled had been subjected to a process of “ultra-filtration,” which removed a substantial portion of the water from the untreated raw milk. The court concluded that the “evidence clearly establishes the chemical composition of the milk is changed because a significant amount of water is removed.”[[27]](#footnote-27) Accordingly, the product hauled by the plaintiff was a manufactured product rather than a dairy product, and so the agricultural exemption did not apply.[[28]](#footnote-28)

***4. Agricultural or Horticultural Commodities***

Section 203(f) defines as “agriculture” the “production, cultivation, growing, and harvesting” of “agricultural or horticultural commodities.”[[29]](#footnote-29) The regulations define such “agricultural or horticultural commodities” generally as those that result from applying agricultural or horticultural techniques.[[30]](#footnote-30) The term includes products of the soil that are planted and cultivated by a person, such as grains, forage crops, fruits, vegetables, nuts, sugar crops, fiber crops, tobacco, and nursery products. The term also includes domesticated animals and some of their products such as milk, wool, eggs, and honey. The term does not include “commodities produced by industrial techniques, by exploitation of mineral wealth or other natural resources, or by cultivated natural growth,”[[31]](#footnote-31) as in the instance of peat humus or peat moss.[[32]](#footnote-32)

Under the regulations, seeds and seedlings of agricultural and horticultural plants are considered “agricultural or horticultural commodities.”[[33]](#footnote-33) The regulations also provide that employees engaged in the gathering or harvesting of wild commodities (such as mosses, wild rice, burls, and laurel plants), or the trapping of wild animals are not engaged in the “production, cultivation, growing, and harvesting of agricultural or horticultural commodities.”[[34]](#footnote-34) However, the fact that a commodity ordinarily grows wild does not, when it is cultivated, preclude it from being classified as an agricultural or horticultural commodity.[[35]](#footnote-35) For example, cultivated blueberries are included in the primary definition of “agriculture.”[[36]](#footnote-36)

The regulations also state “trees grown in forests and the lumber derived therefrom are not ‘agricultural or horticultural commodities.’ Christmas trees, whether wild or planted, are also not so considered.”[[37]](#footnote-37)

In *United States Department of Labor v. North Carolina Growers Ass’n, Inc*.,[[38]](#footnote-38) the plaintiffs challenged the DOL’s long-held position that Christmas tree farming did not fall within the primary definition of “agriculture” because its interpretive bulletins defined Christmas tree farming as forestry, and not agriculture. The district court agreed with the DOL. On appeal the plaintiffs argued that Christmas tree farming involved the cultivation of an agricultural or horticultural commodity, and the Fourth Circuit agreed:

Without question, modern Christmas trees are cultivated commodities, or “economic good[s].”… [T]hey undergo extensive care and management before they are eventually harvested for sale to consumers. Thus, if Christmas trees are “agricultural” or “horticultural,” their cultivation, growing, and harvesting is agriculture under § 203(f). Horticulture is “the science and art of growing … ornamental plants.” Ornamental plants are those “having decorative quality or value.” Because Christmas trees are ornamental plants that are grown and harvested, we believe that they are horticultural commodities. Accordingly, the cultivation, growing, and harvesting of Christmas trees falls squarely within the primary definition of agriculture in § 203(f).[[39]](#footnote-39)

The Court of Appeals found there was no justifiable reason for the DOL’s distinction between trees grown at a nursery and trees grown at a modern Christmas tree farm:

We … note that when the DOL originally promulgated these bulletins in the 1950s, Christmas tree farming as we know it today essentially did not exist. Prior to the late 1960s, Christmas trees were either cut down from the wild or planted and harvested with little or no management. As discussed above, contemporary Christmas tree operations involve extensive management. While the DOL’s categorization of Christmas tree farming as non-agriculture may have been persuasive at the time the bulletins were promulgated, the significant changes in the industry’s cultivation and management techniques since that time render the original bulletins unpersuasive.[[40]](#footnote-40)

Accordingly, the Fourth Circuit held that the cultivation, growing, and harvesting of Christmas trees falls squarely within the primary definition of “agriculture” in Section 203(f).

***5. Commodities Included by Reference to the Agricultural Marketing Act***

The statutory definition of “agriculture” also includes within the scope of “agricultural or horticultural commodities” those items defined as agricultural commodities in the Agricultural Marketing Act.[[41]](#footnote-41) Section 15(g) of the Agricultural Marketing Act provides that, as used in that Act,

the term “agricultural commodity” includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum resin, as defined in the Naval Stores Act, approved March 3, 1923.[[42]](#footnote-42)

In turn, the Naval Stores Act defines “gum spirits of turpentine” as “spirits of turpentine made from gum (oleoresin) from a living tree” and “gum rosin” as the “rosin remaining after the distillation of gum spirits of turpentine.”[[43]](#footnote-43) The production of any of these commodities is therefore within the primary definition of “agriculture.” The only oleoresin included within Section 15 of the Agricultural Marketing Act is that derived from a living tree.[[44]](#footnote-44) Similarly, only gum turpentine or gum rosin produced by the original producer of the crude gum from which they are derived is included under Section 15.[[45]](#footnote-45)

***6. “Production, Cultivation, Growing, and Harvesting” of Commodities***

The words “production, cultivation, and growing”[[46]](#footnote-46) describe raising operations that are normally intended or expected to produce specific agricultural or horticultural commodities.[[47]](#footnote-47) The words do not include operations undertaken for purposes not concerned with obtaining specific agricultural or horticultural commodities or operations that are merely preliminary, preparatory, or incidental to the operations through which the commodities are produced. The regulations provide, as one of several examples, that employees who engage in servicing insecticide sprayers in a farmer’s orchard or in testing soil are not included within the terms “production, cultivation, and growing.”[[48]](#footnote-48)

The term “production,” when used in conjunction with “cultivation, growing, and harvesting,” refers to what is derived and produced from the soil, such as any farm produce. The term does not refer to the grinding or processing of sugar cane, the milling of wheat into flour, or the making of cider from apples or similar operations.[[49]](#footnote-49) The regulations note that the term was included in Section 203(f) solely to cover the special situation of producing turpentine and gum rosins by a process that involves tapping living trees.

The term “harvesting” as used in Section 203(f) includes all operations customarily performed in connection with the removal of crops by the farmer from their growing position.[[50]](#footnote-50) As examples, the regulations refer to cutting grain, picking fruit, and digging up trees and shrubs grown in a nursery. The term does not extend to operations subsequent to and unconnected with the actual process through which agricultural or horticultural commodities are severed from their attachment to the soil or otherwise reduced to possession.[[51]](#footnote-51) Transportation to a concentration point on the farm may be harvesting, but transportation off the farm is not. Such transportation, however, may be within the secondary definition of “agriculture.”

***7. Raising Livestock, Bees, Fur-Bearing Animals, or Poultry***

Workers are employed in raising livestock, bees, fur-bearing animals, or poultry only if their operations relate to “raising” animals of the types enumerated.[[52]](#footnote-52) The purpose for which the animals are raised is immaterial, as is the place where the operations are performed.

The regulations provide that the meaning of the term “livestock” as found in Section 203(f) is confined to its ordinary usage and includes only domestic animals that are ordinarily raised or used on farms, such as cattle, sheep, swine, horses, mules, donkeys, and goats.[[53]](#footnote-53) “Livestock” does not include animals that are ordinarily used by laboratories for research purposes, such as mice, rats, guinea pigs, and hamsters. Although fish are not livestock, employees who engage in fish farming may be exempt under Section 213(a)(6) or 213(b)(12) as well as under Section 213(a)(5).[[54]](#footnote-54)

*a. Raising of Livestock*

The regulations define the term “raising” with regard to livestock to include breeding, fattening, feeding, and the general care of livestock.[[55]](#footnote-55) The term encompasses employees who feed and fatten livestock not bred on the premises if the livestock remain on the premises for a substantial length of time.[[56]](#footnote-56) However, performing these operations with respect to animals that are awaiting sale, shipment, or slaughter is not considered “raising.”[[57]](#footnote-57)

Employees who breed, raise, and train horses on farms for racing purposes are considered agricultural employees. Included are grooms, attendants, exercise persons, and watchmen employed at the breeding farm. However, employees who race, train, and care for horses off the farm in connection with commercial racing are not employed in agriculture.[[58]](#footnote-58)

*b. Raising of Bees*

All activities customarily performed in connection with handling and keeping bees are agricultural activities, including the treatment of disease and raising queens.[[59]](#footnote-59)

*c. Raising of Fur-Bearing Animals*

Animals whose fur has marketable value, such as rabbits, silver foxes, minks, squirrels, and muskrats, are considered “fur-bearing animals” under the regulations.[[60]](#footnote-60) The term “raising of fur-bearing animals” is defined as activities performed in connection with breeding, feeding, and caring for such animals, including the treatment of disease. The term “treatment of disease” refers only to disease of the animals and does not refer to the use of such animals or their fur in treating disease of others.[[61]](#footnote-61) Where wild fur-bearing animals propagate in their natural habitat and are not raised as described here, the trapping or hunting of such animals is not included within Section 203(f).[[62]](#footnote-62)

*d. Raising of Poultry*

The term “poultry” includes domesticated fowl and game birds, ducks, and pigeons, but excludes canaries and parakeets.[[63]](#footnote-63) The term “raising” as applied to poultry includes breeding, hatching, propagating, feeding, and the general care of poultry, but does not include slaughtering, which can be considered “agriculture” only if it comes within the secondary definition of that term.[[64]](#footnote-64) Temporary care and feeding of poultry pending sale, shipment, or slaughter is not considered “raising.” However, feeding, fattening, and caring for poultry over a substantial period of time may constitute the “raising of poultry.”[[65]](#footnote-65) A court found the exemption applicable where, except for loading and unloading the trucks in which the chickens were transported to and from the producer’s property, the defendant’s employees were “involved in the entire process of raising the chickens” from the age of one day to two-and-a-half years, including vaccinating and debeaking them, even though the employer did not own the chickens.[[66]](#footnote-66)

As the regulations note, feed dealers and processors may enter into contracts with growers to raise chicks to marketable size, under which the dealers or processors furnish the chicks and the feed.[[67]](#footnote-67) Under such an arrangement, the activities of the growers and their employees are plainly agriculture within the Section 203(f) definition.[[68]](#footnote-68) The activities of the feed dealer or processor, however, are not considered “raising” and thus are not within the primary definition of “agriculture.” The employees of the dealers or processors who perform work on a farm may be within the secondary definition of “agriculture” if their activities are performed incident to or in conjunction with raising poultry on that farm.[[69]](#footnote-69)

**C. “Secondary” Meaning of the Term “Agriculture”**

The “secondary” definition of agriculture includes “any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.”[[70]](#footnote-70) As the regulations note, the legislative history of this language indicates it was added to make certain that independent contractors—such as threshers of wheat who travel from farm to farm to assist farmers in a purely agricultural task and also to assist farmers in getting their agricultural goods to market in their raw or natural state—would be included within the definition of “agricultural employees.”[[71]](#footnote-71)

To be considered secondary agriculture, a practice must be performed

• either by a farmer or on a farm;

• in connection with the farmer’s own farming operations or in connection with the farming operations conducted on the farm where the practice is performed; and

• as an incident to or in conjunction with the farming operations.[[72]](#footnote-72)

A practice that is performed neither by a farmer nor on a farm is not within the scope of the secondary meaning of “agriculture,” no matter how closely it may relate to farming operations.[[73]](#footnote-73) Processes that are more akin to manufacturing than to agriculture are not within the secondary definition of “agriculture.”[[74]](#footnote-74)

***1. Practices Performed “by a Farmer”***

The term “farmer” is an occupational title, and the farmer-employer must be engaged in activities of a type and to the extent that the person ordinarily regarded as a “farmer” is engaged in order to qualify for the title.[[75]](#footnote-75) If this test is met, it does not matter why the farmer is engaged in farming or whether farming is his or her sole occupation, nor does it matter whether the farmer’s purpose is to obtain products useful to him or her in a nonfarming enterprise that the farmer conducts.[[76]](#footnote-76) An association, partnership, or corporation, as well as an individual, may be a farmer if engaged in actual farming operations.[[77]](#footnote-77)

To be a farmer, an employer must undertake farming operations of such scope and significance as to constitute a distinct activity for the purpose of yielding a farm product.[[78]](#footnote-78) The regulations state that as a general rule a farmer performs farming operations on land owned, leased, or controlled by him or her and devoted to his or her own use, although use of public lands for grazing does not cause an employer to lose status as a farmer.[[79]](#footnote-79) To be a farmer, it is not enough that the employer engage in some actual farming operations, such as harvesting a crop of agricultural commodities; however, the farmer’s “employees who perform the harvesting are employed in ‘agriculture’ in the weeks in which they are exclusively so engaged.”[[80]](#footnote-80) An employer that engages merely in practices that are incidental to farming is not a farmer, as in the case of a company that prepares for market, sells, and ships flowers grown and cultivated on farms by affiliated corporations.[[81]](#footnote-81)

The term “farmer” includes the employees of a farmer, but an employer is not a farmer merely by employing a farmer or appointing a farmer as an agent to do the actual work.[[82]](#footnote-82) A person who merely performs services or supplies materials for farmers in return for compensation is not a farmer, nor is one who has a contract with a farmer to provide a market for the product, contributes counsel and advice, makes advances, and otherwise assists the grower who actually produces the crops. It is the grower, not the person with whom the grower contracts, who is the farmer with respect to that crop.[[83]](#footnote-83) The phrase “by a farmer” does not include the employees of a farmers’ cooperative association—they are employed by the cooperative association and not by the individual farmers who constitute its membership or stockholders.[[84]](#footnote-84) The work performed by such an association is not work performed “by a farmer,” but “for farmers,” unless the association itself engages in actual farming operations.[[85]](#footnote-85)

***2. Practices Performed “on a Farm”***

If a practice is not performed by a farmer, then it must be performed “on a farm” to come within the secondary meaning of “agriculture.”[[86]](#footnote-86) A farm is a tract of land devoted to actual farming operations as described in the primary definition of “agriculture.”[[87]](#footnote-87) The total tract of land operated as a unit for farming purposes is included, even if part of the land is not used for actual farming operations. Thus, delivery to market is excluded when performed by someone other than the farmer because it is not performed “on a farm.”[[88]](#footnote-88) Similarly, transportation of harvest workers from company-provided housing to the grocery store, laundromat, and bank for “basic-necessities trips” does not qualify as secondary agriculture because there is no work performed “on a farm.”[[89]](#footnote-89)

Practices performed by employees of an independent contractor that qualify as being performed “on a farm” include building terraces, threshing wheat, building silos and granaries, digging wells, inspecting and culling flocks of poultry, crop dusting, and conducting animal care auditing.[[90]](#footnote-90) It must be noted that to fall within Section 203(f), such practices must still meet the other elements of the secondary meaning of “agriculture.”[[91]](#footnote-91) An employee may work on more than one farm in a workweek, as long as the employee’s work on each farm pertains solely to farming operations on that farm. The fact that a minor and incidental part of the work of such an employee occurs off the farm does not change the result.[[92]](#footnote-92)

***3. “Such Farming Operations” of the Farmer***

“Practices … performed by a farmer” must be performed as an incident to or in conjunction with “such farming operations” to be within the secondary meaning of “agriculture.”[[93]](#footnote-93) Furthermore, practices must be performed in connection with the farmer’s own farming practices.[[94]](#footnote-94) Thus, as the regulations explain, a farmer who processes agricultural commodities grown by other farmers may be performing a practice that is incident to or in conjunction with the farming operations of the other farmers, but such processing is not performed as an incident to or in conjunction with the farmer’s own farming operations and is therefore not within the secondary meaning of “agriculture.”[[95]](#footnote-95) The regulations further illustrate this principle with examples of activities that do not meet the secondary definition of “agriculture:” (1) employees of a fruit grower who dry or pack fruit not grown by their employer; and (2) storage operations conducted by a farmer for products grown by another farmer.[[96]](#footnote-96)

As long as the farming operations are performed by the farmer in his or her capacity as farmer, the farming operations may take place on more than one farm.[[97]](#footnote-97) Thus, where a practice is performed with respect to products of farming operations, the controlling consideration is whether the products were produced by the farming operations of the farmer who performs the practice, rather than at what place or on whose land the farmer performs that practice.[[98]](#footnote-98) The regulations provide that, in the absence of contrary facts, a practice performed by a farmer in connection with farming operations conducted on land that the farmer owns or leases will be considered as performed in connection with that farmer’s own farming operations; conversely, the opposite conclusion is presumed if the farmer is not the owner or lessee of the land where the farming operations take place. Contractual arrangements not amounting to a bona fide lease between the grower and a landowner must, under the regulations, be scrutinized as to all facts and circumstances regarding the question of whose farming operations are actually being conducted.[[99]](#footnote-99)

***4. “Such Farming Operations” on the Farm***

“Practices … performed … on a farm” must be performed as an incident to or in conjunction with “such farming operations” to come within the secondary meaning of “agriculture.”[[100]](#footnote-100) A practice that is performed with respect to farm commodities is not within Section 203(f) by reason of its performance on a farm unless all such commodities are the products of that farm. As the regulations note, a practice performed on a farm, such as packing or storing, may be incidental to farming operations, but the practice cannot constitute a basis for considering the employees to be engaged in agriculture if it is performed on any commodities that were produced anywhere other than on that farm.[[101]](#footnote-101) For example, the construction by an independent contractor of a granary on a farm is not connected with that farming operation if the farmer for whom it is built intends to use the structure for grain produced on other farms.[[102]](#footnote-102) A practice that pertains to farming operations generally or to those performed on a number of farms, rather than to those performed on one farm only, is outside the scope of the secondary meaning of “agriculture.” Thus, performing area soil surveys is not within the definition where the results of the surveys are provided to a number of farmers.[[103]](#footnote-103)

The secondary meaning of “agriculture” does not include practices performed on a farm in connection with nonfarming operations.[[104]](#footnote-104) Thus, if a farmer operates a gravel pit on his or her farm, none of the practices performed in connection with the operation of that gravel pit falls within Section 203(f).[[105]](#footnote-105) The farmer’s purpose in having the practice performed is the key to whether it is performed in connection with farming operations conducted on the farm; land-clearing operations, for example, are connected with farming operations if the farmer intends to devote the cleared land to farm use.[[106]](#footnote-106)

According to the regulations, the fact that a practice performed on a farm is not performed by or for the farmer is a “strong indication” that it is not performed in connection with the farming operations conducted on that farm.[[107]](#footnote-107) “The question of for whom the practice is performed is one of fact.”[[108]](#footnote-108) As the regulations note, when farmers relinquish title to a crop and divest themselves of further responsibility for it “prior to the performance of the packing or dehydrating operations,” that fact is “highly significant.”[[109]](#footnote-109) For example, when a vegetable packer buys the farmer’s standing crop, harvests it with its own crew, and transports the harvested crop to its off-the-farm packing plant, the transporting and plant employees are not engaged in either primary or secondary agriculture.[[110]](#footnote-110) Even if the packer transfers the plant operations to a location on the farm, the packing activities of its employees are not performed for the farmer.[[111]](#footnote-111)

***5. Performance of the Practice “as an Incident to or in Conjunction With” Farming Operations***

In order for practices, other than actual farming operations, to constitute “agriculture” within the meaning of Section 203(f), it is not enough that they be performed by a farmer or on a farm, they also must be performed “as incident to or in conjunction with” these farming operations.[[112]](#footnote-112) The regulations acknowledge that the line separating the practices that meet this requirement from those that do not “is not susceptible of precise definition.”[[113]](#footnote-113) Generally, a practice performed in connection with farming operations is within the secondary meaning of “agriculture” if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business.[[114]](#footnote-114) Industrial operations and processes that are more akin to manufacturing than to agriculture are not included.[[115]](#footnote-115) The regulations provide for a broad inquiry into the “total situation” to determine “whether a practice [1] is part of the agricultural activity or [2] is a distinct business activity.”[[116]](#footnote-116) Among the factors noted in the regulations are

• the general relationship, if any, of the practice to farming as shown by common understanding, competitive factors, and the prevalence of its performance by farmers;

• the size of the farming operations and the respective sums invested in land, buildings, and equipment for the regular farming operations and in plant and equipment for the practice in question;

• the amount of payroll for each type of work;

• the number of employees and the amount of time they spend in each activity;

• the extent to which the practice is performed by regular farm employees and the amount of interchange of employees between the operations;

• the amount of revenue derived from each activity;

• the degree of industrialization involved; and

• the degree of separation established between the activities.[[117]](#footnote-117)

The inclusion of “incidental practice” in the definition of “agriculture” was not intended to include typical factory workers or employees in industrial operations. Thus, the regulations invoke, as a context for applying the secondary meaning of “agriculture,” “the common understanding of what is agricultural and what is not.”[[118]](#footnote-118) The factors relevant to this inquiry include whether the practice is in competition with agricultural or industrial operations and the extent to which such a practice is ordinarily carried out by farmers incidentally to their farming operations.[[119]](#footnote-119) If a farmer, raising a commodity on which a given practice is performed, does not ordinarily perform the practice, that is a strong indication that the practice is not within the secondary meaning of “agriculture.”[[120]](#footnote-120) The issue is the proportion of those growing the commodity who perform the practice, not the proportion of those performing the practice who grow the commodity.

The secondary meaning of “agriculture” was at issue in the Supreme Court case of *Holly Farms Corp. v. National Labor Relations Board*.[[121]](#footnote-121) Holly Farms hatched broiler chicks at its own hatcheries and immediately delivered the chicks to the farms of independent contractors. The contractors then raised the birds into full-grown broiler chickens. Holly Farms paid the contract growers for their services, but retained title to the broilers and supplied the food and medicine necessary to their growth.[[122]](#footnote-122) At issue was the exemption status of “live haul crews,” who traveled to the contracted growers’ farms, captured the birds, loaded them into cages, and then returned the birds to Holly Farms’ processing plant for slaughter.[[123]](#footnote-123)

Although the case originated as a National Labor Relations Board (NLRB) proceeding, the FLSA’s definition of “agriculture” was at issue because the National Labor Relations Act (NLRA) excludes “agricultural laborers” and depends on the definition of “agriculture” supplied by Section 203(f) of the FLSA.[[124]](#footnote-124)

The Court evaluated whether the workers on the live haul crews were engaged in secondary agriculture.[[125]](#footnote-125) The Court first held that the live-haul activities were not performed “by a farmer,” because Holly Farms’ status as a farmer engaged in raising poultry ended when it contracted with growers to care for and feed its chicks.[[126]](#footnote-126) The Court next rejected Holly Farms’ contention that the live haul crews’ catch and cage work was incidental to farming operations, holding instead that the work was tied to Holly Farms’ slaughtering and processing operations, activities that do not constitute “farming” under the statute.[[127]](#footnote-127) The Court noted that once the broilers had grown on the farm for seven weeks, the growers’ contractual obligation to raise the birds ended, and the work of the live haul crew began.[[128]](#footnote-128)

The Court further noted that other DOL regulations were in harmony with this conclusion that the live haul crews did not engage in secondary farming because their work, although “on a farm,” was not performed “as an incident to or in conjunction with” the independent growers’ poultry-raising operations. Thus, 29 C.F.R. §780.129 reiterates that the work “must be performed ‘as an incident to or in conjunction with’ the farming operations,” and Section 780.143 adds that “[t]he fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted.”

In *Bills v. Cactus Family Farms*, *LLC*,[[129]](#footnote-129) the Eighth Circuit applied the Supreme Court’s holding in *Holly Farms* and concluded that on-farm work performed by an animal care auditor for a pork production company was secondary agriculture because it was “incident to or in conjunction with”[[130]](#footnote-130) farming operations. Cactus Farms bred pigs and raised them through a multisite production model. Those sites included nurseries, wean-to-finish farms, and finishing farms, and were owned and operated either by Cactus Farms or by independent contractors. The plaintiff's job primarily consisted of conducting load assessments at contract growers’ finishing farms at the time of transport to ensure that proper biosecurity and safety protocols were followed and that the animals were not abused. Noting that the plaintiff’s work occurred during the contract growers’ ongoing contractual obligation to raise the pigs, which included loading the pigs onto trucks for transport off the farm, the Eighth Circuit concluded that the plaintiff’s load assessments contributed to the welfare of the pigs (and ensured the quality of the animals when delivered to the processing plant) and therefore was incident to the growers’ pig-raising operations.

In *Rodriguez v. Pure Beauty Farms, Inc*.,[[131]](#footnote-131) the Eleventh Circuit evaluated whether the practices engaged in by the plaintiffs were “performed by a farmer,” “on a farm,” and as “an incident to or in conjunction with” such farming operations. In that case, a commercial nursery-farming operation cultivated and grew plants on land it owned and transported its plants to Home Depot sites where the grower’s employees continued to care for the plants. The plaintiffs’ job was to make sure that the growers’ plants, while located in Home Depot stores, remained healthy, attractive, and in a sellable condition until they were purchased. The plaintiffs also kept the plant staging areas clean, sent unsalable plants back to the grower, and requested more plants. The plaintiffs took care of and handled plants belonging to only the grower.

The parties’ dispute centered on whether the practices engaged in by the plaintiffs, performed on Home Depot store sites, were “incident to or in conjunction with” the growers’ farming operations.[[132]](#footnote-132) To determine whether “the practice is conducted as a separate business activity rather than as a part of agriculture,” the court considered

(1) whether “the type of product resulting from the practice” remains in its raw or natural state or changes; (2) “the value added to the product as a result of the practice and whether a sales organization is maintained for the disposal of the product”; and (3) whether the product is “sold under the producer’s own label rather than under that of the purchaser.”[[133]](#footnote-133)

Applying these factors, the court found that by ensuring that the grower’s plants continued to receive adequate water and light and were pruned and insect-free while in the staging areas, the plaintiffs’ work was directly connected with and subordinate to the growers’ own nursery-farming operations.[[134]](#footnote-134)

In *Ramirez v. Statewide Harvesting & Hauling, LLC*,[[135]](#footnote-135) the Eleventh Circuit again evaluated whether transportation activities were performed by “a farmer,” “on a farm,” and were “incidental to or in conjunction with farming operations” and reached a different conclusion. In *Ramirez*, harvest crew supervisors spent four hours per week transporting harvest workers from company-provided housing to the grocery store, laundromat, and bank. The employer argued that the basic-necessities driving trips were “‘agriculture’ because the transportation was ‘indispensable for the H-2A workers’ and it provided the transportation only to comply with the requirements of the H-2A program.”[[136]](#footnote-136) The Eleventh Circuit disagreed, finding that the off-the-farm activities were separate from the agricultural activities themselves and that secondary agricultural activities must be physically connected to the farm itself.[[137]](#footnote-137) Quoting from a DOL regulation, the court concluded: “Simply put, ‘[n]o matter how closely related it may be to farming operations, a practice performed neither by a farmer nor on farm is not within the scope of the ‘secondary’ meaning of ‘agriculture.’”[[138]](#footnote-138)

In *Acosta v. Bland Farms Production & Packing, LLC*,[[139]](#footnote-139) the Eleventh Circuit examined whether onion packers for an employer running a packing shed that processed and packaged onions it grew, as well as those grown on other farms, were engaged in primary or secondary agriculture. The court concluded that the onion packers were not performing practices “incident to or in conjunction with” the employer’s farming operation because the farming operation of Bland Farm’s growers should not be considered farming of Bland Farms.[[140]](#footnote-140) Therefore, Bland Farm’s packing shed employees were not employed in agriculture when they packed the growers’ onions.[[141]](#footnote-141)

In *Luna Vanegas v. Signet Builders, Inc*.,[[142]](#footnote-142) the Seventh Circuit reversed the district court’s dismissal of the plaintiff’s complaint on the basis that his construction work fell under the FLSA’s agricultural work exemption, 29 U.S.C. § 213(b)(12). The appellate court held that “the question [as to] whether [the exemption applied] is a fact-intensive inquiry that rarely can be decided solely on the face of a complaint, [and found that] because the facts properly in the record do not demonstrate the applicability of the exemption beyond debate, we reverse.”[[143]](#footnote-143) Defendant Signet Builders was a nationwide construction company that built commercial, industrial, and agricultural structures, including livestock confinement facilities on farms. Defendant argued that its construction work was “incident to or in conjunction with”[[144]](#footnote-144) the farming operations of the livestock farmers on whose property it built the enclosures, relying on 29 C.F.R. § 780.136, which provides: “employees engaged in the erection of silos and granaries” are “examples of the types of employees of independent contractors who may be considered employed in practices performed ‘on a farm.’”[[145]](#footnote-145) The Seventh Circuit rejected defendant’s argument that building livestock enclosures was analogous to building silos or granaries, noting that Section 780.136 further states:

Whether such employees [including those erecting silos and granaries] are engaged in ‘agriculture’ depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm as discussed in §§ 780.141 through 780.147; that is whether they are carried on as a part of the agricultural function or as a separately organized productive activity (§§780.104 through 780.144).[[146]](#footnote-146)

The court noted that the DOL regulations provide a non-exhaustive list of factors that help to resolve the issue as to whether the plaintiff’s work was part of “a distinct business activity” from farming.[[147]](#footnote-147) The court further noted that a relevant fact in the analysis is “whether the work the plaintiffs performed is ‘ordinarily performed’ by farmers themselves or by independent businesses hired by those farmers,”[[148]](#footnote-148) citing to 29 C.F.R. §780.146. The Seventh Circuit went on to cite two other relevant considerations for determining the “distinct business activity” analysis, as well as a “hodge-podge” [[149]](#footnote-149) of other relevant factors and case law to conclude that the defendant did not carry its burden of proving that the agricultural exemption applied.[[150]](#footnote-150)

By contrast, an incidental practice that *is* within the secondary meaning of “agriculture” is work by employees of a large greenhouse operation relating to “hard goods,” such as soil, fertilizer, and planting pots. Where the sale of such goods constitutes a negligible portion of the employer’s business and investment of its resources relative to its farming operations, the work is performed by the same employees who perform agricultural tasks relating to propagating and tending plants, and the goods sold are horticultural or related to horticulture, such work qualifies as secondary agriculture.[[151]](#footnote-151)

On the other hand, work by greenhouse employees on the owner’s residence—including lawn mowing and landscaping, car washing, furniture moving, cleaning, unloading and storing hay for the owner’s horses (that were not used in the greenhouse operation), car maintenance and repair, and babysitting—was not secondary agriculture.[[152]](#footnote-152) Arguably, although the “traditional view” of farming operations might include “mowing the lawn at the farmhouse,” such tasks as those listed were not performed incidental to or in conjunction with farming operations.[[153]](#footnote-153)

A further factor is whether the practice changes the raw or natural state of the commodity; such a change is also a strong indication that the practice is not within the secondary meaning of “agriculture.”[[154]](#footnote-154)

Certain egg processing activities may also fall outside the realm of secondary agriculture. The DOL field assistance bulletin on “Egg Processing Activities as Agriculture Under the FLSA”[[155]](#footnote-155) explains when the processing of eggs would be considered secondary agriculture. The DOL cautioned that

[c]ertain other egg processing activities, such as salting and sugaring eggs, however, do not qualify as secondary agriculture because such activities involve adding foreign ingredients to the agricultural commodity. Such activities alter the raw or natural state of the eggs and are more akin to manufacturing than to agricultural processing.

Similarly, when the drying of eggs transforms the liquid interior of an egg into a solid powder form, it thereby effects a substantial change to the natural state of the commodity. As discussed above, when the raw or natural state of an agricultural commodity is altered and the chemical composition of the product changes, such processing is more likely to be considered a manufacturing operation than an agricultural activity. The egg drying process, generally performed using a spray drying method, is more akin to manufacturing and would not qualify as a preparation for market activity. Powdered eggs can no longer be considered to be in an unmanufactured state and thus the activity does not fall within the scope of the secondary agriculture exemption.[[156]](#footnote-156)

The secondary meaning of “agriculture” includes several enumerated activities, which are discussed in the sections that follow. In all cases, the practices must meet the same requirements explained in the preceding discussion of secondary agriculture. Thus, with regard to preparing livestock for market, for example, the practice does not fall within Section 203(f) if animals from other farmers and other farms are handled together with those of the principal farmer.[[157]](#footnote-157)

***6. Practices Included When Performed as Provided in Section 203(f)***

Section 203(f) defines the secondary meaning of “agriculture” to encompass any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations. The practices that may be exempt as “agriculture” if so performed include forestry or lumbering operations subordinate to farming operations, preparation for market, and delivery to storage or to market or to carriers for transportation to market. A description of these practices is set forth below.[[158]](#footnote-158)

*a. Preparation for Market*

“Preparation for market” includes those operations normally performed upon farm commodities to prepare them for the farmer’s market, which in turn means the wholesaler, processor, or distributing agency where the farmer delivers the products.[[159]](#footnote-159) As the regulations observe, activities that are in preparation for market precede delivery to market and are not synonymous with “preparation for sale.” The regulations contain detailed lists of activities that may be performed in the “preparation for market” of more than a dozen different commodities. To cite one example involving fruits and vegetables, preparation for market includes assembling, ripening, cleaning, grading, sorting, drying, preserving, packing, and storing.[[160]](#footnote-160)

In *Rodriguez v. Whiting Farms, Inc*.[[161]](#footnote-161) and *Pacheco v. Whiting Farms, Inc*.,[[162]](#footnote-162) the Tenth Circuit addressed whether the processing of “hackles” was secondary agriculture. Hackles are the long, fine feathers on the backs of certain types of domestic chicken. They are often brightly colored, especially on roosters. These feathers are regularly used as fly lures, and Whiting Farms produced them for that purpose. Whiting Farms bred, raised, euthanized, and processed chickens for their pelts or hackles and then packaged and shipped the pelts to a distributor. Whiting Farms processed only those chickens it had raised itself. The plaintiffs in *Rodriguez* were skinners and trimmers, while the plaintiff in *Pacheco* worked in the packaging department. The issue in these cases was whether these processes constituted secondary agriculture.

The Tenth Circuit held that the processing of hackles “appears to fall directly in line with *preparation for market c*onsidered incidental to farming under the regulations,” and thus falls within the scope of the agricultural exemption.[[163]](#footnote-163) In *Rodriguez*, the plaintiffs argued that analogizing the hackle process to the removal and treatment of pelts from fur-bearing animals was inappropriate because there were specific poultry regulations that were determinative, citing to 29 C.F.R. §780.125. The plaintiffs then noted that the poultry regulations did not reference the processing of chickens for their pelts; therefore, such processing should not be included as secondary agriculture. The court declined to read the regulations as limiting covered activities:

The fur regulations provide insight into the type of preparation for market that is considered incidental to farming, and we find it persuasive. The regulations themselves recognize that the exemptions, “because of their relationship to one another, should be construed together insofar as possible so that they form a consistent whole.” 29 C.F.R. §780.9. Because the amount of change is similar to that which is acceptable under the regulations, it appears the skinning and trimming of pelts is more akin to agriculture than manufacturing.[[164]](#footnote-164)

The Tenth Circuit held that “the weight of the analysis support[ed] the conclusion that Whiting Farms’ processing operations fit within the exemption.”[[165]](#footnote-165) It concluded that “[t]he agricultural exemption was meant to apply broadly and ‘embrace the whole field of agriculture’” and that “[i]f a practice is found to fit within the definition of agriculture, the agricultural exemption should apply.”[[166]](#footnote-166) As with the other commodities included in the regulations, such as fur, dried fruit, and honey, Whiting Farms merely isolated the product it had produced and prepared it for market. A few months later in the *Pacheco* case, the Tenth Circuit held that packaging and delivering chicken pelts to the shipping department also qualified as secondary agriculture.[[167]](#footnote-167)

*b. Specified Delivery Operations*

Employment in “secondary” agriculture under Section 203(f) includes employment in “delivery to storage or to market or to carriers for transportation to market” when performed by a farmer as an incident to or in conjunction with the farmer’s own farming operations.[[168]](#footnote-168) Where such deliveries may be made without leaving the farm where the commodities are grown, the definition extends to employees of someone other than the farmer who raised the commodities if they are performing those deliveries for the farmer. As the regulations note, in the normal situation, these deliveries require travel off the farm, and where this is the case only the employees of a farmer making them can fall within Section 203(f).[[169]](#footnote-169) Where a delivery trip is within Section 203(f), the necessary return trip to the farm is also included. It is important, however, to keep the basic elements of the secondary definition of “agriculture” in mind and to note that employees engaged in such deliveries “would not be engaged in agriculture in any workweek when they deliver commodities of other farmers … because those deliveries would not be performed as an incident to or in conjunction with ‘such’ farming operations.”[[170]](#footnote-170)

The term “delivery to storage” includes taking any agricultural or horticultural commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to the places where they are to be stored or held pending preparation for or delivery to market.[[171]](#footnote-171) The fact that the commodities or other products have been subjected to some other practice by a farmer or on a farm as an incident to or in conjunction with such farming operations does not preclude the inclusion of delivery to storage from falling within Section 203(f), or their delivery to market or delivery to carriers for transportation to market from being likewise within the statutory definition.[[172]](#footnote-172)

The term “delivery to market” refers to the initial journey from the farm to the market.[[173]](#footnote-173) As with the term “preparation for market,” the farmer’s market is the distributing agency, cooperative marketing agency, wholesaler, or processor to which the farmer delivers the products. The delivery to market, with respect to the commodities or products, ends with their physical delivery at the receiving platform at the farmer’s market. Where, as is the typical situation, the delivery involves travel off the farm, the delivery must be performed by workers who are employed by the farmer in order to fall within Section 203(f). In the case of fruits and vegetables, however, Section 213(b)(16) contains an exemption from the overtime requirements for intrastate transportation of the freshly harvested fruits and vegetables from the farm to a place of first marketing or first processing, which may apply to employees who engage in that transportation regardless of whether the farmer is their employer.[[174]](#footnote-174)

The term “delivery to carriers for transportation to market” refers to the same commodities and products listed earlier with regard to the term “preparation for market.”[[175]](#footnote-175) The regulations provide that delivery to “any carrier” qualifies. Employees of the carrier who transport the commodities or products to market are not within the scope of agriculture.

***7. Transportation Operations Not Enumerated in Section 203(f)***

The transportation of farm products from the farm to other places may be within the secondary meaning of “agriculture” regardless of whether the transportation is included as “delivery to storage or to market or to carriers for transportation to market” provided that the transportation is performed by a farmer or on a farm as an incident to or in conjunction with the farming operations of that farmer or that farm.[[176]](#footnote-176) If the transportation is not performed by a farmer, it is not within Section 203(f) if it extends beyond the limits of the farm, even if it is performed by a purchaser of unharvested commodities who has harvested the crop.[[177]](#footnote-177) The scope of Section 203(f) includes the harvesting employees but does not extend to the employees transporting the commodities off the farm.

Transportation by a farmer or on a farm as an incident to or in conjunction with the farming operations of the farmer or of that farm is within the secondary meaning of “agriculture,” even if the farmer transports things other than farm commodities raised by the farmer or on the farm.[[178]](#footnote-178) Transportation by the farmer of farm implements, supplies, and fieldworkers to and from the fields, if performed as an incident to or in conjunction with the farmer’s farming activities, are within the definition of “agriculture,” regardless of whether that transportation involves travel on or off the farm and regardless of the method of transportation used. Although transportation of fieldworkers to and from the farm by persons other than the farmer does not come within Section 203(f), Section 213(b)(16) provides an exemption from the FLSA’s overtime requirements for transportation of fruit or vegetable harvest workers to and from the farm within the same state where the farm is located.[[179]](#footnote-179)

***8. Other Unlisted Practices That May Be Within Section 203(f)***

As noted earlier, the statutory definition of “agriculture” includes other practices performed by a farmer on a farm as an incident to or in conjunction with the farming operations conducted by such farmer or on such farm in addition to the specific practices listed in Section 203(f). The selling (including selling at roadside stands) by a farmer and the farmer’s employees of his or her agricultural commodities, dairy products, etc., is such a practice provided it does not amount to a separate business. Other such practices are office work and maintenance and protective work.[[180]](#footnote-180) The regulations have provided certain other examples of practices that may qualify as “agriculture” under its secondary meaning in Section 203(f): repairing mechanical implements used in farming; operating a cook camp for the sole purpose of feeding workers who engage exclusively in agriculture on the farm; artificially inseminating farm animals; and packing apples by portable packing machines that are moved from farm to farm, packing only apples grown on the particular farm where the packing is being performed.[[181]](#footnote-181) The regulations repeat and emphasize the point that such practices, to come within Section 203(f), must be performed only with regard to agricultural operations of the farmer, and only the farmer’s own farming operations, not those of any other farmer.[[182]](#footnote-182)

**D. Agriculture as It Relates to Specific Situations**

The regulations discuss three types of activities that are specifically referenced in the definition of “agriculture:” one type that is only within the secondary meaning of “agriculture,” and two types that may constitute either primary or secondary agriculture:

• forestry or lumbering operations (secondary only);

• nursery and landscaping operations (primary or secondary); and

• hatchery operations (primary or secondary).

***1. Forestry or Lumbering Operations***

Forestry or lumbering operations are expressly included in agriculture if the operations are performed “by a farmer or on a farm as an incident to or in conjunction with such farming operation.”[[183]](#footnote-183) This language is a limitation on the forestry and lumbering operations that will be considered “agricultural” for purposes of Section 203(f).

The term “forestry or lumbering operations” includes cultivation and management of forests; felling and trimming timber; cutting, hauling, and transporting timber, logs, pulpwood, cordwood, lumber, and like products; sawing logs into lumber or converting logs into ties, posts, and similar products; and similar operations.[[184]](#footnote-184) It also includes the piling, stacking, and storing of all such products and gathering wild plants. Woodworking and the manufacture of charcoal are not included. A separate exemption from the FLSA’s overtime requirements is provided in Section 213(b)(28) for small-scale forestry operations.[[185]](#footnote-185)

Although the regulation includes Christmas tree farming within the definition of “forestry or lumbering operations,” the Fourth Circuit struck down that portion of the regulation in 2004.[[186]](#footnote-186)

The requirements of the secondary meaning of “agriculture” are met only where the employer’s forestry or lumbering operations are subordinate to the employer’s farming operations. As the regulations note, “it would be an unreasonable construction of the Act to hold that all practices were to be regarded as agriculture” in the case of an employer that owns several thousand acres of timberland on which it carries on lumbering operations and cultivates about 100 acres of farmland contiguous to the timberland. Under such facts, the employer would not be engaged in agriculture so far as its forestry or lumbering operations are concerned.[[187]](#footnote-187)

Clearing additional land for cultivation or preparing timber for construction of farm buildings by the farmer may be within the secondary meaning of “agriculture.” Logging or sawmill operations on a farm undertaken on the farmer’s behalf or on behalf of the buyer of the logs or lumber by a contract logger or sawmill owner are not within the scope of “agriculture” unless those operations are incidental to the farming operations on that farm.[[188]](#footnote-188)

The fact that the employer employs fewer than a certain number of workers in forestry or lumbering operations does not provide a basis for considering the workers to be employed in agriculture.[[189]](#footnote-189) By contrast, Section 213(b)(28) provides a limited exemption from the overtime requirements for employers with fewer than eight employees engaged in forestry or logging operations.

***2. Nursery and Landscaping Operations***

The regulations provide that employees of a nursery are engaged in “agriculture” when they engage in the following activities:

sowing seeds and otherwise propagating fruit, nut, shade, vegetable, and ornamental plants or trees (but not Christmas trees), and shrubs, vines, and flowers; handling such plants from propagating frames to the fields; [and] planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.[[190]](#footnote-190)

Although this regulation purports to exclude propagating and otherwise tending to Christmas trees from the definition of “agriculture,” the Fourth Circuit rejected the DOL’s position and held that there is no justifiable reason for the distinction between trees grown at a nursery and trees grown at a modern Christmas tree farm.[[191]](#footnote-191) As the Fourth Circuit explained,   
“[b]ecause Christmas trees are ornamental plants that are grown and harvested, we believe that they are horticultural commodities. Accordingly, the cultivation, growing, and harvesting of Christmas trees falls squarely within the primary definition of agriculture in §203(f).”[[192]](#footnote-192) Notwithstanding the Fourth Circuit’s decision, the DOL has maintained its position as set forth in 29 C.F.R. §780.205.

Planting of trees and bushes is within the scope of agriculture where it constitutes a step in the production, cultivation, growing, and harvesting of agricultural or horticultural commodities or where it constitutes a practice performed by a farmer or on a farm as an incident to or in conjunction with farming operations. The regulations provide several examples: employees of a nursery who plant stock grown by the nursery on private or public property and perform work incidental to the stock’s care and preservation; and employees of a farmer who plant, on their employer’s farm, fruit trees and berry stock not raised by their employer, if the planting is done on a farm as an incident to or in conjunction with the farming operations on that farm.[[193]](#footnote-193)

Landscaping work such as planting trees and bushes on residential, business, or public property is not agriculture when it is performed by employees of an employer that has not grown the trees and bushes, or if the employer has grown them, when the planting operations are an incident to the employer’s landscaping operations rather than to farming operations.[[194]](#footnote-194) Except where it can be considered incidental to farming operations, mowing lawns is not agriculture.[[195]](#footnote-195)

Gathering wild plants for further cultivation by a nursery is incidental to farming operations and is therefore considered to be agriculture if performed by a farmer or on a farm;[[196]](#footnote-196) it is not considered agriculture, however, when the gathering is performed by an independent contractor off the farm.[[197]](#footnote-197)

Operations in a forest tree nursery, such as seeding new beds and growing and transplanting forest seedlings, are not farming operations,[[198]](#footnote-198) nor is their planting or tending. These activities may be within the secondary meaning of “agriculture” if they are subordinate to farming operations and otherwise meet the requirements of that definition.[[199]](#footnote-199)

When employees of a nursery stock grower work in packing or storage sheds and perform tasks such as sorting the stock, grading and trimming it, and packing it for shipment, they are employed in “agriculture,” provided the employees handle only products grown by their employer, the activities constitute an established part of their employer’s agricultural activities, and those activities are subordinate to the employer’s farming operations.[[200]](#footnote-200) Handling and selling nursery stock at or near the place where it is grown may be incidental to the employer’s farming operations, but the character of these operations changes when they are performed in an establishment set up as a marketing point to aid the distribution of those products.[[201]](#footnote-201)

*a. Integrated Agricultural Enterprises*

In nursery and landscaping operations, where related corporate entities are integrated into an agricultural enterprise, work performed in those entities may be considered agriculture. In *Wirtz v. Jackson & Perkins Co.*,[[202]](#footnote-202) a nursery that operated farms in several states and operated a storage center in New York received shipments of products from the farms and prepared them for sale.[[203]](#footnote-203) Several farms were operated as wholly owned subsidiary corporations.[[204]](#footnote-204) The Second Circuit found that because the company “employ[ed] subsidiary corporations whose functions [were] uniquely integrated into the over-all agricultural enterprise,”[[205]](#footnote-205) the agricultural exemption applied equally to the several farms and to the work done at the storage center.[[206]](#footnote-206) The court stated, “[w]e find nothing in the language or history of the Fair Labor Standards Act to suggest that Congress intended the availability of the agricultural exemption to turn upon the technicalities of corporate organization within which farming operations or practices performed incidental thereto were conducted.”[[207]](#footnote-207)

Relying on *Jackson & Perkins Co*., the Eleventh Circuit, in *Ares v. Manuel Diaz Farms*,[[208]](#footnote-208) found that Diaz Farm and Diaz Landscaping were so intertwined as to constitute a single agricultural enterprise that was exempt from the requirement to pay overtime under Section 213(b)(12). The plaintiff was employed by Diaz Landscaping, a Florida corporation owned and operated by Manuel Diaz. Diaz also owned Diaz Farms, a Florida corporation engaged in the business of cultivating, harvesting, and selling plants and trees.

Diaz Landscaping owned land used for agricultural purposes, all of which was leased to Diaz Farms for use in its plant cultivation operations. Additionally, Diaz Landscaping was the employer of record of all employees working at Diaz Farms and paid payroll expenses for employees working at Diaz Farms. Diaz Farms reimbursed Diaz Landscaping for those costs. Diaz Landscaping was not actively involved in agriculture and had no function or activity other than to lease land and employees to Diaz Farms. Diaz Farms cultivated trees, including palm and fruit trees, and ornamental plants, and sold trees and plants in Florida and at times in other states and foreign countries.[[209]](#footnote-209) Diaz Farms sold only its own produce; it did not purchase plants to resell. The district court found that the plaintiff’s duties included spraying for weeds, which was work in agriculture; it also found that Diaz Landscaping and Diaz Farms were so intertwined as to constitute a single agricultural enterprise. The Eleventh Circuit affirmed the district court’s conclusion that the provisions of Section 213(b)(12) applied to the structure of the entity.[[210]](#footnote-210)

In *Rodriguez v. Pure Beauty Farms, Inc.*,[[211]](#footnote-211)a commercial nursery-farming operation cultivated and grew plants on land it owned, and transported its plants to Home Depot sites where the grower’s employees continued to care for the plants. The Eleventh Circuit found the agriculture exemption applicable, and affirmed summary judgment for the defendant on the following grounds: (1) the farm engaged the plaintiffs to receive the plants at retail stores where they were sold (the stores were not owned by the defendant), to inspect the plants, to water them, to ensure they were aesthetically pleasing, to keep the plant staging area clean, to send unsellable plants back to the defendant, and to request more plants when needed; and (2) the plaintiffs’ work duties were “incident to or in conjunction with” the defendant’s farming operations. The Eleventh Circuit found that a farmer’s selling its own agricultural commodities meets this requirement, so long as “it does not amount to a separate business,” and here the plaintiffs’ work did not amount to a separate business because the plaintiffs maintained only the farm’s own plants, and their work in watering and pruning the plants was “agricultural.”[[212]](#footnote-212)

***3. Hatchery Operations***

Raising poultry includes hatchery operations incidental to poultry breeding, regardless of whether the hatchery is located in an urban or rural area.[[213]](#footnote-213) If the hatchery is engaged solely in procuring eggs for hatching, performing the hatching operations, and selling the chicks, all of the hatchery’s employees, including those who perform office and maintenance work, are engaged in agriculture.[[214]](#footnote-214)

Hatchery employees are engaged in “raising” operations when they work on farms in connection with maintaining the quality of the poultry flock, including tasks such as testing for disease, culling, weighing, cooping, loading, and transporting the culled birds.[[215]](#footnote-215) Hatchery employees who, on a farm, catch and load broilers for transportation to market are also engaged in agricultural operations. The hatchery may at times have a surplus of eggs, including those suitable for hatching and culled eggs that it sells. Activities such as grading and packing performed by the hatchery employees in connection with the disposal of these eggs are an incident to the breeding of poultry by the hatchery and are within the scope of agriculture.[[216]](#footnote-216)

When a hatchery engages in the produce business and commingles with the culled eggs and chickens other eggs and chickens that the hatchery has purchased for resale, work that relates to both the hatchery and produce types of activities are not agricultural.[[217]](#footnote-217) In some situations, the hatchery also operates a feed store and furnishes feed to the growers. As in the case of the produce business operated by a hatchery, this is not an agricultural activity, and feed sale employees such as truck drivers who make deliveries to growers are not agricultural employees. Office workers and other employees are likewise not employed in agriculture when their duties relate to nonagricultural activities.[[218]](#footnote-218)

**E. Court Decisions Regarding “Agricultural” or “Nonagricultural” Work**

Courts have found employees who perform the following functions to be working in agriculture: picking or harvesting produce;[[219]](#footnote-219) Christmas tree farming;[[220]](#footnote-220) repairing or maintaining farm implements;[[221]](#footnote-221) transporting the employer’s agricultural commodities, generally on the employer’s premises;[[222]](#footnote-222) packaging;[[223]](#footnote-223) maintaining a dam;[[224]](#footnote-224) caring for plants displayed in stores;[[225]](#footnote-225) processing of hackles;[[226]](#footnote-226) and various other functions, ranging from “handyman” activities to operating machinery.[[227]](#footnote-227)

On the other hand, courts have found that employees who perform the following functions are not working in agriculture: bookkeeping;[[228]](#footnote-228) milling or processing, and packing;[[229]](#footnote-229) maintaining and repairing the employer’s dwelling houses and properties;[[230]](#footnote-230) packaging products grown by other producers;[[231]](#footnote-231) accounting for “outside” cattle;[[232]](#footnote-232) transporting feed in a vertically integrated poultry enterprise’s mill to independently operated farms contracted to raise the enterprise’s chickens;[[233]](#footnote-233) restoring and reforesting nonfarming land;[[234]](#footnote-234) and other functions deemed unrelated to agricultural operations.[[235]](#footnote-235)

III. Section 213(a)(6) Exemption From the FLSA’s Minimum Wage and Overtime Requirements

**A. Basic Conditions**

The FLSA provides a broad array of exemptions that apply to persons employed in agriculture, processing agricultural commodities, and related agricultural activities.[[236]](#footnote-236) These exemptions differ substantially in their terms, scope, and methods of application. This section focuses on the minimum wage and overtime exemption set forth in 29 U.S.C. §213(a)(6)[[237]](#footnote-237) for any employee employed in agriculture if that employee is

(A) employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than 500 “man-days” of agricultural labor;

(B) the parent, spouse, child, or other member of the employer’s “immediate family”;

(C) (i) a hand-harvest laborer paid on a piece rate basis in an operation and in a region in which piece rate pay is customary; (ii) commutes daily from his or her permanent residence to the farm; and (iii) was employed in agriculture fewer than 13 weeks during the preceding calendar year;

(D) (i) 16 years of age or younger and is employed as a hand-harvest laborer who is paid on a piece rate basis in an operation and in a region in which piece rate pay is customary; (ii) employed on the same farm as his or her parent or person standing in the place of his or her parent; and (iii) paid at the same piece rate as employees older than age 16 are paid on the same farm; or

(E) principally engaged in the range production of livestock.[[238]](#footnote-238)

**B. Section 213(a)(6) After the 1966 Amendments**

In the original version of the 1938 Act, Section 213(a)(6) provided a minimum wage and overtime exemption to “any employee engaged in agriculture.”[[239]](#footnote-239) In 1966, the current language of Section 213(a)(6) replaced the original language of this section and redesignated the former language of Section 213(a)(6) as Section 213(b)(12).[[240]](#footnote-240) As a result, Section 213(a)(6) now exempts from the FLSA’s minimum wage and overtime requirements only the five specific categories of agricultural employees specified in subsections (A) through (E) of Section 213(a)(6), listed above.

The legislative history of the 1966 Amendments indicates that Congress, in enacting minimum wage protection for agricultural workers for the first time, sought to provide a minimum wage floor for the farmworkers on large farms or agribusiness enterprises.[[241]](#footnote-241) “The Section 213(a)(6)(A) exemption was intended to exempt those farmworkers on the smaller or family size farm.”[[242]](#footnote-242)

Where an employee in the same workweek performs both exempt and nonexempt work, the employee is not exempt that week and the wage and hour requirements of the FLSA are applicable.[[243]](#footnote-243) Thus, even if the nonexempt work covered by the FLSA is minimal, the Section 213(a)(6) exemption cannot apply for that workweek.

***1. Small Farms Exemption (“Man-Days”)***

Section 213(a)(6)(A) exempts agricultural workers who are employed by “small farms,” as measured by whether the employer used no more than 500 “man-days” of agricultural labor in any calendar quarter during the previous calendar year.[[244]](#footnote-244) Section 203(u) defines the term “man-day” as any day during which an employee performs any agricultural labor for not less than one hour.[[245]](#footnote-245) Under Section 203(e)(3), an ­individual who is the parent, spouse, child, or other member of the employer’s immediate family is excluded from the employer’s man-day calculation.[[246]](#footnote-246) It is sufficient if the employer “uses” agricultural labor, but the employer need not be a “farmer” as that term is defined in the regulations.[[247]](#footnote-247)

An employer may, in any or every calendar quarter of the preceding calendar year, employ up to (and including) 10 persons to perform agricultural work for any number of hours each day up to 50 days without losing the Section 213(a)(6)(A) exemption. On the other hand, if in any calendar quarter in the preceding calendar year *any one* of those 10 employees performed agricultural labor (for at least one hour per day) for *more than* 50 days, and the other nine employees performed such labor for 50 days, the exemption would be lost.[[248]](#footnote-248) The man-days test is applied only retrospectively; thus, if the employer used no more than 500 man-days of agricultural labor in, for example, any quarter of a given year, the employer’s workers who perform agricultural labor in the ensuing year would be exempt under Section 213(a)(6)(A), regardless of the number of man-days of agricultural labor the employer used in that ensuing year. Conversely, if the employer used more than 500 man-days of agricultural labor in year one, the employer’s workers who performed agricultural labor in year two would not be exempt under Section 213(a)(6)(A), regardless of the number of man-days of agricultural labor the employer used in year two.[[249]](#footnote-249)

In calculating the number of man-days of agricultural labor used by an employer, all the man-days of all the employer’s agricultural employees, unless excluded by Section   
203(e)(3), must be counted whether they work at one site or at widely scattered locations.[[250]](#footnote-250) The calculation includes the man-days of agricultural employees who may be exempt under another section of FLSA, such as a general manager who may be an exempt executive under Section 213(a)(1).[[251]](#footnote-251) Days on which an employee has not actually worked for the employer for at least one hour should not be counted as man-days applicable to that employer.[[252]](#footnote-252)

The man-day calculation must include employees jointly employed by the employer and an independent contractor. The regulations provide, as an example, that where a farmer hires an independent contractor to harvest the farmer’s crops, the harvest workers provided by the independent contractor are jointly employed by the contractor and the farmer if the farmer has the power to direct, control, or supervise their work or to determine the rates of pay or the method of payment.[[253]](#footnote-253) Each employer who uses such an independent contractor must include the contractor’s employees in the employer’s man-day count.[[254]](#footnote-254)

***2. Immediate Family Exemption (Family Farms)***

Section 213(a)(6)(B) exempts from the minimum wage and overtime provisions an employee who is “the parent, spouse, child, or other member of [his or her] employer’s immediate family.”[[255]](#footnote-255) The regulations define “other member of the employer’s immediate family” as including some individuals who are not related by blood or by marriage, but only stepchildren, foster children, stepparents, and foster parents fall within the definition.[[256]](#footnote-256) Other relatives, even if they live permanently in the employer’s household, do not qualify as part of the employer’s immediate family.[[257]](#footnote-257)

The Section 213(a)(6)(B) exemption applies to immediate family members, notwithstanding that the employer may have used more than 500 man-days of agricultural labor in a calendar quarter of the preceding calendar year.[[258]](#footnote-258)

***3. Local Hand-Harvest Laborer Exemption***

Section 213(a)(6)(C) provides an exemption from the FLSA’s minimum wage and overtime requirements for local workers who temporarily engage in hand-harvesting operations, where all of the conditions listed in the statute are met.[[259]](#footnote-259) Specifically, to qualify for the exemption an employee must

• be employed in agriculture;

• be employed as a hand-harvest laborer;

• be paid on a piece-rate basis;

• be paid piece rates in an operation that has been paying, and is customarily and generally recognized as having been paying, piece rates in the region of employment;

• commute daily from the employee’s permanent residence to the farm on which the employee is employed; and

• have been employed in agriculture fewer than 13 weeks during the preceding calendar year.[[260]](#footnote-260)

In order for the Section 213(a)(6)(C) exemption to apply to a “hand harvest laborer,” each of the above requirements must be met. With respect to the requirement that the worker be “employed in agriculture,” the regulations provide that “[s]ince a hand harvest laborer is normally an agricultural worker, while so engaged, such an employee would meet the basic requirements that he be employed in agriculture.”[[261]](#footnote-261) A discussion of the remaining conditions are set out below.

*a. “Be Employed as a Hand-Harvest Laborer”*

The regulations define “hand-harvesting” as manually gathering or severing the soil-grown crops from the soil, stems, or roots at its growing position in the fields.[[262]](#footnote-262) Included is harvesting done by hand or with hand tools of crops such as cotton, tobacco, grains, fruits, and vegetables. Hand-harvesting includes integrally related operations that are closely related geographically and in point of time and performed before the crop is transported to concentration points on the farm. For example, picking up, by hand, tomatoes that have been hand-picked from the vines is considered to be hand-harvesting. The term does not include work performed with electrically powered mechanical devices or any operation involving animals (for example, shearing).[[263]](#footnote-263) The Section 213(a)(6)(C) exemption is lost if the hand-harvester performs any nonharvesting work during the workweek. For example, wrapping tomatoes in a packing shed or culling undesirable fruit from the crop before its harvest are nonharvesting operations and, therefore, if performed by a hand-harvest laborer the Section 213(a)(6)(C) exemption for that workweek is lost.[[264]](#footnote-264) Employees who chop cotton also do not qualify for the exemption.[[265]](#footnote-265)

*b. “Is Paid on a Piece-Rate Basis”*

Employees will be exempt only for those workweeks during which they are paid solely by piece rate; any other method of payment results in loss of the exemption for that workweek.[[266]](#footnote-266) For example, if an employee is paid an hourly rate for part of the week and on a piece rate for part of the week, the exemption is not available.

*c. “Hand-Harvesting Operations Recognized as Paid on a Piece-Rate Basis”*

Under Section 213(a)(6)(C), a hand-harvest operation qualifies for the exemption only if it “has been, and is customarily and generally recognized as having been,” paying its employees on a piece-rate basis in the region of employment.[[267]](#footnote-267) The regulations note that the legislative history is silent on exactly who must “customarily and generally recognize” the hand-harvest operation as having paid on a piece-rate basis.[[268]](#footnote-268) Based on the context of the term’s usage, however, the regulations require that the recognition must be on the part of agricultural employers and employees and other individuals in the region of employment who are familiar with farming operations and practices in the region and the method of compensation used in such operations and practices.[[269]](#footnote-269)

*d. “Hand-Harvest Laborers Must Commute Daily to the Farm”*

Section 213(a)(6)(C) provides an exemption only to employees who “commute daily” from their permanent residence to the farm where they are employed. The exemption does not apply to migrant farmworkers who travel to different areas of the country during harvesting seasons, even if the farmworkers spend a substantial amount of time in one location.[[270]](#footnote-270) The regulations state that employees who live on the farm where they are employed meet this requirement even though they do not literally “commute” between two different locations.[[271]](#footnote-271) Thus, as the regulations point out, members of a tractor driver’s family who reside on the farm could be employed in picking cotton within the terms of the exemption. Such family members would be considered to be “commuting daily” from their permanent residence despite the fact that their residence may be located on the farm where they are employed.[[272]](#footnote-272)

*e. “Was Employed in Agriculture Less Than 13 Weeks During the Preceding Calendar Year”*

The Section 213(a)(6)(C) exemption is limited to employees who were employed in agriculture for fewer than 13 weeks during the preceding calendar year.[[273]](#footnote-273) For purposes of this requirement, the regulations define a “week” as a fixed and regularly recurring period of 168 hours consisting of seven consecutive 24-hour periods during which the employee worked at least one man-day.[[274]](#footnote-274) As noted previously, a man-day is any day during which an employee performs any agricultural labor for not less than one hour.[[275]](#footnote-275) On this basis, the phrase “employed in agriculture less than 13 weeks” means that an employee has accumulated fewer than 13 weeks in the preceding year during which agricultural work of one hour or more was done.[[276]](#footnote-276) In calculating the number of weeks of agricultural employment for an individual employee, all agricultural labor performed on behalf of all of that employee’s employers in the preceding calendar year is counted, but self-employment is excluded.[[277]](#footnote-277)

An employer who claims this exemption must obtain a statement from the employee showing the number of “weeks” the employee was employed in agriculture during the preceding calendar year.[[278]](#footnote-278) The latter regulation is found in Part 516, Subpart B, which pertains to recordkeeping requirements of the FLSA.

***4. Migrant Hand-Harvest Laborers Younger Than 17 Years of Age***

Section 213(a)(6)(D) provides an exemption from the minimum wage and overtime requirements of the FLSA for children of migrant farmworkers who engage in hand-harvesting operations, where all conditions listed in the statute are met.[[279]](#footnote-279) Those conditions are that these employees are employed in agriculture and are

• not *local* hand-harvest laborers as described in Section 213(a)(6)(C)(ii);

• 16 years of age or younger;

• employed as hand-harvest laborers;

• paid on a piece-rate basis;

• employed in an operation that has been paying, and is customarily and generally recognized as having been paying, piece rates in the region of employment;

• employed on the same farm as their parent or a person standing in the place of their parent; and

• paid at the same piece rate as employees older than age 16 are paid on the same farm.

Some of these conditions are the same as those on which the local hand-harvest laborer exemption contained in Section 213(a)(6)(C) is predicated. For purposes of the Section   
213(a)(6)(D) exemption, the regulations incorporate by reference the interpretation of the following terms contained in the regulations that apply to the Section 213(a)(6)(C) exemption: “employment in agriculture,” “hand-harvest laborer,” “piece-rate basis,” and “operations recognized as having paid on a piece-rate basis.”[[280]](#footnote-280)

The Section 213(a)(6)(D) exemption was intended to apply to children of migrant farmworkers who typically accompany their parents in harvesting and other agricultural work.[[281]](#footnote-281)

*a. Nonlocal Minors*

The exemption is available only to migrant or other than local hand-harvest workers who are age 16 or younger who do not come within the scope of the Section 213(a)(6)(C) exemption. A local minor who commutes daily from his or her permanent residence to the farm is not exempt under Section 213(a)(6)(D).[[282]](#footnote-282)

*b. Minors 16 Years of Age or Younger*

Section 213(a)(6)(D), by its terms, applies only to employees age 16 or younger. Even where the exemption does apply, the employer must nevertheless comply with the child labor provisions of the FLSA prohibiting employment in agriculture except under certain conditions and circumstances. The child labor requirements of the FLSA are discussed in Chapter 12, Child Labor.

*c. Employed on the Same Farm as Parent or Person Standing in Place of Parent*

The term “employed on the same farm” is, under the regulations, to be given its natural meaning.[[283]](#footnote-283) The regulations define the term “person standing in place of [a] parent” in accordance with the general usage of “in loco parentis,” that is, one who takes a child into his or her home and treats the child as a true member of the family, educating and supporting the child as if his or her own.[[284]](#footnote-284)

***5. Range Production of Livestock Exemption***

Under Section 213(a)(6)(E), the minimum wage and overtime provisions of the FLSA are inapplicable to any worker employed in agriculture who “is principally engaged in the range production of livestock.”[[285]](#footnote-285) Because the application of this exemption depends on the activities of the individual employee, some employees of a given employer may be exempt while others are not.[[286]](#footnote-286)

Section 213(a)(6)(E) applies to employees who are employed in agriculture and

• principally engaged;

• on the “range”; and

• in the production of livestock.

Because the Section 203(f) definition of “agriculture” includes raising livestock,[[287]](#footnote-287) an employee who is principally engaged in range production of livestock will meet the requirement that he or she be employed in agriculture.[[288]](#footnote-288)

The nature of an employee’s duties and responsibilities determine whether that employee is principally engaged in the exempt activities. To be “principally engaged” in the range production of livestock, the employee must have as a primary duty and responsibility the active care of animals or standing in readiness for that purpose.[[289]](#footnote-289) The determination of whether an employee has range production of livestock as the employee’s primary duty is based on “all the facts of the particular case.”[[290]](#footnote-290) The regulations provide that the amount of time spent in the performance of range production duties is a “useful guide”[[291]](#footnote-291) when addressing “primary duty.” Ordinarily, an employee will be considered to have the exempt activities as that employee’s primary duty where the major part, or more than 50 percent, of the employee’s time is spent in performing such activities.[[292]](#footnote-292) The regulations state that the Section 213(a)(6)(E) exemption applies to an employee who spends more than 50 percent of his or her time *during the year* in one or more of the whole set of duties designated as range production of livestock,[[293]](#footnote-293) in contrast to the standard focus on each workweek in most, if not all, FLSA exemptions.

A “range” is land that is not cultivated and that produces native forage for animal consumption, including land that is revegetated naturally or artificially.[[294]](#footnote-294) The range may be on private, federal, or state land and need not be an “open range.”[[295]](#footnote-295)

The regulations define “production of livestock” as actively taking care of animals or standing by in readiness for that purpose. Included are herding, handling, transporting, feeding, watering, caring for, branding, tagging, protecting, or otherwise assisting in raising livestock.[[296]](#footnote-296) “Immediately incidental” activities such as inspecting and repairing fences, wells, and windmills are also exempt. Work such as terracing; reseeding; haying; and constructing dams, wells, and irrigation ditches is not within the exemption.[[297]](#footnote-297) The term “livestock” includes cattle, sheep, horses, goats, and other domestic animals that are ordinarily raised or used on the farm, excluding poultry.[[298]](#footnote-298)

The Section 213(a)(6)(E) exemption is intended to apply only to those employees whose primary duty is the range production of livestock that requires their constant attendance, on at least a standby basis, for such periods of time so as to make the computation of hours worked extremely difficult.[[299]](#footnote-299) The regulations require that the specified activities therefore be performed away from “headquarters,” meaning the administrative center where management duties are performed and where the ranch house, barns, sheds, pen, bunkhouse, and cookhouse are located.[[300]](#footnote-300) Work performed in feedlots or in any area where the livestock is near the headquarters is not exempt.[[301]](#footnote-301) The term “headquarters” is not the same as the term “headquarters ranch,” which means the main ranch within the rancher’s system of ranches, and work on the headquarters ranch (away from its administrative center) may qualify as work on the range.[[302]](#footnote-302)

In *Mencia v. Allred*,[[303]](#footnote-303) the Tenth Circuit analyzed whether a sheep ranch employee fell within the “range production of livestock” exemption. In reversing the district court’s decision that the plaintiff was exempt, the Tenth Circuit concluded that the evidence showed he was not required to spend more than half his time raising sheep in a remote location where the sheep can graze, his work location was not remote but usually in the immediate vicinity of the ranch headquarters, and the sheep he watched did not graze but instead were fed hay by the plaintiff.[[304]](#footnote-304) Moreover, the plaintiff was supervised by superiors who could have recorded his hours.[[305]](#footnote-305) The court noted that

[t]he entire reason for the FLSA’s “range production of livestock” exemption is that cowboys, sheepherders, and goatherders do not have clear start and stop times but instead work off and on, “on a standby basis, for such periods of time so as to make the computation of hours worked extremely difficult.”[[306]](#footnote-306)

IV. Section 213(b) Exemptions From the Overtime Requirements of the FLSA

All employees engaged in “agriculture,” as that term is defined in the FLSA, who do not qualify for the minimum wage and overtime exemption set forth in Section 213(a)(6) may nonetheless be exempt from the overtime requirements pursuant to one of the following exemptions:

• Section 213(b)(5) (Outside Buyers of Certain Agricultural Products),

• Section 213(b)(12) (Agricultural Workers and Those Employed in Operating or Maintaining Irrigation Systems for Agricultural Purposes),

• Section 213(b)(13) (Employment in Agriculture and Livestock Auction Operations by a Farmer),

• Section 213(b)(14) (Employment by Small Country Elevators Within the Area of Production),

• Section 213(b)(15) (Processing Maple Sap Into Sugar or Syrup**)**,

• Section 213(b)(16) (Intrastate Transportation of Fruits and Vegetables and Fruit and Vegetable Harvesters**)**, or

• Section 213(b)(28) (Small-Scale Forestry or Lumbering Operations).[[307]](#footnote-307)

Each of these exemptions is treated separately.

**A. Outside Buyers of Certain Agricultural Products**

Section 213(b)(5) of the FLSA exempts from the overtime requirements “any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state.”[[308]](#footnote-308) This section was added to the FLSA in 1949,[[309]](#footnote-309) and its language has not changed since that time.

The term “outside buyer” is not defined in the FLSA or the regulations, but Section 20c of the *Field Operations Handbook* elaborates on the terms found in the Section   
213(b)(5) exemption,[[310]](#footnote-310) including “outside buyer.” As to that term, the *Field Operations Handbook* provides the following:

The term “outside buyer” as used in Sec. 213(b)(5) refers only to employees who are engaged in buying or contracting to buy, and who are regularly performing these functions away from their employer’s place of business. The term does not include buyers who are located and perform their work in fixed establishments, usually known as buying stations, which are located in the country or in small rural communities away from the main plant where the goods are processed.[[311]](#footnote-311)

According to the *Field Operations Handbook*, the exemption applies “to an employee who has as his chief duty or primary function buying, in the sense of obtaining and soliciting commitments from the persons on whom he calls, to sell the named commodities.”[[312]](#footnote-312) Section 20c02 provides that “[f]or enforcement purpose[s], an outside buyer will be considered exempt even though he spends 20% or less of his time in the [workweek] in nonexempt activities.”[[313]](#footnote-313)

Examples of nonexempt work by outside buyers include testing milk and culling poultry on farms.[[314]](#footnote-314) Exempt work may include promotional activities undertaken by the outside buyer that is designed to increase the amount of poultry, eggs, cream, or milk purchased in their raw or natural states.[[315]](#footnote-315)

**B. Agricultural Workers and Those Employed in Operating or Maintaining Irrigation Systems for Agricultural Purposes**

Section 213(b)(12) of the FLSA exempts from the overtime requirements

any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year … .[[316]](#footnote-316)

The first five words of Section 213(b)(12) are the same as those found in Section 213(a)(6) prior to the 1966 Amendments.[[317]](#footnote-317) As a result of the 1966 Amendments, Section 213(b)(12) provides an overtime exemption for any employee employed in “agriculture” who does not qualify for the minimum wage and overtime exemption under Section 213(a)(6) (A), (B), (C), (D), and (E) of the 1966 Amendments.[[318]](#footnote-318)

In addition to exempting from overtime requirements employees engaged in agriculture, Section 213(b)(12) also exempts employees employed in specified irrigation activities. The 1997 Amendments substituted “water, at least 90% of which was ultimately delivered for agricultural purposes during the preceding year” for “water for agricultural purposes.”[[319]](#footnote-319)

***1. Employees Employed in Agriculture***

The Section 213(b)(12) exemption is intended to cover all agriculture, including “extraordinary methods” of agriculture as well as the more conventional ones and large operators as well as small ones.[[320]](#footnote-320) This exemption does not extend to processes that are more akin to manufacturing.[[321]](#footnote-321) An employee is considered an exempt agricultural or irrigation employee if and only if the employee’s work falls clearly within the specific language of Section 203(f) or Section 213(b)(12).[[322]](#footnote-322)

According to the regulations, it is the activities of the employee rather than those of his or her employer that ultimately determine the application of the exemption.[[323]](#footnote-323) Thus, the exemption may not apply to some employees of an employer engaged almost exclusively in activities within the exemption and may apply to some employees of an employer engaged almost exclusively in other activities.[[324]](#footnote-324) But the burden of differentiating exempt from nonexempt work as between different groups of employees is on the employer.

In the nursery and landscape areas of “agriculture,” issues have arisen concerning the corporate structure of the employing entity and whether that corporate structure affects the application of the Section 213(b)(12) exemption.[[325]](#footnote-325)

***2. The Irrigation Exemption***

Any employee employed in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways not owned or operated for profit, or operated on a sharecrop basis, and that are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year, is exempt from the FLSA overtime requirements.[[326]](#footnote-326) The second concept in this exemption was added to Section 213(a)(6) in 1949 to alter the effect of the Supreme Court decision in *Farmers Reservoir & Irrigation Co. v. McComb.*[[327]](#footnote-327) There, the Supreme Court explained that

the ditch company carries the water in its own canals to the lands of the farmers. When a farmer desires water so that he can irrigate his fields he notifies the company. Its employees then operate the headgates, which are located on the company’s canals and which the farmers are forbidden to operate, so that the appropriate quantity of water can pass out of the company’s canals and off the company’s land into the farmer’s irrigation ditches. The responsibility of the company’s employees ceases when they so release the water. The water is supplied to the farmer at the headgates and he takes it over there and uses it, in his own laterals, as he sees fit, to irrigate his crops. The ditch company, then, is not engaged in cultivating or tilling the soil or in growing any agricultural commodity.[[328]](#footnote-328)

Moreover, the ditch company was not engaged in “production … of any agricultural … commodities,” said the Court, because it was “clear” the term “production” did not “encompass the work of the company’s employees who cannot be said, in any normal use of the term, to be engaged in the production of agricultural commodities. Their work is necessary to agricultural production, but it is not production.”[[329]](#footnote-329)

Turning to the secondary definition of “agriculture,” the Court said “it is equally clear that it does constitute a practice performed as an incident to or in conjunction with farming. … Such practices are exempt only if they are performed by a farmer or on a farm.”[[330]](#footnote-330) The Court found that “it is clear that the work of the company’s employees is done neither on a farm or by farmers,”[[331]](#footnote-331) and thus concluded that the court of appeals correctly determined that the field employees were not exempt from the provisions of the FLSA as persons employed in agriculture.[[332]](#footnote-332)

The *Farmers Reservoir* decision issued in June 1949. By the end of that year, Section 213(a)(6) had been amended to exempt from minimum wage and overtime “[a]ny employee employed in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agricultural purposes.”[[333]](#footnote-333)

According to DOL regulations, “Congress chose to accomplish this result, not by expanding the definition of agriculture in Section 203(f), but by adding a further exemption. In view of this approach, it can well be said that Congress agreed with the Supreme Court’s holding that such workers are not employed in agriculture.”[[334]](#footnote-334)

In 1966, the language referenced above was moved to Section 213(b)(12) as an exemption from overtime requirements only. In 1997, Congress amended Section 213(b)(12) by limiting the exemption to those providers who supplied and stored water at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year.[[335]](#footnote-335) “For example, the exemption would not apply where more than 10 percent of the water supplier’s water is delivered to a municipality to be used for general, domestic, and commercial purposes.”[[336]](#footnote-336)

The Ninth and Tenth Circuits[[337]](#footnote-337) have applied the 1997 Amendment to deny the exemption for specified irrigation activities where the water delivered by the irrigation system was not used “exclusively” for supplying and storing water for agricultural purposes. Another court has found that “the term ‘exclusively’ applies [solely] to the supply and storing component while the term ‘90 percent’ applies to the delivery component.”[[338]](#footnote-338)

**C. Employment in Agriculture and Livestock Auction Operations by a Farmer**

Section 213(b)(13) of the FLSA exempts from the overtime requirements

any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee

(A) is primarily employed during his workweek in agriculture by such farmer, and

(B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206 (a)(1) of this title.[[339]](#footnote-339)

Ordinarily, an employee who in the same workweek engages in work that is exempt as agriculture under Section 213(a)(6) or 213(b)(12) and also performs nonexempt work is not exempt in that week.[[340]](#footnote-340) Under Section 213(b)(13), however, an employee who is employed by a farmer in agriculture as well as in livestock auction operations in the same workweek will not lose the overtime exemption for that workweek, if certain conditions are met.[[341]](#footnote-341) The general requirements for the exemption under Section 213(b)(13) are as follows:

(a) employment of the employee “primarily” in agriculture in the particular workweek;

(b) the primary employment “by a farmer”;

(c) engagement by the farmer in “raising livestock”;

(d) engagement by the farmer in livestock auction operations “as an adjunct to” the raising of livestock; and

(e) payment of the minimum wage for all hours spent in livestock auction work by the employee.[[342]](#footnote-342)

The employee must be primarily engaged in agriculture in a given workweek—in other words, more than half of the employee’s work hours must be in agriculture—for the exemption to apply.[[343]](#footnote-343) The employee’s primary ­employment in agriculture must be by a “farmer,” a term defined to include individuals, associations, partnerships, and corporations that actually farm, as well as employees of an individual farmer.[[344]](#footnote-344) Farm cooperatives may be included in the definition of “farmer,” but only where the cooperative itself engages in practices normally performed by a farmer.[[345]](#footnote-345)

The livestock auction operations in question must be engaged in by the same farmer for whom the employee is primarily employed in agriculture.[[346]](#footnote-346) Therefore, an employee who performs agricultural activities for several farmers and services livestock auctions for one may not qualify for the exemption where more than half of the workweek is spent performing agricultural work for farmers other than the one who operates the auction.[[347]](#footnote-347) Livestock auction operations must be an “adjunct to the raising of livestock” and must be an established part of, and subordinate to, the farmer’s raising of livestock.[[348]](#footnote-348) The farmer may operate the livestock auction on the farmer’s own account or with other farmers, but the exemption is lost if the farmer joins with others who are not farmers.[[349]](#footnote-349)

**D. Employment by Small Country Elevators Within the Area of Production**

Section 213(b)(14) of the FLSA exempts from the overtime requirements

any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations.[[350]](#footnote-350)

Four conditions must be met for this exemption to apply: (1) the employing establishment is commonly recognized as a country elevator, (2) there are not more than five workers employed in the establishment’s operations, and (3) the workers are employed by that establishment (4) within the “area of production”[[351]](#footnote-351) (as defined by the Secretary of Labor).[[352]](#footnote-352)

The regulations define a “country elevator” as an elevator typically located along railroads in small towns and rural areas that has the principal functions of providing a point of initial concentration for grain grown in the local area and its handling, short-term storage, and shipment by rail from the producing area.[[353]](#footnote-353) The exemption is not lost if the country elevator also sells products and services used in the operation of a farm as a minor and incidental secondary activity.[[354]](#footnote-354) The exemption applies only where not more than five workers are employed in the operations of the country elevator, including those employed in selling products and services used in farming operations as well as employees of a farmer, independent contractor, or other person who perform their duties of employment “in the establishment.”[[355]](#footnote-355)

To qualify for the exemption, the worker must be employed by a country elevator located in the open country or in a rural community, defined as excluding any city, town, or urban place with a population of 2,500 or more.[[356]](#footnote-356) Furthermore, the regulations provide that “open country or rural community” shall not include any area within one airline mile of a town or city with a population between 2,500 and 49,999; three airline miles of any town or city with a population between 50,000 and 499,999; or five airline miles of any city with a population of 500,000 or more.[[357]](#footnote-357) In addition, at least 95 percent of the commodities received by the country elevator with respect to which it performs its primary concentration, storage, and marketing functions, as measured by total receipts, must come from normal rural sources of supply within the following specified distances from the establishment: 50 airline miles for soybeans and grains and 20 airline miles for all other commodities.[[358]](#footnote-358) The distance test can be met if the total dollar value of commodities from either disqualifying sources or distances does not exceed 5 percent of the total receipts.[[359]](#footnote-359)

**E. Processing Maple Sap Into Sugar or Syrup**

Section 213(b)(15) of the FLSA exempts from the overtime requirements “any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup.”[[360]](#footnote-360)

Examples of processing-type work include hauling the sap from the field to the mill, weighing and unloading the sap, performing sampling tests, operations on the sap in making raw sugar, laboratory testing, operating machinery used in processing, and maintaining or cleaning the machinery.[[361]](#footnote-361) Other nonintegral duties of the operation are considered nonexempt work, including office and general clerical work, feeding and housing millhands and visitors, or hauling raw sugar or molasses away from the mill.[[362]](#footnote-362) Only processing maple sap is within the exemption.[[363]](#footnote-363) Employees who produce refined sugar are expressly excluded from the exemption.[[364]](#footnote-364)

**F. Intrastate Transportation of Fruits and Vegetables, and Fruit and Vegetable Harvesters**

Section 213(b)(16) of the FLSA exempts the following from the overtime requirements:

any employee engaged

(A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or

(B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables.[[365]](#footnote-365)

The employee need not be employed by the “farmer” who grows the fruits and vegetables in order to be exempt.[[366]](#footnote-366) The employee transporting the fruits and vegetables may also be engaged in preparing the products for transportation.[[367]](#footnote-367)

The products being transported must be “just-harvested” fruits or vegetables.[[368]](#footnote-368) Work that does not involve preparing for transportation or transporting fruits or vegetables is nonexempt (for example, office, clerical, and maintenance work).[[369]](#footnote-369) The exemption does not apply to unloading performed at the delivery point by employees other than those who transported the commodities.[[370]](#footnote-370) In addition, retail packing or preparation for retail distribution beyond the place of first processing or first marketing is not exempt as “preparation for transportation.”[[371]](#footnote-371) Preparation for market (such as ripening, cleaning, grading, or sorting), even if performed at the farm, is also not considered exempt work for purposes of this section[[372]](#footnote-372) although these activities may be exempt under other agricultural exemptions of the FLSA.[[373]](#footnote-373) Processing and canning at the farm are not considered to constitute preparation for transportation.[[374]](#footnote-374)

The Section 213(b)(16) exemption is limited to employees who transport the fruits or vegetables to a place of either first processing or first marketing within the same state where the produce was harvested.[[375]](#footnote-375) The exemption does not apply to transport within the same state where the fruit or vegetables were harvested if they are destined for a place of first processing or first marketing located in another state.[[376]](#footnote-376) However, the exemption does apply where the farm and the place of first processing or marketing are both located in the same state, even if the fruits or vegetables are eventually transported by the processor or marketer across state lines to their ultimate destination.[[377]](#footnote-377)

A place of first processing includes any place where canning, freezing, drying, preserving, or other operations that first change the form of fresh fruits and vegetables are performed.[[378]](#footnote-378) A plant exclusively engaged in grading and packing is not considered a place of first processing.[[379]](#footnote-379) A place of first marketing is a place where freshly harvested fruits and vegetables are brought from the farm and first delivered for marketing, such as a packing plant, a farmer’s market, a wholesale or distribution operation, a cooperative market, or a processor.[[380]](#footnote-380) A place of first marketing may also be a place of first processing, but it need not be.[[381]](#footnote-381)

Section 213(a)(16)(B) exempts employees who transport harvest workers employed, or to be employed, in harvesting fruits or vegetables, where the transportation provided is between the farm and any point within the same state.[[382]](#footnote-382) The exemption applies only to employees who actually engage in providing transportation, such as drivers and driver’s helpers; those who perform supporting activities, such as office employees and garage mechanics, are not within the exemption.[[383]](#footnote-383) The regulations define “harvesting” fruits and vegetables as removing them from their growing position in the fields and operations customarily performed in connection with severing crops from the soil.[[384]](#footnote-384) Activities performed in preparation for marketing, such as ripening, cleaning, grading, sorting, drying, and storing, are nonexempt work.[[385]](#footnote-385)

**G. Small-Scale Forestry or Lumbering Operations**

Section 213(b)(28) of the FLSA exempts from the overtime requirements

any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.[[386]](#footnote-386)

The exemption is available only for workers employed in the named operations, which the regulations define by reference to their ordinary meaning in the forestry and logging industry.[[387]](#footnote-387) The enumerated operations include incidental activities normally performed by persons employed in such operations, but exclude mill operations.[[388]](#footnote-388) For example, employees engaged in “planting or tending trees” include those who weed, prepare firebreaks, plant seedlings, prune, spray, and engage in similar operations when the object is to foster the growth of trees, and those who keep watch over the timberland to guard against theft and fire.[[389]](#footnote-389) Employees engaged in incidental activities so as to fall within the scope of the exemption include cooks, bullcooks, timekeepers, repair shop mechanics, and crew supervisors, who are usual members of logging crews.[[390]](#footnote-390) The exemption does not cover employees of a sawmill, workers who transport lumber from the mill, and workers employed in land-clearing projects where the lumber is destroyed and not marketed.[[391]](#footnote-391)

The exemption is available only if the employer employs eight or fewer workers in the enumerated operations, and activities incidental to such operations, in a workweek. The exemption is lost if the employer employs more than eight workers in the named operations or incidental activities, without regard for how the employer divides the work or whether the employees work on different shifts or in different locations.[[392]](#footnote-392) The total number of workers employed by the employer is immaterial, provided that no more than eight are employed in the specified activities.[[393]](#footnote-393) Where there are multiple crews that supply an employer’s sawmill, each of which has not more than eight employees engaged in the specified activities, the regulations require that they be aggregated unless the crews are truly independently owned and operated businesses.[[394]](#footnote-394) The principles that apply generally to the question as to whether, under the FLSA, an individual is an employee or an independent contractor also apply to situations where multiple crews supply an employer’s sawmill.[[395]](#footnote-395) The regulations make clear that even employees who are exempt under other provisions of the FLSA still must be counted toward the eight-employee threshold.[[396]](#footnote-396)

The exemption will be lost in any workweek in which an employee performs a substantial amount of nonexempt work.[[397]](#footnote-397) For enforcement purposes, nonexempt work will be considered substantial in amount if it accounts for more than 20 percent of the time worked by the employee in a given workweek.[[398]](#footnote-398) Where two types of work cannot be segregated, however, so as to permit separate measurement of the time spent in each, the employee will not be exempt.[[399]](#footnote-399) In *Camargo v. Trammell Crow Interest Co.*,[[400]](#footnote-400) the court found that where the “great majority” of the plaintiff’s duties were focused on the private residence, surrounding buildings, and office of the employer and “only a negligible, if any, portion of Plaintiff’s work consisted of [exempt] activities,”[[401]](#footnote-401) the plaintiff’s work was not exempt in that the forestry or lumbering exemption lacks a secondary component.[[402]](#footnote-402) Moreover, the court noted that because the plaintiff performed nonexempt work in the same weeks that he claimed to have performed exempt work, the performance of nonexempt work would have destroyed the exemption anyway.

V. Section 213(d) Exemption From the Minimum Wage, Overtime, and Child Labor Requirements: Employment of Homeworkers in Making Wreaths

Section 213(d) of the FLSA exempts from the minimum wage, overtime, and child labor requirements any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens.[[403]](#footnote-403) Under the regulations, a wreath is made “principally” of evergreens when it is composed mostly of evergreens, meaning that the evergreen content must constitute a greater part of the wreath than all other materials combined.[[404]](#footnote-404) The exemption includes harvesting by the homeworker of forest products used to make wreaths and transporting the harvested products to the home of the wreath maker,[[405]](#footnote-405) but does not include harvesting evergreens and other forest products for a use other than wreath making, or for use by wreath makers who are not homeworkers.[[406]](#footnote-406) The regulations define a “homeworker” within the meaning of the FLSA to be a person who works for an employer in or about a home, apartment, tenement, or room in a residential establishment.[[407]](#footnote-407) The term “in or about a home” includes any home, apartment, or other dwelling place (including a convent, orphanage, or similar institution) and surrounding premises such as yards, garages, sheds, and basements.[[408]](#footnote-408) For the exemption to apply, all the employee’s wreath-making work must be performed “in or about [his or her] home.”[[409]](#footnote-409)

VI. Partial Overtime Exemptions Regarding Cotton, Sugar, and Tobacco

Sections 213(h), 213(i), 213(j), and 207(m)[[410]](#footnote-410) of the FLSA provide certain workers processing cotton, sugar, and tobacco products a partial overtime exemption (up to 10 hours in a workday and up to 48 hours in a workweek for up to 14 workweeks in the aggregate in any period of 52 consecutive weeks).[[411]](#footnote-411)

Section 213(h) provides a partial overtime exemption, as described above, to any employee who is engaged “exclusively to provide services necessary and incidental to”

(1) ginning cotton in an establishment primarily en-gaged in ginning cotton;[[412]](#footnote-412)

(2) receiving, handling, storing, and compressing raw cotton when performed at a cotton warehouse or compress warehouse facility, other than one operated in conjunction with a cotton mill, that is primarily engaged in storing and compressing;[[413]](#footnote-413)

(3) receiving, handling, storing, and processing cottonseed in an establishment primarily engaged in such activities;[[414]](#footnote-414) or

(4) processing sugar cane or sugar beets in an establishment primarily engaged in processing sugar cane or sugar beets.[[415]](#footnote-415)

Sections 213(i) and 213(j) also provide a partial overtime exemption, as described above, to employees engaged in ginning cotton for market at a place of employment located in a county where cotton is grown in commercial quantities[[416]](#footnote-416) or to employees engaged in processing sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup.[[417]](#footnote-417)

In addition, Section 207(m) provides a partial overtime exemption, as described above, to employees engaged “exclusively to provide services necessary and incidental to” sale at auction of certain types of green leaf tobacco; or, in auction sale—depending on the type of green leaf tobacco involved—buying, handling, stemming, redrying, packing, sorting, grading, or storing those specified types of green leaf tobacco; or, in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming, before packing, perishable cigar leaf tobacco of certain specified types.[[418]](#footnote-418)

Both the statutory language and the DOL’s *Field Operations Handbook* set forth some common traits of the exemption provided for in Sections 213(h), (i), (j), and 207(m), including the following:

• Such employees are exempt from overtime requirements for up to an aggregate of 14 workweeks in any period of 52 consecutive weeks.[[419]](#footnote-419)

• The Section 213(h), 213(i), 213(j), and 207(m) exemptions apply only where employees receive one-and-one-half times their regular rate for all hours worked in excess of 10 in any workday or in excess of 48 in any workweek.[[420]](#footnote-420)

• The choice of the 14 weeks is a matter that is within the discretion of the employer. However, the exemption may be taken only for workweeks during which the operations specified in the FLSA are carried on for those employees who worked more than 10 hours in a day or 48 hours in a week.[[421]](#footnote-421)

• The exempt weeks need not run consecutively.[[422]](#footnote-422)

• The weeks taken under these exemptions are applicable on an establishment basis, and an employee may be subject to an exemption in each establishment in which the employee works, even though the establishments are operated by a single employer.[[423]](#footnote-423)

• Because these are exemptions from Section 207(a), none can be operative with respect to any employee in a workweek when that employee does not work hours in excess of those specified in Section 207(a). “If an employer can qualify for one of these exemptions he need not pay daily overtime for hours worked in excess of 10 in a day when no Section 207(a) weekly overtime is worked by the employee.”[[424]](#footnote-424)

• Where the terms of Sections 213(h), (i), (j), and 207(m) are not met, the enforcement policy for computing back wages is as set forth in Section 20j00 of the *Field Operations Handbook*.[[425]](#footnote-425)

Although at first glance the Section 213(h) exemption may seem indistinguishable from those found in Sections 213(i) and 213(j), there are important differences. The Section 213(h) exemption extends only to employees of employers “primarily engaged” in the particular business in question, whereas the Section 213(i) and 213(j) exemptions are not limited to those employed in the primary business of the employer. For example, the Section 213(h) exemption would not apply to an employee who provides services that are necessary and incidental to processing sugar beets if the employee works for an employer that is not primarily engaged in processing sugar beets.[[426]](#footnote-426) The exemptions may also be distinguished on the basis of the type of work to which they apply. Section 213(h) applies to services that are “necessary and incidental” to the four enumerated functions. On the other hand, Sections 213(i) and 213(j) apply only to the actual ginning of cotton and actual processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup. It has therefore been held that the Section 213(j) exemption does not apply to employees who are responsible for nonprocessing functions, such as transporting and storing sugar beets, notwithstanding the fact that this type of work may be necessary and incidental to processing sugar beets.[[427]](#footnote-427) In *Brock v. Circle “A” Construction, Inc.*,[[428]](#footnote-428) the court said:

The (j) exemption, unlike the (h)(1)(D) exemption, is not limited to cases where the primary business of the employer is the processing of sugar beets. However, to say that the employees in question are “engaged” in the processing of sugar beets would require a rather broad definition of “engage.” If the (j) exemption were the only one to be considered, it might be reasonable to extend the coverage of that exemption to any employee involved with sugar beets, no matter how remote that employee is from the processing stage. However, when the (j) exemption is read together with the (h)(a)(D) exemption, it appears that the FLSA has a distinction between employees engaged in processing sugar beets and those employees performing services incidental to sugar beet processing.[[429]](#footnote-429)

Section 213(h) contains a provision not found in any of the other Section 213 exemptions. It provides that an employer that receives an exemption under Section 213(h) shall not be eligible for any other exemption under Section 213.[[430]](#footnote-430) Section 207(m) contains a similar provision.[[431]](#footnote-431)

The regulations and the *Field Operations Handbook* elaborate on the meaning of the various categories of exempt work specifically referenced in Sections 213(h), (i), (j), and 207(m).[[432]](#footnote-432)

**A. Activities Exempt Under Section 213(h)**

Section 213(h) was added to the FLSA in 1974.[[433]](#footnote-433) Prior to that time the four activities that are the subject of the exemption were covered by Sections 207(c) or 207(d) of the FLSA.[[434]](#footnote-434) Sections 207(c) and 207(d) provided partial exemptions from the overtime requirements for employees in industries of a seasonal nature and for employees in some types of industries characterized by marked annually recurring seasonal peaks of operation.[[435]](#footnote-435) However, as noted in the *Field Operations Handbook*, Section 213(h), unlike its predecessors (Sections 207(c) and 207(d)), is more narrow in its applications with respect to cotton storing and compressing and cotton processing industries. “[O]ld sections 207(c) and 207(d) exempted entire industries, whereas sections 213(h)(1)(B) and 213(h)(1)(C) exempt only individual employees. Section 213(h) requires that employees be exclusively involved in specified activities (thus permitting no tolerances).”[[436]](#footnote-436)

Section 213(h) exempts employees performing auxiliary services (services that are necessary and incidental to the named operations) that are not exempt under Sections 213(i) and 213(j).[[437]](#footnote-437) For example, employees not actually engaged in ginning cotton, or processing sugar beets, sugar beet molasses, or sugar cane into sugar may be eligible for the Section 213(h) exemption.[[438]](#footnote-438) As noted above,theSection 213(h) exemption extends to employees of employers “primarily engaged” in one of four particular industries.

***1. Ginning, Receiving, Handling, Storing, and Processing of Cotton***

The “ginning of cotton” specified in Section 213(h)(1)(A) includes receiving seed cotton at the gin; handling, cleaning, ginning, and baling the cotton; handling the baled cotton and cottonseed; and any operations or services necessary or incidental to the foregoing, including placing the cotton and cottonseed in storage or in transportation facilities on or near the premises.[[439]](#footnote-439) For the exemption to apply, the work must be performed in an establishment primarily engaged in ginning cotton. The exemption for “ginning of cotton” does not apply to work performed during periods when an establishment is not receiving cotton for ginning, sometimes referred to as “the dead season.”[[440]](#footnote-440) Thus, employees who engage in repair work at the gin during the dead season are not exempt under Section 213(h).[[441]](#footnote-441)

“Cotton storing and compressing” under Section 213(h)(1)(B) includes receiving, handling, and storing raw cotton, and compressing raw cotton. For the exemption to apply, the work must be performed in a cotton warehouse or compress warehouse facility primarily engaged in storing and compressing cotton, other than one operated in conjunction with a cotton mill.[[442]](#footnote-442) Also included as exempt work are such incidental activities as loading, unloading, weighing, sampling, assembling, and preparing for shipment when such work is performed at the storing establishment.[[443]](#footnote-443)

The term “processing of cottonseed” in Section 213(h)(1)(C) includes cleaning and removing hulls and linters from cottonseed; extracting oil therefrom; making cottonseed cake; and, when done in a continuous series of operations with the crushing, grinding the cake into meal.[[444]](#footnote-444) For the exemption to apply, the work must be performed in an establishment primarily engaged in the named activities. This exemption also includes the work of grinding cottonseed cake, even when not part of a continuous series of operations with the crushing and even though an insubstantial amount of hull bran purchased from other sources is added.[[445]](#footnote-445) Handling and grinding the purchased bran, when only an insubstantial amount is added, is also exempt under Section 213(h).[[446]](#footnote-446) Similarly, processing the hulls into fiber and bran constitutes exempt work. However, the exemption does not apply to further processing of hulls into fiber and bran if the hulls have been received from other cottonseed crushing mills, except where the amount of the hulls is insubstantial.[[447]](#footnote-447) Refining crude cottonseed oil that has been produced exclusively at the crushing mill is exempt work only when done in a continuous series of operations with the crushing.[[448]](#footnote-448) The exemption extends to laboratory employees who test crude or refined oil during the crushing season.[[449]](#footnote-449) Processing cottonseed also includes preparing cottonseed for planting by means of drying, screening, delinting, redrying, or poisoning.[[450]](#footnote-450)

***2. Processing Sugar Cane***

There are no regulations or *Field Operations Handbook* provisions relating to the work that falls under the definition of “processing of sugar cane” so as to be subject to a 14-workweek exemption from the overtime requirements under Section 213(h)(1)(D) of the FLSA. However, there is a *Field Operations Handbook* provision that deals with the processing of sugar cane within the meaning of Section 213(j). It includes the following:

(1) unloading sugar cane at the mill;

(2) processing sugar cane into sugar, syrup, and molasses;

(3) immediate refining, as one of a connected series of operations, of raw sugar produced from sugar cane that is ground on the premises;

(4) refining, by introduction into the series of operations, raw sugar that has been produced during the same grinding season in other cane-processing plants of the same employer, except where the refined sugar made from the transferred raw sugar produced during the cane-processing season constitutes half or more of the refined sugar produced during the cane-processing season, or where purchased raw sugar is refined during the cane-processing season;

(5) burning, removing from the premises, or dehydrating bagasse that results from processing sugar cane;

(6) extracting calcium aconitate from “B” molasses, including drying the cake;

(7) handling, baling, bagging, packing, and storing the sugar, syrup, molasses, bagasse, or calcium aconitate; and

(8) placing these products in storage or transportation facilities on or near the premises.[[451]](#footnote-451)

For the exemption to apply, the work must be performed in an establishment that is primarily engaged in processing sugar cane.[[452]](#footnote-452)

***3. Processing Sugar Beets***

Similarly, there are no regulations or *Field Operations Handbook* provisions relating to the work that falls under the definition of “processing of sugar beets” so as to be subject to a 14-workweek exemption from the overtime requirements under Section 213(h)(1)(D) of the FLSA. However, the *Field Operations Handbook* does address the processing of sugar beets within the meaning of Section 213(j). It includes the following:

(1) receiving the sugar beets at the factory site or at receiving stations operated by the beet sugar factory;

(2) transporting the beets from the receiving stations to the factory when performed by employees of the sugar beet processor;

(3) producing sugar from the beets and further extracting sugar from the sugar beet molasses by mixing and concurrently processing the molasses with the beet juice obtained directly from the sugar beets;

(4) the following operations when performed by employees of the sugar beet processor on or near the premises of the beet sugar plant while the sugar beets are being received at the factory or are being processed into sugar: powdering the sugar; compressing and artificially drying wet beet pulp; weighing, handling, packaging, bagging, and storing sugar, wet beet pulp, dried beet pulp, and molasses; removing these products from the premises; and placing them in transportation facilities; and

(5) testing equipment, maintenance, repairs, etc.[[453]](#footnote-453)

For the exemption to apply, the work must be performed in an establishment primarily engaged in processing sugar beets. An employer that transports sugar beets does not fall within the exemption, because the employees perform services incidental to “sugar beet processing,” and are not engaged in the processing.[[454]](#footnote-454)

**B. Activities Exempt Under Section 213(i): Employees Engaged in Cotton Ginning**

Section 213(i) of the FLSA provides a partial overtime exemption for a period or periods of not more than 14 workweeks in the aggregate in any 52 consecutive weeks to any employee who is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities.[[455]](#footnote-455) “Ginning of cotton” refers to operations performed on seed cotton, i.e., cotton in its natural state, to separate the seeds from the spinnable fibers.[[456]](#footnote-456) Only those activities that constitute the first processing of cotton in its natural state qualify for the exemption.[[457]](#footnote-457) The exemption is lost if the cotton is not marketed in the form in which the ginning operation leaves it.[[458]](#footnote-458)

Under the regulations, the following activities are within the meaning of the term “engaged in ginning of cotton:”

• “spotting” vehicles in the gin yard or nearby areas before or after weighing;

• moving vehicles to the “suction” area and reparking them;

• weighing seed cotton before ginning, weighing lint cotton and seed after ginning, and preparing associated records;

• placing seed cotton in temporary storage and removing it from storage to be ginned;

• operating the suction feed, gin stands, and power equipment;

• repairing gin equipment during the ginning season;

• operating the press;

• removing bales from the press to holding areas near the gin premises; and

• other work directly and physically connected with and integral to the ginning process itself.[[459]](#footnote-459)

Activities that do not qualify for the exemption include

• transporting seed cotton from farms to the gin;

• general maintenance work;

• general office and custodial duties;

• “watching” duties;

• working in the seed house;

• transporting seed, hulls, and ginned bales away from the gin; and

• any activity performed during the “off-season.”[[460]](#footnote-460)

The exemption is available only to workers employed in the described activities “in any place of employment located in a county in which cotton is grown in commercial quantities.”[[461]](#footnote-461) The DOL takes the position that “in the cotton-growing areas of the country there should be little question in most instances as to whether commercial quantities of cotton are grown in the county where the ginning is done.”[[462]](#footnote-462) The regulations contain guidelines as to what constitutes “commercial quantities.”[[463]](#footnote-463)

**C. Activities Exempt Under Section 213(j): Employees Engaged in Sugar Processing**

Section 213(j) of the FLSA provides a partial overtime exemption for a period or periods of not more than 14 workweeks in the aggregate in any 52 consecutive weeks to any employee who is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into unrefined sugar or syrup.[[464]](#footnote-464) The exemption is limited to the particular commodities and products enumerated in Section 213(j). For example, processing sorghum cane or refinery syrup into raw sugar or syrup, or processing sugar, glucose, or ribbon cane syrup into syrup, is not covered by the exemption.[[465]](#footnote-465) Nor is processing work exempt if it produces any product other than raw (i.e., unrefined) sugar or syrup.[[466]](#footnote-466)

According to the regulations, the processing of sugar cane is considered to begin when the processor receives the cane for processing and ends when the cane is processed “into sugar” or syrup.[[467]](#footnote-467) Employees engaged in the following activities of a sugar cane processing mill are considered to be engaged in the “processing of” the sugar cane into the named product within the Section 213(j) exemption:

• loading sugar cane in the field and hauling it to the mill, if performed by employees of the mill;

• weighing, unloading, and stacking the cane at the mill yard;

• performing sampling tests on the incoming cane;

• washing the cane, feeding it into the mill crushers, and crushing the cane;

• operations on the extracted cane juice in the making of raw sugar and molasses;

• laboratory analysis and testing operations;

• loading raw sugar or molasses or handling, baling, or storing bagasse during the grinding season; and

• firing boilers and other activities connected with the overall operation of the plant machinery during grinding operations, including cleanup, maintenance work, and day-to-day repairs.[[468]](#footnote-468)

Employees engaged in operations that are not an integral part of processing the named commodities will not fall within the exemption.[[469]](#footnote-469) The following activities are not considered exempt activities:

• office and general clerical work;

• feeding and housing millhands or visitors;

• hauling raw sugar or molasses away from the mill; and

• any work performed outside of the grinding season.[[470]](#footnote-470)

According to the *Field Operations Handbook*, the following operations are considered “processing” of sugar beets within the meaning of Section 213(j):

• receiving the sugar beets at the factory site or at receiving stations operated by the beet sugar factory;

• transporting the beets from such receiving stations to the factory when performed by employees of the sugar beet processor;

• production of sugar from the beets and the further extraction of sugar from the sugar beet molasses by mixing and concurrently processing the molasses with the beet juice obtained directly from the sugar beets;

• operations when performed by employees of the sugar beet processor on or near the premises of the beet sugar plant while the sugar beets are being received at the factory or are being processed into sugar; the powdering of sugar; the compressing and artificial drying of wet beet pulp; the weighing, handling, packaging, bagging, and storage of sugar, wet beet pulp, dried beet pulp and molasses; the removal of these products from the premises and placing them in transportation facilities; and

• the testing of equipment, maintenance, repairs, etc.[[471]](#footnote-471)

**D. Activities Exempt Under Section 207(m): Employees Providing Services for Tobacco Auctions**

Section 207(m) of the FLSA provides a partial overtime exemption for a period or periods of not more than 14 workweeks in the aggregate in any calendar year to any employee who is employed by an employer

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco;

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture); or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture).[[472]](#footnote-472)

The Section 207(m) exemption applies only to activities that relate to the sale at auction of green leaf tobacco and not to its growing or harvesting.[[473]](#footnote-473) The last sentence of Section 207(m) provides that, where an employer claims the Section 207(m) exemption for an employee, that employer may not claim another overtime exemption from Section 207 for such employee.[[474]](#footnote-474)

1. S. Rep. No. 89-1487, at 5 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3006. [↑](#footnote-ref-1)
2. Pub. L. No. 89-601, §203(a), 80 Stat. 830, 833–34 (1966). [↑](#footnote-ref-2)
3. The exemptions treated in this chapter appear in the following sections of the FLSA: Section 213(a)(6), Certain Employees Employed in Agriculture; Section 213(b)(5), Outside Buyers of Agricultural Products; Section 213(b)(12), Other Agricultural Workers; Section 213(b)(13), Livestock Auction Operations; Section 213(b)(14), Small Country Grain Elevators; Section 213(b)(15), Processing of Maple Sap; Section 213(b)(16), Intrastate Transportation of Fruits and Vegetables or Fruit and Vegetable Harvesters; Section 213(b)(28), Small Scale Forestry or Lumbering Operations; Section 213(d), Employment of Homeworkers in Making Wreaths; Sections 213(h), (i), and (j), Employment in the Ginning of Cotton, Processing of Sugar Beets, Sugar Beet Molasses or Sugar Cane; and Section 207(m), Employees Engaged in the Tobacco Industry. Section 213(g) of the FLSA, which covers employees of small agricultural establishments controlled by a conglomerate, is addressed in Chapter 4, Employer Coverage, §III.C.2.f [Enterprise Coverage; Requirements of Section 203(s); Section 3(s)(1)(A)(ii): The Business Dollar Volume Test; Conglomerate Coverage Rules].

   In addition to the FLSA and the exemptions from those requirements, certain agricultural employees and employers are subject to the provisions of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. §1801 *et seq*. *See* 29 C.F.R. pt. 500. The MSPA regulates farm labor contractors and contains requirements pertaining to employment, compensation, transportation, and housing of migrant and seasonal agricultural workers. It provides for enforcement through the U.S. Department of Labor (DOL) and private actions. [↑](#footnote-ref-3)
4. Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 9 WH Cases 1 (1949). [↑](#footnote-ref-4)
5. 29 U.S.C. §203(f). [↑](#footnote-ref-5)
6. U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook ch. 20, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH\_Ch20.pdf. For an updated version of the FOH, *see* U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook, https://www.dol.gov/agencies/whd/field-operations-handbook [hereinafter FOH]. [↑](#footnote-ref-6)
7. 29 U.S.C. §203(f). This definition of “agriculture” applies not only to the FLSA, but also to the National Labor Relations Act (NLRA). Section 2(3) of the NLRA, 29 U.S.C. §152(3), defines the term “employee” to exclude “any individual employed as an agricultural laborer.” The NLRA does not define the term “agricultural laborer,” but in the National Labor Relations Board Appropriation Act of 1947, Congress adopted the definition of “agricultural laborer” contained in §203(f) of the FLSA to apply to the exclusion in the NLRA. 60 Stat. 698, ch. 672, tit. IV (1947). Although some of the National Labor Relations Board’s (NLRB’s) interpretations of the term “agriculture” are cited in the DOL regulations (e.g., 29 C.F.R. §780.118, interpreting the term “harvesting”), decisions of the Board and the courts for purposes of the NLRA are not controlling for FLSA purposes, and vice versa. *But see* Holly Farms Corp. v. NLRB, 517 U.S. 392, 405, 152 LRRM 2001, 2007 (1996) (upholding NLRB’s decision that live-haul chicken catchers, forklift operators, and truck drivers engaged by poultry producer to collect and load broiler chickens for transport from independent growers’ farms to processing plant were “employees” of producer, rather than “agricultural laborers” exempt from coverage under §2(3) of NLRA). In *Holly Farms*, the Court found that the Board’s decision was supported by the DOL’s interpretation of “agriculture” as used in FLSA §203(f) and thus affirmed the circuit court’s decision. *Holly Farms* is discussed in detail at §II.C.5 [General Scope of the Term “Agriculture”; “Secondary” Meaning of the Term “Agriculture”; Performance of the Practice “as an Incident to or in Conjunction With” Farming Operations] of this chapter. [↑](#footnote-ref-7)
8. 337 U.S. 755, 9 WH Cases 1 (1949). [↑](#footnote-ref-8)
9. 337 U.S. at 762–63, 9 WH Cases at 4. [↑](#footnote-ref-9)
10. 29 C.F.R. §780.104. *See, e.g.*, Acosta v. Bland Farms Prod. & Packing, LLC, 767 F. App’x 862 (11th Cir. 2019) (packing of onions grown by other farmers on other farms was production operation, not farming). [↑](#footnote-ref-10)
11. 29 C.F.R. §780.105. [↑](#footnote-ref-11)
12. *Id.* §780.106. [↑](#footnote-ref-12)
13. *Id.* [↑](#footnote-ref-13)
14. *Id.* §780.107. [↑](#footnote-ref-14)
15. 29 U.S.C. §203(f). [↑](#footnote-ref-15)
16. 29 C.F.R. §780.109. [↑](#footnote-ref-16)
17. 802 F.3d 856 (6th Cir. 2015). [↑](#footnote-ref-17)
18. *Id*. at 865. [↑](#footnote-ref-18)
19. 29 C.F.R. §780.109. [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. *Id.* §780.110. [↑](#footnote-ref-21)
22. *Id*. [↑](#footnote-ref-22)
23. 29 C.F.R. §780.111. [↑](#footnote-ref-23)
24. *Id*. [↑](#footnote-ref-24)
25. *Id*. [↑](#footnote-ref-25)
26. 2013 WL 459611 (E.D. Cal. Feb. 5, 2013). [↑](#footnote-ref-26)
27. *Id.* at \*10 (citing Wyatt v. Holtville Alfalfa Mills, Inc., 106 F. Supp. 624, 631 (S.D. Cal. 1952) (dehydration changes chemical content of commodity)). [↑](#footnote-ref-27)
28. *Id.* at \*10–11. [↑](#footnote-ref-28)
29. 29 U.S.C. §203(f). [↑](#footnote-ref-29)
30. 29 C.F.R. §780.112. [↑](#footnote-ref-30)
31. *Id.* [↑](#footnote-ref-31)
32. *Id*. [↑](#footnote-ref-32)
33. *Id*. §780.113. [↑](#footnote-ref-33)
34. *Id.* §780.114. [↑](#footnote-ref-34)
35. *Id.*; Morante-Navarro v. T&Y Pine Straw, Inc., 350 F.3d 1163, 9 WH Cases2d 131 (11th Cir. 2003) (relying in part on 29 C.F.R. §780.114 (2003), court found in MSPA case that workers who raked, gathered, baled, and loaded pine straw were involved in “agricultural employment” even though pine straw could grow wild without being cultivated). [↑](#footnote-ref-35)
36. 29 C.F.R. §780.114. [↑](#footnote-ref-36)
37. *Id.* §780.115; *see also* Castillo v. Groundlevel, Inc., 2013 WL 5499611 (M.D. Fla. Oct. 1, 2013) (relying on 29 C.F.R. §780.115, court found that “restoration and reforestation” of nonfarming land by planting trees was not within definition of “agriculture” in FLSA and accompanying regulations and refused to dismiss overtime claim on basis of agriculture exemption). [↑](#footnote-ref-37)
38. 377 F.3d 345, 9 WH Cases2d 1448 (4th Cir. 2004). [↑](#footnote-ref-38)
39. 377 F.3d at 352 (citations omitted). [↑](#footnote-ref-39)
40. *Id*. at 355. The court noted that the DOL had reconsidered its position on Christmas tree farming on three subsequent occasions but on each occasion it had adhered to its original interpretation “without any consideration of the evolution of the industry.” *Id.* [↑](#footnote-ref-40)
41. 29 U.S.C. §203(f) (referencing §15(g) of Agricultural Marketing Act, 12 U.S.C. §1141–1141j). [↑](#footnote-ref-41)
42. 29 C.F.R. §780.116(a). [↑](#footnote-ref-42)
43. *Id*. [↑](#footnote-ref-43)
44. *Id*. §780.116(b). [↑](#footnote-ref-44)
45. *Id*. §780.116(c). [↑](#footnote-ref-45)
46. The terms “growing” and “production” are further described in 29 C.F.R. §780.117(a). [↑](#footnote-ref-46)
47. 29 C.F.R. §780.117(a). [↑](#footnote-ref-47)
48. *Id*. *But see id*. §780.128 (stating possible exemption on other grounds). [↑](#footnote-ref-48)
49. *Id*. §780.117(a). [↑](#footnote-ref-49)
50. *Id*. §780.118(a). [↑](#footnote-ref-50)
51. *Id*. §780.118(b). [↑](#footnote-ref-51)
52. 29 C.F.R. §780.119. [↑](#footnote-ref-52)
53. *Id*. §780.120; *see also* Chhum v. Anstett, 2016 WL 4203389 (D. Conn. Aug. 9, 2016) (holding that plaintiff’s animal caretaking responsibilities that included caring for employer’s retired racehorses, as well as donkey, mule, llamas, chicken, pigeons, duck, and pig, fell squarely within definition of “raising livestock”). [↑](#footnote-ref-53)
54. 29 C.F.R. §780.120. Section 213(a)(5) is discussed in Chapter 6, Other Statutory Exemptions, §III.B [Section 213(a) Exemptions From the Minimum Wage and Overtime Requirements of the FLSA; Employees Engaged in Fishing or First Processing at Sea of Aquatic Products]. [↑](#footnote-ref-54)
55. 29 C.F.R. §780.121; *see also* *Chhum*, 2016 WL 4203389 (holding that plaintiff’s animal caretaking responsibilities that included feeding and caring for employer’s retired race horses, as well as donkey, mule, llamas, chickens, pigeons, duck, and pig, were within definition of “raising livestock”). [↑](#footnote-ref-55)
56. Baldwin v. Iowa Select Farms, L.P., 6 F. Supp. 2d 831, 4 WH Cases2d 1119 (N.D. Iowa 1998) (holding that defendant’s business of breeding sows and gilts through artificial insemination, furrowing sows and weaning pigs, and furrowing pigs and hogs in nursery and finishing operations, through to marketing, was engagement in primary agricultural activity of raising livestock). Regarding the nature of modern, segmented, and quasi-industrial agriculture, the court in *Baldwin* observed:

    Although there may be some appeal to Baldwin’s assertion that industrialized hog production operations that bear a greater resemblance to Ford Motor Company than to a “farm” should not be able to invoke the “employed in agriculture” exemption from overtime pay requirements of the FLSA, that argument is better addressed to Congress than to this court in light of the language of the statute and the governing interpretations.

    6 F. Supp. 2d at 842, 4 WH Cases2d at 1127. [↑](#footnote-ref-56)
57. 29 C.F.R. §780.121. *See also* Taylor v. White Oak Pastures, Inc., 454 F. Supp. 3d 1317, 1327 (M.D. Ga. 2020) (finding that “slaughtering cattle” is not the raising of livestock; thus, plaintiffs’ labor of slaughtering and butchering cattle did not constitute primary agriculture). [↑](#footnote-ref-57)
58. 29 C.F.R. §780.122. [↑](#footnote-ref-58)
59. *Id*. §780.123. [↑](#footnote-ref-59)
60. *Id*. §780.124(a). [↑](#footnote-ref-60)
61. *Id.* §780.124(b). [↑](#footnote-ref-61)
62. *Id*. [↑](#footnote-ref-62)
63. *Id*. §780.125(a). [↑](#footnote-ref-63)
64. *Id*. §780.125(b). [↑](#footnote-ref-64)
65. *Id.* [↑](#footnote-ref-65)
66. Jimenez v. Duran, 287 F. Supp. 2d 979, 982, 9 WH Cases2d 153 (N.D. Iowa 2003) (“raising of poultry” can apply to employer that does not own poultry but engages in their general care). [↑](#footnote-ref-66)
67. 29 C.F.R. §780.126. [↑](#footnote-ref-67)
68. *Id.* [↑](#footnote-ref-68)
69. *Id.* [↑](#footnote-ref-69)
70. 29 U.S.C. §203(f); Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762–63, 9 WH Cases 1, 4 (1947); *see also* Bayside Enters. v. NLRB, 429 U.S. 298, 301, 94 LRRM 2199 (1977) (explaining that raising poultry is “primary” agriculture and that, while hauling of commodities to or from farm is not “primary” agriculture, it may be “secondary” agriculture if performed by farmer or on farm and related to farming operation); Damutz v. William Pinchbeck, Inc., 158 F.2d 882, 883, 6 WH Cases 501, 502 (2d Cir. 1946) (noting that “agriculture” includes much more than ordinary farming activity). [↑](#footnote-ref-70)
71. 29 C.F.R. §780.128. [↑](#footnote-ref-71)
72. *Id*. §780.129. [↑](#footnote-ref-72)
73. *Id.* (listing examples of activities not within scope of “secondary” agriculture, e.g., warehouse employees at typical tobacco warehouses). [↑](#footnote-ref-73)
74. *Id.* [↑](#footnote-ref-74)
75. 29 C.F.R.§780.130. [↑](#footnote-ref-75)
76. *Id.* [↑](#footnote-ref-76)
77. *Id*. [↑](#footnote-ref-77)
78. *Id*. §780.131. In an opinion letter, the Wage and Hour Division Administrator commented on the definition of “agriculture” as applied to on-shore crabmeat packers. “The activities engaged in by crabmeat pickers and packers do not constitute ‘farming,’ nor is the work in a seafood processing plant performed ‘by a farmer or on a farm.’ Therefore, the work of crabmeat pickers and packers does not constitute ‘agriculture’ under any of the FLSA’s definitions.” WH Op. FLSA2004-2, 2004 WL 769498 (Feb. 5, 2004).

    [↑](#footnote-ref-78)
79. 29 C.F.R. §780.131. [↑](#footnote-ref-79)
80. *Id*.; *see* Ramirez v. Statewide Harvesting & Hauling, LLC, 997 F.3d 1356, 1360 (11th Cir. 2021) (recognizing that company employing harvest workers and transporting fruit was not a “farmer” because it did not “own, lease, or control the farms or crops harvested”). [↑](#footnote-ref-80)
81. *Id*. [↑](#footnote-ref-81)
82. *Id*. §780.132. [↑](#footnote-ref-82)
83. *Id*. [↑](#footnote-ref-83)
84. 29 C.F.R. §780.133. [↑](#footnote-ref-84)
85. *Id.*; *see also* Sariol v. Florida Crystals Corp., 490 F.3d 1277, 1282 (11th Cir. 2007) (holding cooperative association engaging in “actual farming operations” qualified as “farmer” for purposes of §780.133). [↑](#footnote-ref-85)
86. 29 C.F.R. §780.134; Rodriguez v. Whiting Farms, Inc., 360 F.3d 1180, 9 WH Cases2d 513 (10th Cir. 2004) (employees who worked on farm that raised chickens for sole purpose of being skinned and having their feathers (pelts) sold for use in tying fishing flies performed all breeding, processing, and packaging of pelts on employers’ four farms, and thus were engaged in practice performed “on a farm”). *But see* WH Op. FLSA2004-2, 2004 WL 769498 (Feb. 5, 2004) (holding that activities of crabmeat pickers and packers who worked in seafood processing plant was not work performed “on a farm”). *See also* Araiza-Calzada v. Webb’s Seafood, Inc., 49 F. Supp. 3d 1001 (N.D. Fla. 2014) (finding that term “agriculture” under MSPA did not include seafood because definition is derived in part from FLSA, which provides separate exemptions for “agriculture” and seafood; 29 U.S.C. §213(a)(5), (6)). [↑](#footnote-ref-86)
87. 29 C.F.R. §780.135. [↑](#footnote-ref-87)
88. *Id*. §780.134.

    [↑](#footnote-ref-88)
89. Ramirez v. Statewide Harvesting & Hauling, LLC, 997 F.3d 1356, 1359–61 (11th Cir. 2021); *see also* Holly Farms Corp. v. NLRB, 517 U.S. 392, 395–96 (1996) (recognizing that truck drivers who transported chickens and crews between farms and processing plant did not perform work “on a farm”); Wirtz v. Osceola Farms Co., 372 F.2d 584, 588–90 (5th Cir. 1967) (holding that work of flagmen who stopped traffic on public roads so that truck drivers taking sugar cane from a farm to a sugar mill could pass safely were “clearly outside of the [agricultural] exemption”); Chapman v. Durkin, 214 F.2d 360, 363 (5th Cir. 1954) (hauling fruit away from a farm “cannot be said to be work performed … on a farm”). [↑](#footnote-ref-89)
90. *Id*. §780.136; Bills v. Cactus Fam. Farms, LLC, 5 F.4th 844 (8th Cir. 2021) (holding that animal care auditor for pork company engaged in secondary agriculture by monitoring loading of livestock into transportation vehicles on farms of independent contractors to ensure biosecurity and safety protocols were followed); Jimenez v. Duran, 287 F. Supp. 2d 979, 9 WH Cases2d 153 (N.D. Iowa 2003) (holding that employees who performed on-site services for poultry producers, such as vaccination, debeaking, and crating of chicks and chickens, engaged in secondary agriculture). [↑](#footnote-ref-90)
91. 29 C.F.R. §780.136 (noting requirement that practices be performed as incident to or in conjunction with farming operations on particular farm—that is, whether they are carried on as part of agricultural function or as separately organized productive activity). [↑](#footnote-ref-91)
92. *Id*. [↑](#footnote-ref-92)
93. *Id*. §780.137; *see also* Sariol v. Florida Crystals Corp., 490 F.3d 1277, 1280–81 (11th Cir. 2007) (affirming summary judgment for defendant employer because plaintiff truck driver who provided planting and fertilizing services to defendant qualified for exemption even though he was independent contractor). [↑](#footnote-ref-93)
94. 29 C.F.R. §780.137. In *Adkins v. Mid-American Growers, Inc*., 167 F.3d 355 (7th Cir 1999), the court analyzed various activities conducted by the defendant’s greenhouse and held that the agricultural exemption covers nonagricultural activities that are incidental to core activities that are exempt, such as (1) sale of flower pots, planters, and other containers even if sold without plants or flowers; and (2) work connected with plants that are purchased but not cultivated in order to cover greenhouse shortfalls. However, work related to mature plants purchased because of excess orders over normal production is not exempt work. [↑](#footnote-ref-94)
95. 29 C.F.R. §780.137. [↑](#footnote-ref-95)
96. *Id*. §780.138. [↑](#footnote-ref-96)
97. *Id*. §780.140. [↑](#footnote-ref-97)
98. *Id*. [↑](#footnote-ref-98)
99. *Id*. [↑](#footnote-ref-99)
100. 29 C.F.R. §780.141. [↑](#footnote-ref-100)
101. *Id*. [↑](#footnote-ref-101)
102. *Id*. [↑](#footnote-ref-102)
103. *Id*. [↑](#footnote-ref-103)
104. For an example of how this issue can arise, *see Perez v. Bland Farms Production & Packing, LLC*, 2016 WL 1070842 (S.D. Ga. Mar. 16, 2016). [↑](#footnote-ref-104)
105. 29 C.F.R. §780.142. [↑](#footnote-ref-105)
106. *Id.* [↑](#footnote-ref-106)
107. *Id*. §780.143. [↑](#footnote-ref-107)
108. *Id*. [↑](#footnote-ref-108)
109. *Id*. [↑](#footnote-ref-109)
110. *Id.* [↑](#footnote-ref-110)
111. *Id*. [↑](#footnote-ref-111)
112. *Id*. §780.144. [↑](#footnote-ref-112)
113. *Id*. [↑](#footnote-ref-113)
114. *Id*. *See also* WH Op. FLSA2019-5 (Apr. 2, 2019) (concluding that farm’s “light processing” activities (cutting and freezing its own agricultural products and packing, storing, and delivering such products) are secondary agriculture if these activities are subordinate to its farming operations and do not amount to independent business); Chhum v. Anstett, 2016 WL 4203389 (D. Conn. Aug. 9, 2016) (holding that following activities were incidental to and in conjunction with plaintiff’s primary agricultural activities and thus exempt: feeding, exercising, grooming, and buying food for animals; repairing fences on pastures that housed animals; burying animals when they died; and mowing lawns and repairing house to provide living space for animals, which were only one step away from direct animal care). [↑](#footnote-ref-114)
115. 29 C.F.R. §780.143. [↑](#footnote-ref-115)
116. *Id*. §780.145. [↑](#footnote-ref-116)
117. *Id*. [↑](#footnote-ref-117)
118. *Id*. §780.146; *see also* *Chhum*, 2016 WL 4203389 (holding that following activities were incidental to and in conjunction with plaintiff’s primary agricultural activities and thus exempt: feeding, exercising, grooming, and buying food for the animals; repairing fences on pastures that housed animals; burying animals when they died; and mowing lawns and repairing house to provide living space for animals, which were only one step away from direct animal care); Jimenez v. Duran, 287 F. Supp. 2d 979, 989, 9 WH Cases2d 153 (N.D. Iowa 2003) (holding that “culling, catching, cooping, and loading of poultry” may constitute secondary agriculture). [↑](#footnote-ref-118)
119. For example, in certain circumstances, slaughtering can be considered secondary agriculture. *See, e.g.*, Taylor v. White Oak Pastures, Inc., 454 F. Supp. 3d 1317, 1329 (M.D. Ga. 2020) (slaughtering, cutting, and grinding activities at farm’s red meat abattoir were in preparation for market and could be considered secondary agriculture because the process did not involve any additives or manufacturing processes that altered the fundamental physical chemical properties of the beef). [↑](#footnote-ref-119)
120. 29 C.F.R. §780.146. [↑](#footnote-ref-120)
121. 517 U.S. 392 (1996). [↑](#footnote-ref-121)
122. *Id.* at 395. [↑](#footnote-ref-122)
123. *Id.* at 395–96. [↑](#footnote-ref-123)
124. *Id.* [↑](#footnote-ref-124)
125. *Id.* at 399–400. [↑](#footnote-ref-125)
126. Holly Farms Corp. v. NLRB, 517 U.S. 392, 400–401 (1996). [↑](#footnote-ref-126)
127. *Id.* at 401. [↑](#footnote-ref-127)
128. *Id.* at 403*.* [↑](#footnote-ref-128)
129. 5 F.4th 844 (8th Cir. 2021). [↑](#footnote-ref-129)
130. 29 C.F.R. §780.129. [↑](#footnote-ref-130)
131. 503 F. App’x 772 (11th Cir. 2013). [↑](#footnote-ref-131)
132. *Id*. (citing 29 C.F.R. §780.129); *see also* 29 C.F.R. §780.144 (“Generally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business.”). [↑](#footnote-ref-132)
133. *Rodriguez*, 503 F. App’x at 775–76 (quoting 29 C.F.R. §780.147). [↑](#footnote-ref-133)
134. *See* Luna Vanegas v. Signet Builders, Inc., 46 F.4th 636 (7th Cir. 2022) (reversal of Rule 12(b)(6) dismissal; recognizing §780.145 requires a fact-driven, totality-of-the circumstances analysis and defendant did not meet its burden of proving on the pleadings that its construction employees who built livestock structures on farms worked for distinct businesses, separate from agricultural activity). [↑](#footnote-ref-134)
135. 997 F.3d 1356 (11th Cir. 2021). [↑](#footnote-ref-135)
136. *Id*. at 1362. [↑](#footnote-ref-136)
137. *Id*. at 1362–63. [↑](#footnote-ref-137)
138. *Id*. at 1363 (quoting 29 C.F.R. §780.129). [↑](#footnote-ref-138)
139. 767 F. App’x 862 (11th Cir. 2019). [↑](#footnote-ref-139)
140. *Id.* at 864. The court noted prior precedent holding that a farm’s processing of commodities produced by other farms is incidental to or in conjunction with the farming operations of the other farmers, and not incidental to or in conjunction with the farming operations of the farmers on whose premises the processing is done. [↑](#footnote-ref-140)
141. *Id.* [↑](#footnote-ref-141)
142. 46 F.4th 636 (7th Cir. 2022). [↑](#footnote-ref-142)
143. *Id.* at 639. [↑](#footnote-ref-143)
144. *Id.* at 642. [↑](#footnote-ref-144)
145. 29 C.F.R. §780.136. [↑](#footnote-ref-145)
146. *Id*. [↑](#footnote-ref-146)
147. *See* 29 C.F.R §§780.141–147. [↑](#footnote-ref-147)
148. *Luna Vanegas*, 46 F.4that 643. [↑](#footnote-ref-148)
149. *Id.* at 643–44. [↑](#footnote-ref-149)
150. *Id.* at 645. [↑](#footnote-ref-150)
151. 29 C.F.R. §780.147; *see also* Adkins v. Mid-American Growers, Inc., 965 F. Supp. 1076, 1089–90 (N.D. Ill. 1997), *aff’d in part*, 167 F.3d 355 (7th Cir. 1999) (citing Maneja v. Waialua Agric. Co., 349 U.S. 254 (1955)). [↑](#footnote-ref-151)
152. *Adkins*, 965 F. Supp. at 1090–91. [↑](#footnote-ref-152)
153. *Id*. [↑](#footnote-ref-153)
154. 29 C.F.R. §780.147. *See* Williams v. Hilarides, 2013 WL 459611 (E.D. Cal. Feb. 5, 2013) (agricultural exemption did not apply because product had been treated by ultra-filtration, which removed substantial portion of water from untreated raw milk; this evidence clearly established that chemical composition of milk was changed after water was removed). [↑](#footnote-ref-154)
155. U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2013-1 (Apr. 29, 2013). [↑](#footnote-ref-155)
156. *Id.* (citing Williams v. Hilarides, 2013 WL 459611, at \*9–11 (E.D. Cal. Feb. 5, 2013) (ultra-filtration process by which significant amount of water is removed from raw milk is more akin to manufacturing than agriculture)). [↑](#footnote-ref-156)
157. 29 C.F.R. §780.149. [↑](#footnote-ref-157)
158. “Forestry or lumbering operations” is discussed in §II.D.1 [General Scope of the Term “Agriculture”; Agriculture as It Relates to Specific Situations; Forestry or Lumbering Operations]of this chapter*.* [↑](#footnote-ref-158)
159. 29 C.F.R. §780.150. [↑](#footnote-ref-159)
160. *Id*. §780.151(b). [↑](#footnote-ref-160)
161. 360 F.3d 1180, 9 WH Cases2d 513 (10th Cir. 2004). [↑](#footnote-ref-161)
162. 365 F.3d 1199, 9 WH Cases2d 1001 (10th Cir. 2004). [↑](#footnote-ref-162)
163. *Rodriguez*, 360 F.3d at 1188 (emphasis supplied). [↑](#footnote-ref-163)
164. *Id.* at 1188–89. [↑](#footnote-ref-164)
165. *Id*. [↑](#footnote-ref-165)
166. *Id*. (quoting Maneja v. Waialua Agric. Co., 349 U.S. 254, 260 (1955)). [↑](#footnote-ref-166)
167. Pacheco v. Whiting Farms Inc., 365 F.3d 1199, 1206, 9 WH Cases2d 1001 (10th Cir. 2004). [↑](#footnote-ref-167)
168. 29 U.S.C. §203(f). [↑](#footnote-ref-168)
169. 29 C.F.R. §780.152. [↑](#footnote-ref-169)
170. *Id*. [↑](#footnote-ref-170)
171. *Id*. §780.153. [↑](#footnote-ref-171)
172. *Id*. *See* Borja v. Hines Nurseries, Inc., 172 F. App’x 927, 928 (11th Cir. 2006) (referencing 29 C.F.R. §§781.153, .154, .155, & .158 in holding that driving of “jockey truck” with empty plant trailers to area where they were loaded with plants and working in “staging area” by watering and loading plants and collecting trash were activities “incident to or in conjunction with” farming operations). [↑](#footnote-ref-172)
173. 29 C.F.R. §780.154. [↑](#footnote-ref-173)
174. This exemption is discussed in §IV.F [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Intrastate Transportation of Fruits and Vegetables, and Fruit and Vegetable Harvesters] of this chapter. [↑](#footnote-ref-174)
175. 29 C.F.R. §780.155. [↑](#footnote-ref-175)
176. *Id.* §780.156. [↑](#footnote-ref-176)
177. *Id*. (noting harvesting employees would be within §203(f), but transporting employees would be excluded). [↑](#footnote-ref-177)
178. *Id*. §780.157(a). [↑](#footnote-ref-178)
179. For a discussion of this exemption, see §IV.F [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Intrastate Transportation of Fruits and Vegetables, and Fruit and Vegetable Harvesters] of this chapter. [↑](#footnote-ref-179)
180. 29 C.F.R. §780.158(a). [↑](#footnote-ref-180)
181. *Id*. §780.158. *See also* WH Op. FLSA2019-5 (Apr. 2, 2019) (concluding that farm’s “light processing” activities (cutting and freezing its own agricultural products, and packing, storing, and delivering such products) are secondary agriculture if these activities are subordinate to its farming operations and do not amount to independent business). [↑](#footnote-ref-181)
182. 29 C.F.R. §780.158. Equipment maintenance workers employed by a farmer are within Section 203(f) as long as they work only on equipment used in performing agricultural functions and only on equipment used by the farmer who employs them. [↑](#footnote-ref-182)
183. *Id*. §780.200. [↑](#footnote-ref-183)
184. *Id*. §780.201. [↑](#footnote-ref-184)
185. This exemption is discussed in §IV.G [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Small-Scale Forestry or Lumbering Operations] of this chapter. [↑](#footnote-ref-185)
186. 29 C.F.R. §780.201. *But see* U.S. Dep’t of Labor v. North Carolina Growers Ass’n, Inc., 377 F.3d 345, 353, 9 WH Cases2d 1448 (4th Cir. 2004) (finding that Christmas tree farming was not forestry or lumbering operation that Congress intended to exclude from the primary definition of “agriculture”). [↑](#footnote-ref-186)
187. 29 C.F.R. §780.202. [↑](#footnote-ref-187)
188. *Id*. §780.203. [↑](#footnote-ref-188)
189. *Id*. §780.204. [↑](#footnote-ref-189)
190. *Id*. §780.205. [↑](#footnote-ref-190)
191. U.S. Dep’t of Labor v. North Carolina Growers Ass’n, Inc., 377 F.3d 345, 9 WH Cases2d 1448 (4th Cir. 2004) (rejecting long-standing interpretation by DOL and making seasonal employees hired to harvest Christmas trees exempt under §213(b)(12)). See the discussion of Christmas trees in §II.B.4 [General Scope of the Term “Agriculture”; “Primary” Agriculture; Agricultural or Horticultural Commodities] of this chapter. [↑](#footnote-ref-191)
192. 377 F.3d at 352. [↑](#footnote-ref-192)
193. 29 C.F.R. §780.206(a). [↑](#footnote-ref-193)
194. *Id*. §780.206(b). [↑](#footnote-ref-194)
195. *Id*. §780.206(c). [↑](#footnote-ref-195)
196. *Id*. §780.207. [↑](#footnote-ref-196)
197. *Id*. [↑](#footnote-ref-197)
198. 29 C.F.R.§780.208. [↑](#footnote-ref-198)
199. *Id*. [↑](#footnote-ref-199)
200. *Id*. §780.209; *see also* Mayorga v. Deleon’s Bromeliads, Inc., 2013 WL 3927692 (S.D. Fla. July 29, 2013) (denying summary judgment to orchid grower because issue of material fact existed as to whether plaintiff handled plants purchased from other farmers that were simply turned around for resale, or handled plants defendants were “brokering”; under such circumstances plaintiff’s work would be considered incidental to farming operations of other farms and exemption would not apply); Saldibar v. Delray One, Inc., 2008 WL 755265 (S.D. Fla. Feb. 20, 2008) (employer cultivated house plants for sale and also purchased immature and mature plants from other nurseries and processed them for resale; plaintiff was maintenance employee at defendant’s plant nursery operation and responsible for handling incoming and outgoing plants for sale; on motion for summary judgment, court determined that because plaintiff handled plants purchased from other farmers that were simply turned around for resale, he was engaged in neither primary nor secondary agriculture); Farrell v. Pike, 342 F. Supp. 2d 433, 10 WH Cases2d 460 (M.D.N.C. 2004) (rejecting, on motion to dismiss, defendant’s allegation that tending to roses grown by someone else entitled one to agricultural exemption). [↑](#footnote-ref-200)
201. 29 C.F.R. §780.209. [↑](#footnote-ref-201)
202. 312 F.2d 48 (2d Cir. 1962). [↑](#footnote-ref-202)
203. *Id*. at 49–50. [↑](#footnote-ref-203)
204. *Id*. at 50. [↑](#footnote-ref-204)
205. *Id*. [↑](#footnote-ref-205)
206. *Id.* at 51. [↑](#footnote-ref-206)
207. *Id*. at 50. [↑](#footnote-ref-207)
208. 318 F.3d 1054, 8 WH Cases2d 677 (11th Cir. 2003). [↑](#footnote-ref-208)
209. 318 F.3d at 1056. [↑](#footnote-ref-209)
210. *Id*. at 1056–58; *see also* Mayorga v. Deleon’s Bromeliads, Inc., 2013 WL 3927692 (S.D. Fla. July 29, 2013) (holding that where plaintiff that may have handled plants purchased from other farmers that were simply turned around for resale or handled plants defendants were “brokering,” her work would be considered incidental to farming operations of other farms and exemption would not apply). [↑](#footnote-ref-210)
211. 503 F. App’x 772 (11th Cir. 2013). [↑](#footnote-ref-211)
212. *Id*. at 778; *see also* Mayorga v. Deleon’s Bromeliads, Inc., 2014 WL 1330755 (S.D. Fla. Mar. 31, 2014) (because more than 99% of work performed by defendant’s employees satisfied requirements of §213(b)(12) exemption and less than 1% of defendant’s business consisted of purchasing plants from other nurseries (nonexempt activity) when production shortfalls occurred, court granted summary judgment to employer; court applied de minimis doctrine to conclude that this small amount of nonexempt work did not affect defendant’s ability to claim exemption). [↑](#footnote-ref-212)
213. 29 C.F.R. §780.127. Subpart B of the regulations principally discusses the primary and secondary meanings of “agriculture.” The detailed regulations concerning hatchery operations, however, are located in Subpart C, 29 C.F.R. §780.210 *et seq*. [↑](#footnote-ref-213)
214. *Id.* §780.210. [↑](#footnote-ref-214)
215. *Id*. §780.212. [↑](#footnote-ref-215)
216. *Id*. §780.211. [↑](#footnote-ref-216)
217. *Id*. §780.213. [↑](#footnote-ref-217)
218. *Id*. §780.214. [↑](#footnote-ref-218)
219. Maneja v. Waialua Agric. Co., 349 U.S. 254, 263 (1955) (employees engaged in sugar cane harvesting were performing agricultural work); Chapman v. Durkin, 214 F.2d 360, 363 (5th Cir. 1954) (employee who gathered fruit and loaded it onto trailer on farm was agricultural employee, but employees who drove trailers to canning factories were not); Fort Mason Fruit Co. v. Durkin, 214 F.2d 363, 364 (5th Cir. 1954) (same). [↑](#footnote-ref-219)
220. U.S. Dep’t of Labor v. North Carolina Growers Ass’n, Inc., 377 F.3d 345, 9 WH Cases2d 1448 (4th Cir. 2004). [↑](#footnote-ref-220)
221. *Supreme Court: Waialua Agric. Co*., 349 U.S. at 263 (employees were exempt because implements they repaired were used in farming and it was irrelevant that employer was of large size, which permitted extraordinary degree of specialization).

     *Fifth Circuit:* McElrath Poultry Co. v. NLRB, 494 F.2d 518 (5th Cir. 1974) (mechanic who maintained trucks used as farm implements on farm was agricultural employee).

     *Ninth Circuit:* Holtville Alfalfa Mills v. Wyatt, 230 F.2d 398, 402 (9th Cir. 1955) (alfalfa dehydrating mill employee who spent most of his time in fields repairing machines used in harvesting commodity that was, at time of harvest, chopped and then taken to mill was employed in agriculture) [↑](#footnote-ref-221)
222. *Supreme Court: Waialua Agric. Co*., 349 U.S. at 262–63 (workers on plantation railroad who transported sugar cane from field to processing plant and who also transported farming implements, as well as fieldworkers on railroad, engaged in agriculture because work was necessary part of agricultural enterprise).

     *Fifth Circuit:* Coleman v. Sanderson Farms, 629 F.2d 1077, 1081 (5th Cir. 1980) (poultry live-haul drivers and loaders found engaged in agriculture), *reh’g denied*, 644 F.2d 34 (5th Cir. 1981); *McElrath Poultry Co*., 494 F.2d 518 (employees who spent most of their time driving trucks used as farm implements were agricultural employees); NLRB v. Strain Poultry Farms, 405 F.2d 1025, 1032 (5th Cir. 1969) (truck drivers of poultry enterprise that supplied feed and retained ownership of chickens raised to maturity by independent farmers engaged in agriculture when they drove chickens to market).

     *Ninth Circuit:* NLRB v. Olaa Sugar Co., 242 F.2d 714, 718 (9th Cir. 1954) (sugar company’s truck driver who spent half of his time transporting cane from company’s fields to company’s mill and half of his time transporting suppliers’ cane from their fields to company’s mill was employed in agriculture with respect to time spent transporting company’s cane).

     *Eleventh Circuit:* Borja v. Hines Nurseries, Inc., 172 F. App’x 927 (11th Cir. 2006) (employee who drove jockey trucks to facility where plants were loaded in preparation for sale, watered plants, loaded plants onto trailers, and picked up trash in nursery area engaged in agriculture because his work was secondary to, and supportive of, farming) [↑](#footnote-ref-222)
223. Dofflemyer v. NLRB, 206 F.2d 813, 814 (9th Cir. 1953) (grape packing and storage plant employees who worked in packing shed were agricultural employees). [↑](#footnote-ref-223)
224. Carman v. Yolo Cnty. Flood Control & Water Conservation Dist., 535 F. Supp. 2d 1039, 1049 (E.D. Cal. 2008) (employee charged with maintaining certain water levels did not qualify for irrigation exemption). [↑](#footnote-ref-224)
225. Rodriguez v. Pure Beauty Farms, Inc., 503 F. App’x 772 (11th Cir. 2013). [↑](#footnote-ref-225)
226. Pacheco v. Whiting Farms, Inc., 365 F.3d 1199, 9 WH Cases2d 1001 (10th Cir. 2004); Rodriguez v. Whiting Farms, Inc., 360 F.3d 1180, 9 WH Cases2d 513 (10th Cir. 2004). [↑](#footnote-ref-226)
227. *See, e.g*.,

     *Second Circuit:* Damutz v. William Pinchbeck, Inc., 158 F.2d 882, 883 (2d Cir. 1946) (employee of wholesale florist whose job involved operating steam boiler used to sterilize soil for growing flowers from seedlings purchased by florist was agricultural employee).

     *Fifth Circuit:* Boyls v. Wirtz, 352 F.2d 63 (5th Cir. 1965) (airplane pilot and flagman employees of crop-dusting business who entered farm were exempt).

     *Tenth Circuit:* NLRB v. Karl’s Farm Dairy, 570 F.2d 903, 906 (10th Cir. 1978) (dairy farm “handyman” was agricultural employee where he spent most of his time performing jobs “incidental to or in conjunction with” dairy farming, such as running bottling operations, bottle washing, pulling and filing route drivers’ orders, and cleaning milk truck tanks).

     *Eleventh Circuit:* Sariol v. Florida Crystals Corp., 490 F.3d 1277, 1280 (11th Cir. 2007) (delivering fuel to farm machinery and maintaining equipment are “absolutely necessary” to employer farm’s operations); Mayorga v. Deleon’s Bromeliads, Inc., 2014 WL 1330755 (S.D. Fla. Mar. 31, 2014) (nursery employees whose duties included fertilizing, spraying, alignment, and cleaning of plants were “farmers,” and their work relating to purchases of plants from other growers was de minimis); Saldibar v. Delray One, Inc., 2008 WL 755265 (S.D. Fla. Feb. 20. 2008) (finding that maintenance employee responsible for handling incoming and outgoing plants for sale at plant nursery operation was engaged in neither primary nor secondary agriculture as his work was incidental to or in conjunction with farming operations of other farms). [↑](#footnote-ref-227)
228. Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 769–70, 9 WH Cases 1 (1949) (bookkeeper who worked for mutual nonprofit ditch company, only activity of which was to supply water to farmers through its irrigation canal system, was not engaged in agriculture). [↑](#footnote-ref-228)
229. *Supreme Court:* Maneja v. Waialua Agric. Co., 349 U.S. 254, 270 (1955) (sugar milling, including grinding of employer’s own sugar cane, was not employment in agricultural production).

     *First Circuit:* NLRB v. Bayside Enters., 527 F.2d 436, 438 (1st Cir. 1975) (integrated poultry processing company was not engaged in farming where bulk of its resources were devoted to feed mill and processing plant operations), *aff’d*, 429 U.S. 298 (1977); Bowie v. Gonzales, 117 F.2d 11, 17 (1st Cir. 1941) (grinding and processing sugar cane was not “production” but rather processing and therefore was not employment in agriculture).

     *Fourth Circuit:* Wirtz v. Ti Peat Humus Co., 373 F.2d 209, 213 (4th Cir. 1967) (processing and packing of peat humus was not incidental to agricultural activities because activities were not performed on farm or by farmer).

     *Fifth Circuit:* Marshall v. Abbott Farms, 559 F.2d 1006, 1007 (5th Cir. 1977) (employees engaged in processing, packing, storing, and shipping eggs obtained by employer from “contract growers” were engaged in activities independent of growers’ activities and thus were not performing agricultural work).

     *Eleventh Circuit*: Acosta v. Bland Farms Prod. & Packing, LLC, 767 F. App’x 862 (11th Cir. 2019) (affirming decision of district court finding that where Bland Farms packed onions from 12 growers that grew onions on their own land exclusively for Bland Farms, it was not performing practices incident to or in conjunction with “such farming operations”) (relying on Mitchell v. Huntsville Wholesale Nurseries, Inc., 267 F.2d 286, 290 (5th Cir. 1959)) [↑](#footnote-ref-229)
230. *Supreme Court: Waialua Agric. Co*., 349 U.S. at 272 (maintenance and repair of village and dwellings owned by employer was not agricultural).

     *First Circuit:* Calaf v. Gonzales, 127 F.2d 934, 937–38 (1st Cir. 1942) (employees who operated, repaired, and maintained employer’s transportation facilities used to transport commodities grown on employer’s farm to employer’s mills were not employed in agriculture because transportation was incidental to milling instead of to farming).

     *Fifth Circuit:* Camargo v. Trammell Crow Interest Co.,318 F. Supp. 2d 443 (E.D. Tex. 2004) (employee doing lawn and garden maintenance where employer’s agricultural operations were subordinate to forestry operation was not engaged in agriculture) [↑](#footnote-ref-230)
231. Marshall v. Gulf & W. Indus., 552 F.2d 124, 126 (5th Cir. 1977), *reh’g denied*, 555 F.2d 1391 (5th Cir. 1977) (employees who packaged tomatoes grown by independent farmers as well as commodities grown by employer were not engaged in agriculture, nor were employees who packaged vegetables purchased from independent subsidiary of employer engaged in agriculture); Hodgson v. Idaho Trout Producers Co., 497 F.2d 58, 60 (9th Cir. 1974) (employees who performed cleaning, processing, freezing, packing, and marketing of trout for nonexempt cooperative set up by three trout farms were not subject to exemption because there was formal separation and division of function between farms and processing plant). [↑](#footnote-ref-231)
232. Dillon v. Gottsch Emp’rs Grp., LLC, 2007 WL 1792422 (D. Neb. June 19, 2007) (where plaintiff’s job was inventorying and monitoring cattle on feedlots owned by defendant, question of fact as to ownership of cattle precluded summary judgment for defendant). [↑](#footnote-ref-232)
233. Bayside Enters. v. NLRB, 429 U.S. 298, 303 (1977) (drivers were not engaged in agriculture because their work was neither performed “on a farm” nor “by a farmer”); Chapman v. Durkin, 214 F.2d 360, 363 (5th Cir. 1954) (nonfarmer/nonproducer’s hauling of fruit off of farm was not agricultural); *see also* Holly Farms Corp. v. NLRB, 517 U.S. 392, 152 LRRM 2001 (1996) (finding “live-haul” employees who caught chickens at contract farm and delivered them to farm’s processing plant were not engaged in either primary agriculture (“raising poultry”) or secondary agriculture (activities on farm were not “incidental to or in conjunction with” farming operations)). Three subsequent federal district court decisions relied on the holding in *Holly Farms* regarding whether “live-haul” employees fall under the “secondary agriculture” exemption:

     *Fourth Circuit:* Heath v. Perdue Farms, 87 F. Supp. 2d 452, 5 WH Cases2d 1633 (D. Md. 2000) (granting plaintiffs’ motion for summary judgment).

     *Fifth Circuit:* Herman v. Tyson Foods, Inc., 82 F. Supp. 2d 631 (E.D. Tex. 2000) (denying defendant’s motion to dismiss).

     *Eleventh Circuit:* Herman v. Continental Grain Co., 80 F. Supp. 2d 1290, 5 WH Cases2d 1680 (M.D. Ala. 2000) [↑](#footnote-ref-233)
234. Castillo v. Groundlevel, Inc., 2013 WL 5499611 (M.D. Fla. Oct. 1, 2013). [↑](#footnote-ref-234)
235. *Supreme Court:* Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 768–69, 9 WH Cases 1 (1949) (field employees of irrigation enterprise, including ditch riders, lake tenders, and maintenance persons, were not engaged in agriculture where employer’s sole activity related to selling irrigation services to farmers).

     *First Circuit:* McComb v. Super-A Fertilizer Works, 165 F.2d 824, 828 (1st Cir. 1948) (term “production,” as used in conjunction with “cultivation, growing and harvesting,” pertains to what is derived and produced from soil and was not intended to apply to industrial activity that may be necessary to production of agricultural commodities).

     *Second Circuit:* Wirtz v. Jackson & Perkins Co., 312 F.2d 48, 51 (2d Cir. 1962) (employees of distributors of agricultural products were not engaged in agriculture).

     *Third Circuit:* Donovan v. Frezzo Bros., Inc., 678 F.2d 1166, 1173 (3d Cir. 1982) (employees involved in preparation of mushroom compost were not involved in “cultivation and tillage of soil”).

     *Fourth Circuit:* Wirtz v. Ti Peat Humus Co., 373 F.2d 209, 213 (4th Cir. 1967) (extracting and selling peat humus and shipping it in interstate commerce were not incident to agricultural activities because activities were not performed on farm or by farmer).

     *Fifth Circuit:* Reich v. Tiller Helicopter Servs., 8 F.3d 1018, 1028 (5th Cir. 1993) (employees of farmer’s helicopter business were not engaged in agriculture where helicopter business was independent of farm business and owned no land, raised no crops, and performed both agricultural and nonagricultural services); Hodgson v. Wittenberg, 464 F.2d 1219, 1222–23 (5th Cir. 1972) (employees who cared for and fed livestock purchased by employer for immediate resale were not engaged in “raising livestock” nor in activity related to livestock auction); Boyls v. Wirtz, 352 F.2d 63 (5th Cir. 1965) (employees of crop-dusting service who did not enter farms were not exempt).

     *Ninth Circuit:* Williams v. Hilarides, 2013 WL 459611 (E.D. Cal. Feb. 5, 2013) (ultra-filtration process by which significant amount of water is removed from raw milk is more akin to manufacturing than agriculture); Uribe v. Mainland Nursery, Inc., 2007 WL 4356609, at \*2–3 (E.D. Cal. Dec. 11, 2007) (denying defendant employer’s motion to dismiss because reasonable inference could be drawn that plaintiff employees’ work related to sale of plants rather than growing of plants). [↑](#footnote-ref-235)
236. For example, in addition to §213(a)(6), *see* §213(b)(5), (b)(12)–(16), (b)(28), (d), (h), (i), & (j). [↑](#footnote-ref-236)
237. For a discussion of the statutory exemptions that apply to employees who engage in agriculture-related occupations, see §IV.A through §IV.G [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Outside Buyers of Certain Agricultural Products; Agricultural Workers and Those Employed in Operating or Maintaining Irrigation Systems for Agricultural Purposes; Employment in Agriculture and Livestock Auction Operations by a Farmer; Employment by Small Country Elevators Within the Area of Production; Processing Maple Sap Into Sugar or Syrup; Intrastate Transportation of Fruits and Vegetables, and Fruit and Vegetable Harvesters; Small-Scale Forestry or Lumbering Operations] and §VI.A through §VI.D [Partial Overtime Exemptions Regarding Cotton, Sugar, and Tobacco; Activities Exempt Under Section 213(h); Activities Exempt Under Section 213(i): Employees Engaged in Cotton Ginning; Activities Exempt Under Section 213(j): Employees Engaged in Sugar Processing; Activities Exempt Under Section 207(m): Employees Providing Services for Tobacco Auctions] of this chapter. [↑](#footnote-ref-237)
238. 29 U.S.C. §213(a)(6). Workers who are employed by an “establishment” with total gross sales exceeding $10 million are excluded from §213(a)(6)’s minimum wage exemption. *Id*. §213(g). [↑](#footnote-ref-238)
239. Act of June 25, 1938, ch. 676, 52 Stat. 1060, 29 U.S.C. §§201–219. In 1949, the irrigation language now part of §213(b)(12) was added to §213(a)(6). Act of Oct. 26, 1949. [↑](#footnote-ref-239)
240. *See* Pub. L. No. 89-601, 29 U.S.C. §203 (1966). [↑](#footnote-ref-240)
241. 29 C.F.R. §780.300. [↑](#footnote-ref-241)
242. *Id.* [↑](#footnote-ref-242)
243. *Id.* §780.11. [↑](#footnote-ref-243)
244. 29 U.S.C. §213(a)(6)(A); 29 C.F.R. §780.302–.306. A new business is entitled to the 500 man-day exemption automatically if it had no employees during the previous year. However, this is true only if the new entity is indeed a new entity and not a continuation of a pre-existing employer. Sejour v. Steven Davis Farms LLC, 28 F. Supp. 3d 1216 (N.D. Fla. 2014) (defendants were not entitled to the small farms exemption where court found Steven Davis Farms LLC was extension of owner’s previous business). [↑](#footnote-ref-244)
245. 29 U.S.C. §203(u). [↑](#footnote-ref-245)
246. *Id*. §203(e)(3); 29 C.F.R. §780.301, .308 (limiting, for purposes of §213(a)(6)(B) exemption as well as §203(e) exclusion from man-day calculation, “other member of the employer’s immediate family” to stepchildren, foster children, stepparents, and foster parents). The parent, spouse, and child are the “immediate family”; beyond these named groups, blood relationship is not considered. [↑](#footnote-ref-246)
247. 29 C.F.R. §780.304(a). [↑](#footnote-ref-247)
248. *See* Hodgson v. Okada, 472 F.2d 965, 967, 20 WH Cases 1107, 1108–09 (10th Cir. 1973) (exemption was not applicable where, according to parties’ stipulation, employer had used more than 500 man-days of labor). [↑](#footnote-ref-248)
249. 29 C.F.R. §780.306. [↑](#footnote-ref-249)
250. *Id*. §780.304(b). [↑](#footnote-ref-250)
251. *Id*. §780.305(b). [↑](#footnote-ref-251)
252. Salinas v. Rodriguez, 963 F.2d 791, 794, 30 WH Cases 1647, 1649 (5th Cir. 1992) (man-days spent working for different employer were not considered), *petition for reh’g denied*, 978 F.2d 187, 1 WH Cases2d 291 (5th Cir. 1992). [↑](#footnote-ref-252)
253. 29 C.F.R. §780.305(c). [↑](#footnote-ref-253)
254. *Id*. [↑](#footnote-ref-254)
255. 29 U.S.C. §213(a)(6)(B); 29 C.F.R. §780.307. [↑](#footnote-ref-255)
256. 29 C.F.R. §780.308 (referring to §203(e)(1) exclusion from man-day calculation, now located in §203(e)(3)). [↑](#footnote-ref-256)
257. *Id*.; *see* Hodgson v. Okada, 472 F.2d 965, 967, 20 WH Cases 1107 (10th Cir. 1973) (exemption did not apply to workers who were related to crew leader who was not party to action, even though crew leader was found to be “joint employer” with farmer). [↑](#footnote-ref-257)
258. 29 C.F.R. §780.307. [↑](#footnote-ref-258)
259. 29 U.S.C. §213(a)(6)(C). [↑](#footnote-ref-259)
260. *Id*.; 29 C.F.R. §780.311(a). [↑](#footnote-ref-260)
261. *See* 29 C.F.R. §780.311(b). Section II [General Scope of the Term “Agriculture”] of this chapter contains a detailed discussion of what constitutes employment in agriculture. [↑](#footnote-ref-261)
262. 29 C.F.R. §780.312(a). *See* WH Op. FLSA2004-1, 2004 WL 769500 (Feb. 5, 2004) (finding that exemption for “hand-harvest laborers” set forth in   
     §213(a)(6)(C) does not apply to employees of onshore seafood processing plant who picked and packed crabmeat and refers only to manually gathering or severing soil-grown crop from soil, stems, or roots at its growing position in field). [↑](#footnote-ref-262)
263. 29 C.F.R. §780.312(a). [↑](#footnote-ref-263)
264. *Id*. §780.312(b). [↑](#footnote-ref-264)
265. *Id.* [↑](#footnote-ref-265)
266. *Id*. §780.313. [↑](#footnote-ref-266)
267. 29 U.S.C. §213(a)(6)(C)(i). [↑](#footnote-ref-267)
268. 29 C.F.R. §780.314. [↑](#footnote-ref-268)
269. *Id.* [↑](#footnote-ref-269)
270. 29 U.S.C. §213(a)(6)(C)(ii) (requiring that employee “commute[] daily from his permanent residence to the farm on which he is so employed”); 29 C.F.R. §780.315(a). [↑](#footnote-ref-270)
271. 29 C.F.R. §780.315(b). [↑](#footnote-ref-271)
272. *Id*. [↑](#footnote-ref-272)
273. 29 U.S.C. §213(a)(6)(C)(iii). [↑](#footnote-ref-273)
274. 29 C.F.R. §780.316(a). [↑](#footnote-ref-274)
275. 29 U.S.C. §203(u). [↑](#footnote-ref-275)
276. 29 C.F.R. §780.316(b). [↑](#footnote-ref-276)
277. *Id*. §780.316(c). [↑](#footnote-ref-277)
278. *Id*. §780.316(e); *id*. §516.33(d). [↑](#footnote-ref-278)
279. 29 U.S.C. §213(a)(6)(D). [↑](#footnote-ref-279)
280. 29 C.F.R. §780.319(b). Each of these terms is discussed in §III.B.3.a–.c [Section 213(a)(6) Exemption From the FLSA’s Minimum Wage and Overtime Requirements; Section 213(a)(6) After the 1966 Amendments; Local Hand-Harvest Laborer Exemption; “Be Employed as a Hand-Harvest Laborer”; “Is Paid on a Piece-Rate Basis”; “Hand-Harvesting Operations Recognized as Paid on a Piece-Rate Basis”] of this chapter. [↑](#footnote-ref-280)
281. 29 C.F.R. §780.318(b). [↑](#footnote-ref-281)
282. 29 U.S.C. §213(a)(6)(D) (expressly excluding “an employee described in [§213(a)(6)(C)]”); 29 C.F.R. §780.320. [↑](#footnote-ref-282)
283. 29 C.F.R. §780.322(a) (noting “usual caution” that exemptive language is to be construed “narrowly”). [↑](#footnote-ref-283)
284. *Id*. §780.322(b). [↑](#footnote-ref-284)
285. 29 U.S.C. §213(a)(6)(E); 29 C.F.R. §§ 780.323–.329. [↑](#footnote-ref-285)
286. 29 C.F.R. §780.323. [↑](#footnote-ref-286)
287. 29 U.S.C. §203(f). [↑](#footnote-ref-287)
288. 29 C.F.R. §780.324(b). [↑](#footnote-ref-288)
289. *Id*. §780.325(a). [↑](#footnote-ref-289)
290. *Id.* [↑](#footnote-ref-290)
291. *Id.* [↑](#footnote-ref-291)
292. *Id*. [↑](#footnote-ref-292)
293. 29 C.F.R. §780.325(b). [↑](#footnote-ref-293)
294. *Id*. §780.326(a). [↑](#footnote-ref-294)
295. *Id*. §780.326(b). [↑](#footnote-ref-295)
296. *Id*. §780.327. [↑](#footnote-ref-296)
297. *Id*. [↑](#footnote-ref-297)
298. 29 C.F.R. §780.328; *see also id*. §780.120 (definition of “livestock” for purposes of §203(f) definition of “agriculture”). [↑](#footnote-ref-298)
299. *Id*. §780.329; Hodgson v. Mauldin, 344 F. Supp. 302, 314, 20 WH Cases 818, 825 (N.D. Ala. 1972) (applying precursor of DOL regulations, Farmer’s Guide to Agricultural Provisions of Fair Labor Standards Act of 1967, and finding, after bench trial involving lay and expert testimony, that employees in question were engaged in range production of livestock), *aff’d* *sub nom*. Brennan v. Mauldin, 478 F.2d 702, 21 WH Cases 109 (5th Cir. 1973), *reh’g denied*, 480 F.2d 924, 21 WH Cases 316 (5th Cir. 1973); Hodgson v. Elk Garden Corp., 482 F.2d 529, 534–35, 21 WH Cases 148, 151–52 (4th Cir. 1973) (applying precursor to regulations and finding that employees were not within exemption because their work was not sufficiently distant from headquarters and hours were easily tracked). [↑](#footnote-ref-299)
300. 29 C.F.R. §780.329(b); *Elk Garden Corp*., 482 F.2d at 534–35. [↑](#footnote-ref-300)
301. 29 C.F.R. §780.329(c). [↑](#footnote-ref-301)
302. *Id*. [↑](#footnote-ref-302)
303. 808 F.3d 463 (10th Cir. 2015). [↑](#footnote-ref-303)
304. *Id*. at 469. [↑](#footnote-ref-304)
305. *Id*. [↑](#footnote-ref-305)
306. *Id*. (citing 29 C.F.R. §780.329(a)). [↑](#footnote-ref-306)
307. 29 U.S.C. §213(b)(5), (12), (13), (14), (15), (16), & (28). Insofar as is possible, the DOL and the courts attempt to construe the several separate exemptions that apply to activities performed in or connected with agriculture, and the particular subparts of 29 C.F.R. Part 780 that apply to such separate exemptions, so as to apply the statutory exemptions and the regulations as a consistent whole. 29 C.F.R. §780.9. [↑](#footnote-ref-307)
308. 29 U.S.C. §213(b)(5). [↑](#footnote-ref-308)
309. Act of Oct. 29, 1949. [↑](#footnote-ref-309)
310. FOH §§20c00–20c06. [↑](#footnote-ref-310)
311. *Id*. §20c01(a). [↑](#footnote-ref-311)
312. *Id*. §20c01(b). [↑](#footnote-ref-312)
313. *Id*. §20c02. A 20% limitation on nonexempt activities was also previously found in the regulations defining the exemption for outside salesmen. *See* 29 C.F.R. §541.5 (stating that “outside salesman” means any employee “[w]hose hours of work of a nature other than that described … do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer … .”), *superseded by* 29 C.F.R. §541.500. However, this 20% restriction was dropped in the 2004 Amendments to the 29 C.F.R. Part 541 regulations in favor of the “relatively simple, understandable” primary duty test. 69 Fed. Reg. 22,121, 22,161 (Apr. 23, 2004). Because §213(b)(5) is concerned with buyers, not sellers, the 2004 Amendments may not apply to that provision. [↑](#footnote-ref-313)
314. FOH §§20c04–20c05. [↑](#footnote-ref-314)
315. *Id*. §20c03. [↑](#footnote-ref-315)
316. 29 U.S.C. §213(b)(12). [↑](#footnote-ref-316)
317. In 1949, the words “or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agricultural purposes” were added to §213(a)(6). Act of Oct. 26, 1949. [↑](#footnote-ref-317)
318. Pub. L. No. 89-601. [↑](#footnote-ref-318)
319. Pub. L. No. 105-78, 105. [↑](#footnote-ref-319)
320. 29 C.F.R. §780.402. [↑](#footnote-ref-320)
321. *Id*. §780.402(a). [↑](#footnote-ref-321)
322. *Id*. §780.402(b). [↑](#footnote-ref-322)
323. *Id.* §780.403. [↑](#footnote-ref-323)
324. *Id.* [↑](#footnote-ref-324)
325. See the discussion of this topic in §II.D.2.a [General Scope of the Term “Agriculture”; Agriculture as It Relates to Specific Situations; Nursery and Landscaping Operations; Integrated Agricultural Enterprises] of this chapter. [↑](#footnote-ref-325)
326. 29 U.S.C. §213(b)(12). [↑](#footnote-ref-326)
327. 337 U.S. 755, 9 WH Cases 1 (1949). [↑](#footnote-ref-327)
328. 337 U.S. at 763–64. [↑](#footnote-ref-328)
329. *Id.* at 766. [↑](#footnote-ref-329)
330. *Id.* [↑](#footnote-ref-330)
331. *Id*. at 767. [↑](#footnote-ref-331)
332. *Id.* at 769. Justice Frankfurter wrote a concurring opinion and Justice Jackson wrote a dissenting opinion. [↑](#footnote-ref-332)
333. Act of Oct. 26, 1949. [↑](#footnote-ref-333)
334. 29 C.F.R. §780.405. [↑](#footnote-ref-334)
335. Pub. L. No. 105-78, §105, 111 Stat. 1467 (1997). [↑](#footnote-ref-335)
336. 29 C.F.R. §780.408. [↑](#footnote-ref-336)
337. Sanders v. Elephant Butte Irrigation Dist., 112 F.3d 468, 3 WH Cases2d 1573 (10th Cir. 1997) (citing Dole v. Western Extension Irrigation Dist., 909 F.2d 349, 29 WH Cases 1449 (9th Cir. 1990), and applying 29 C.F.R. §780.408) (applying regulations to deny exemption for specific irrigation activities, where water delivered by irrigation system was not used exclusively for supplying and storing water for agricultural purposes). [↑](#footnote-ref-337)
338. Carman v. Yolo Cnty. Flood Control & Water Conservation Dist., 535 F. Supp. 2d 1039, 1049 (E.D. Cal. 2008); *see also* *Sanders*, 112 F.3d 468, 3 WH Cases2d 1573 (citing *Dole*, 909 F.2d 349, 29 WH Cases 1449, and applying 29 C.F.R. §780.408) (applying regulations to deny exemption for specific irrigation activities, where water delivered by irrigation system was not used exclusively for supplying and storing water for agricultural purposes); Watson v. Yolo Cnty. Flood Control & Water Conservation Dist., 2007 WL 3034267, at \*6–7 (E.D. Cal. Oct. 17, 2007) (holding that irrigation exemption did not apply because reservoir for which plaintiff worked was used for recreational purposes, to generate electricity, and for flood control and thus was not “exclusively” for agricultural supply and storage). [↑](#footnote-ref-338)
339. 29 U.S.C. §213(b)(13). [↑](#footnote-ref-339)
340. 29 C.F.R. §780.11. [↑](#footnote-ref-340)
341. 29 U.S.C. §213(b)(13). [↑](#footnote-ref-341)
342. 29 C.F.R. §780.604. [↑](#footnote-ref-342)
343. *Id*. §780.607. [↑](#footnote-ref-343)
344. *Id*. §§780.130, .132; *see* Mitchell v. Budd, 350 U.S. 473, 481, 12 WH Cases 805, 809 (1955) (holding that employees of tobacco farmer were engaged in farming when performing agricultural tasks but not when delivering tobacco to bulking plants). [↑](#footnote-ref-344)
345. 29 C.F.R. §780.133; Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 763, 9 WH Cases 1, 6 (1949) (holding that nonprofit company run like cooperative was not engaged in farming where it provided water to farmers who then used water for irrigation). [↑](#footnote-ref-345)
346. 29 C.F.R. §780.613; *see also* Dillon v. Gottsch Emp’rs Grp., LLC, 2007 WL 1792422, at \*7 (D. Neb. June 19, 2007) (denying summary judgment to defendant because plaintiff, whose job consisted of inventorying and monitoring cattle on feedlots owned by defendant, testified that some of her work involved accounting for “outside” cattle that may or may not have been owned solely by defendant, thereby creating issue of material fact as to ownership of cattle). [↑](#footnote-ref-346)
347. 29 C.F.R. §780.613. [↑](#footnote-ref-347)
348. *Id*. §780.617. [↑](#footnote-ref-348)
349. *Id*. §780.618. [↑](#footnote-ref-349)
350. 29 U.S.C. §213(b)(14). [↑](#footnote-ref-350)
351. *See* 29 C.F.R. pt. 536 (definition of “area of production”). [↑](#footnote-ref-351)
352. *Id*. §780.703. [↑](#footnote-ref-352)
353. *Id*. §780.708; *see* Tobin v. Flour Mills of Am., 185 F.2d 596, 598–99, 9 WH Cases 669, 670–71 (8th Cir. 1950) (providing description of country grain elevators). [↑](#footnote-ref-353)
354. 29 U.S.C. §213(b)(14); 29 C.F.R. §780.710; FOH §20f00a. [↑](#footnote-ref-354)
355. 29 U.S.C. §213(b)(14); 29 C.F.R. §§780.712, .715. [↑](#footnote-ref-355)
356. 29 C.F.R. §780.720; *id*. §536.3. [↑](#footnote-ref-356)
357. *Id*. §536.3. The measuring requirements are not strictly enforced. The DOL will instead rely on “rule of thumb” measurements. In addition, measurements are made from nearest boundary to nearest boundary. FOH §20f03a–b. [↑](#footnote-ref-357)
358. 29 C.F.R. §780.720; *id*. §536.3(a). [↑](#footnote-ref-358)
359. *See* FOH §20f01e. [↑](#footnote-ref-359)
360. 29 U.S.C. §213(b)(15). [↑](#footnote-ref-360)
361. 29 C.F.R. §780.817. [↑](#footnote-ref-361)
362. *Id*. §780.818. [↑](#footnote-ref-362)
363. *Id*. §780.816. [↑](#footnote-ref-363)
364. *Id*. §780.819. [↑](#footnote-ref-364)
365. 29 U.S.C. §213(b)(16). [↑](#footnote-ref-365)
366. *Id.*; 29 C.F.R. §780.905. [↑](#footnote-ref-366)
367. 29 C.F.R. §780.905. [↑](#footnote-ref-367)
368. *Id.* §780.907. Transporting or preparing for the transport of livestock, eggs, tobacco, or poultry are nonexempt activities. In addition, the regulations provide that sugar cane is not a fruit or vegetable for purposes of this exemption. *See id*.; Wirtz v. Osceola Farms Co., 372 F.2d 584, 591, 17 WH Cases 575, 583 (5th Cir. 1967) (employee responsible for transportation of sugar cane to mill for processing was not engaged in exempt activities). [↑](#footnote-ref-368)
369. 29 C.F.R. §780.908. [↑](#footnote-ref-369)
370. *Id*. §780.909. [↑](#footnote-ref-370)
371. *Id*. §780.913(a). [↑](#footnote-ref-371)
372. *Id*. §780.913(b). [↑](#footnote-ref-372)
373. For discussions of exemptions for agricultural employees under §213(a)(6) and §213(b)(12), see §III [Section 213(a)(6) Exemption From the FLSA’s Minimum Wage and Overtime Requirements] and §IV.B [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Agricultural Workers and Those Employed in Operating or Maintaining Irrigation Systems for Agricultural Purposes] of this chapter. [↑](#footnote-ref-373)
374. 29 C.F.R. §780.913(c). [↑](#footnote-ref-374)
375. 29 U.S.C. §213(b)(16)(A); 29 C.F.R. §780.915–.917. [↑](#footnote-ref-375)
376. 29 C.F.R. §780.917. [↑](#footnote-ref-376)
377. *Id*. [↑](#footnote-ref-377)
378. *Id*. §780.915. [↑](#footnote-ref-378)
379. *Id*. [↑](#footnote-ref-379)
380. 29 C.F.R. §780.916. [↑](#footnote-ref-380)
381. *Id.* [↑](#footnote-ref-381)
382. 29 U.S.C. §213(a)(16)(B); 29 C.F.R. §780.918. [↑](#footnote-ref-382)
383. 29 C.F.R. §780.919. [↑](#footnote-ref-383)
384. *Id*. §780.922; *see* *also id*. §780.118 (defining “harvesting” for purposes of agricultural exemptions under FLSA). [↑](#footnote-ref-384)
385. *Id*. §780.922. [↑](#footnote-ref-385)
386. 29 U.S.C. §213(b)(28); 29 C.F.R. pt. 788. These regulations, which interpret the exemption for small-scale forestry employees, refer to §213(a)(13) as providing an exemption from the FLSA’s minimum wage and overtime requirements. Section 213(a)(13) was repealed by Pub. L. No. 93-259 (Apr. 8, 1974), effective December 31, 1976, and §213(b)(28), preserving only the overtime exemption for these employees, was then enacted. The regulations have not been revised since 1969. [↑](#footnote-ref-386)
387. 29 C.F.R. §788.6. [↑](#footnote-ref-387)
388. *Id*. [↑](#footnote-ref-388)
389. *Id*. §788.7; Gatlin Lumber Co. v. Mitchell, 287 F.2d 76, 79, 14 WH Cases 362, 364 (5th Cir. 1961). [↑](#footnote-ref-389)
390. FOH §25e03; *see also* Woods Lumber Co. v. Tobin, 199 F.2d 455, 456, 11 WH Cases 154, 155 (6th Cir. 1952) (employees who operate and work on derrick boats and towboats, including cooks and those who engage in unloading barges, are engaged in forestry), *aff’g per curiam* 20 Lab. Cas. (CCH) ¶66,640 (W.D. Tenn. 1951). [↑](#footnote-ref-390)
391. *See* FOH §§25e04, 25e07. [↑](#footnote-ref-391)
392. 29 C.F.R. §788.13. [↑](#footnote-ref-392)
393. *Id*. §788.14. [↑](#footnote-ref-393)
394. *Id*. §788.15. [↑](#footnote-ref-394)
395. *Id*. §788.16. [↑](#footnote-ref-395)
396. *Id*. §788.13. [↑](#footnote-ref-396)
397. 29 C.F.R. §788.17. [↑](#footnote-ref-397)
398. *Id.* [↑](#footnote-ref-398)
399. *Id.* [↑](#footnote-ref-399)
400. 318 F. Supp. 2d 443 (E.D. Tex. 2004). [↑](#footnote-ref-400)
401. *Id.* at 448. [↑](#footnote-ref-401)
402. *Id.* [↑](#footnote-ref-402)
403. 29 U.S.C. §213(d). [↑](#footnote-ref-403)
404. 29 C.F.R. §780.1010. [↑](#footnote-ref-404)
405. 29 U.S.C. §213(d); *see also* 29 C.F.R. §780.1014. [↑](#footnote-ref-405)
406. 29 C.F.R. §780.1016. [↑](#footnote-ref-406)
407. *Id*. §780.1005. [↑](#footnote-ref-407)
408. *Id*. §780.1006. [↑](#footnote-ref-408)
409. *Id*. [↑](#footnote-ref-409)
410. Sections 207(m) and 213(h) were added to the FLSA by amendment in 1974; §§213(i) and 213(j) were added in 1977. *See* Pub. L. No. 93-259, §§9(A) (1974), 22; and Pub. L. No. 95-121, §§6(a), 7(a). Before 1974, the activities covered by these exemptions were included in §213(b)(15). In 1974, Congress removed these activities from §213(b)(15) (leaving that exemption to apply only to employees engaged in the processing of maple sap into sugar (other than refined sugar) or syrup) and added §§213(b)(25) and (26), which contain limited exemptions for cotton ginning and sugar processing activities, respectively. Pub. L. No. 93-259, §20(b)(1)–(c)(1) (1974). In 1977, Congress changed the exemptions for these activities by replacing §§213(b)(25) and (26) with §§213(i) and (j), respectively. For a discussion of §213(b)(15), see §IV.E [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Processing Maple Sap Into Sugar or Syrup] of this chapter. The regulations that applied to §213(b)(15) before its amendment in 1974, 29 C.F.R. Part 780, Subpart I, continue to apply to the exemption for maple sap processing provided by the current §213(b)(15), as well as to the exemptions for certain cotton ginning and sugar processing activities now provided by §§213(i) and 213(j), respectively, except that Subpart I of Part 780 does not deal with the 14-workweek limitations contained in §§213(i) and 213(j). FOH chapter 20, subparts j, t, u, v, and w, deal with §§213(h), (i), (j), and 207(m). [↑](#footnote-ref-410)
411. 29 U.S.C. §§213(h), (i), (j) & 207(m). [↑](#footnote-ref-411)
412. *Id*. §213(h)(1)(A). [↑](#footnote-ref-412)
413. *Id*. §213(h)(1)(B). [↑](#footnote-ref-413)
414. *Id*. §213(h)(1)(C). [↑](#footnote-ref-414)
415. *Id*. §213(h)(1)(D). [↑](#footnote-ref-415)
416. 29 U.S.C. §213(i). [↑](#footnote-ref-416)
417. *Id*. §213(j). [↑](#footnote-ref-417)
418. *Id.* §207(m). [↑](#footnote-ref-418)
419. *Id.* §213(i), (j). No week included in any 52-week period for purposes of §§213(i) or (j) may be included in any other 52-week period. [↑](#footnote-ref-419)
420. *Id*. §§213(h)(2), (i)(2), (j)(2), 207(m)(2). [↑](#footnote-ref-420)
421. FOH §20j01. [↑](#footnote-ref-421)
422. *Id.* [↑](#footnote-ref-422)
423. *Id.* §20j02. [↑](#footnote-ref-423)
424. *Id*. §20j04. [↑](#footnote-ref-424)
425. *See also id.* §32a01. [↑](#footnote-ref-425)
426. Brock v. Circle “A” Constr., Inc., 680 F. Supp. 1460, 1462–63, 28 WH Cases 1132, 1133 (D. Idaho 1987). [↑](#footnote-ref-426)
427. *Id*. [↑](#footnote-ref-427)
428. 680 F. Supp. 1460, 28 WH Cases 1132 (D. Idaho 1987). [↑](#footnote-ref-428)
429. 680 F. Supp. 2d at 1463–64. [↑](#footnote-ref-429)
430. 29 U.S.C. §213(h). [↑](#footnote-ref-430)
431. *Id.* §207(m). [↑](#footnote-ref-431)
432. FOH §§20t–20w. [↑](#footnote-ref-432)
433. Pub. L. No. 93-259, §22, 88 Stat. 53, 71–72 (1974). [↑](#footnote-ref-433)
434. Sections 207(c) and (d) were repealed in 1974. Pub. L. No. 93-259, §19(19)(c), 88 Stat. 66 (1974). [↑](#footnote-ref-434)
435. The following portions of the Seasonal Industries Regulations, 29 C.F.R. Part 526, were pertinent to the four enumerated activities listed in subsections (A)–(D) of §213(h)(1), as such activities were previously treated under §207(c) and (d): ginning cotton, 29 C.F.R. §526.10(b)(7); storing and compressing cotton,   
     §526.10(b)(8); processing cottonseed, §526.11(b)(1); sugar processing, §526.10(b)(30)(i) (beet sugar processing), §526.10(b)(30)(ii) (cane sugar processing in Louisiana), §526.12(b)(6)(i) (cane sugar processing in Florida), and §526.12(b)(6)(ii) (cane sugar processing in Puerto Rico). In 1995, however, the DOL withdrew these regulations and has provided no substitute regulations concerning §§213(h)(1)(A)–(D). [↑](#footnote-ref-435)
436. FOH §20u00(b)(3). [↑](#footnote-ref-436)
437. *Id*. §20u00(c). [↑](#footnote-ref-437)
438. *Id.* [↑](#footnote-ref-438)
439. FOH §20v01. [↑](#footnote-ref-439)
440. *Id*. §20v02. [↑](#footnote-ref-440)
441. *Id*. [↑](#footnote-ref-441)
442. *Id*. §20u02. [↑](#footnote-ref-442)
443. *Id*. [↑](#footnote-ref-443)
444. FOH §20u01a. [↑](#footnote-ref-444)
445. *Id*. §20u01b1. [↑](#footnote-ref-445)
446. *Id*. [↑](#footnote-ref-446)
447. *Id*. §20u01b2. [↑](#footnote-ref-447)
448. *Id*. §20u01b4. [↑](#footnote-ref-448)
449. FOH §20u01b4. [↑](#footnote-ref-449)
450. *Id*. §20u01c. [↑](#footnote-ref-450)
451. 29 C.F.R. §§780.817, .818; FOH §20w01a. [↑](#footnote-ref-451)
452. 29 U.S.C. §213(h)(1)(D). [↑](#footnote-ref-452)
453. FOH §20w01b. [↑](#footnote-ref-453)
454. Brock v. Circle “A” Constr., Inc., 680 F. Supp. 1460, 1462–63, 28 WH Cases 1132, 1133 (D. Idaho 1987). [↑](#footnote-ref-454)
455. 29 U.S.C. §213(i). [↑](#footnote-ref-455)
456. 29 C.F.R. §780.804. [↑](#footnote-ref-456)
457. *Id*. §780.805. [↑](#footnote-ref-457)
458. *Id*. §780.807. [↑](#footnote-ref-458)
459. *Id*. §780.809. [↑](#footnote-ref-459)
460. *Id*. §780.810. [↑](#footnote-ref-460)
461. 29 U.S.C. §213(i). [↑](#footnote-ref-461)
462. 29 C.F.R. §780.814. [↑](#footnote-ref-462)
463. *Id*. [↑](#footnote-ref-463)
464. 29 U.S.C. §213(j). [↑](#footnote-ref-464)
465. 29 C.F.R. §780.816. [↑](#footnote-ref-465)
466. *Id*. §780.819. [↑](#footnote-ref-466)
467. *Id.* §780.817. [↑](#footnote-ref-467)
468. *Id*. [↑](#footnote-ref-468)
469. 29 C.F.R. §780.818. [↑](#footnote-ref-469)
470. *Id*. [↑](#footnote-ref-470)
471. FOH §20w01(b). [↑](#footnote-ref-471)
472. 29 U.S.C. §207(m). [↑](#footnote-ref-472)
473. *Id*. [↑](#footnote-ref-473)
474. *Id.* [↑](#footnote-ref-474)